

Avoiding Elder Abuse By Agents, Trustees & Conservators

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The 2010 Census reported that there were 310 million Americans of which 40.3 million (13%) were over the age of 65. The fastest growing segment of the population is 85+.



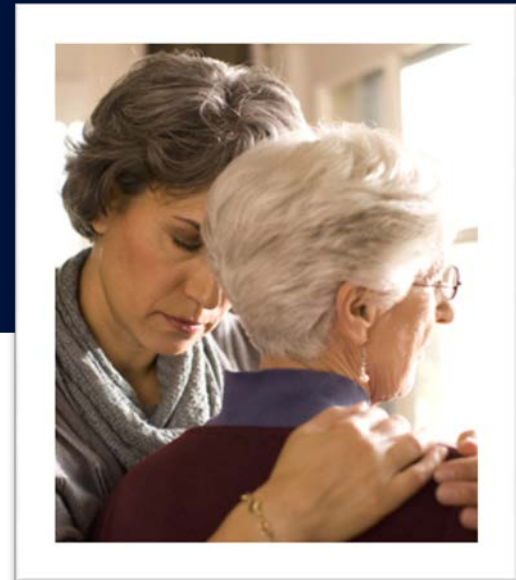
Prevalence of Older Americans

About 14 million Americans over age 65 have a disability.

About 5 million Americans over age 65 have some form of dementia.

Source: 2010 U.S. Census Bureau

Prevalence of Disability for Older Americans



Intentional actions that cause harm or create a serious risk of harm (whether or not harm is intended) to a vulnerable elder by a caregiver or other person who stands in a trust relationship to the elder.

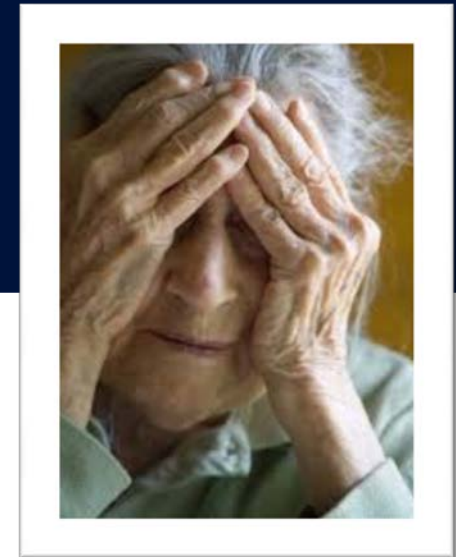


What is Elder Abuse?

- Unfortunately, we don't know the prevalence with certainty.
- Most recent studies show a prevalence of 7.6% to 10%.
- Females are more likely to be abused.
- The older you are the greater the prevalence.
- Persons with dementia have a higher risk of abuse.

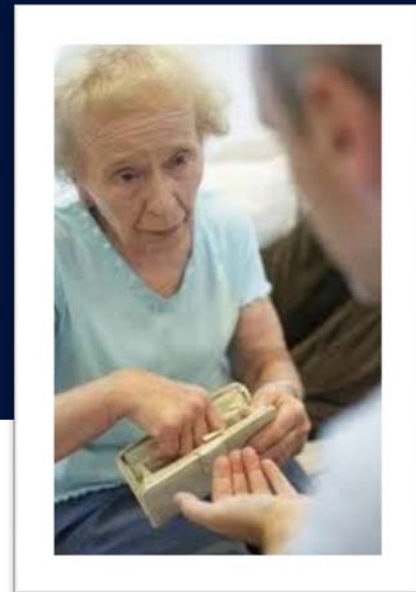
Source: National Center on Elder Abuse, Administration on Aging

Prevalence of Elder Abuse



About 90% of abusers are family members including children, spouses & partners.

Source: National Center on Elder Abuse, Westat, Inc. (1998).
The National Elder Abuse Incidence Study: Final Report. Washington D.C.



Those Who Abuse

- The impact of abuse, neglect, and exploitation also has a profound fiscal cost;
- the direct medical costs associated with violent injuries to older adults are estimated to add over \$5.3 billion to the nation's annual health expenditures; and
- the annual financial loss by victims of elder financial exploitation were estimated to be \$2.9 billion in 2009, a 12% increase from 2008.

Impact of Elder Abuse



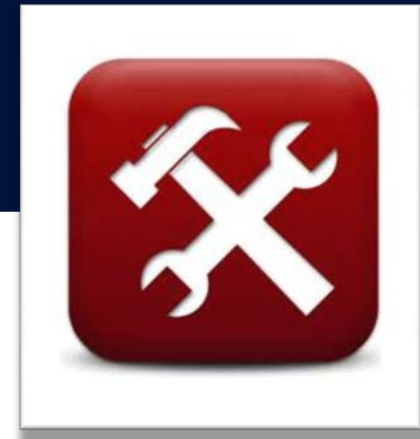
Ineffectively drafted and implemented
disability planning tools
using inappropriate fiduciaries
increase the likelihood of elder abuse.

Proposition



- Informal Relationships, for example, a joint bank account
- Power of Attorney/
Advance Medical Directive
- Trust Agreement
- Conservatorship/Guardianship

Tools to Address Disability



- Informal Relationship: Understand the nature & consequences of the transaction.
- Power of Attorney/Advance Medical Directive: Understand the nature & consequences of the transaction.
- Trust: Understand the nature & consequences of the transaction.
- Conservatorship/Guardianship: Incapacitated

Capacity Required to Implement Planning Tool



➤Nature & Consequences:

Ability to understand the nature & consequences of the transaction.

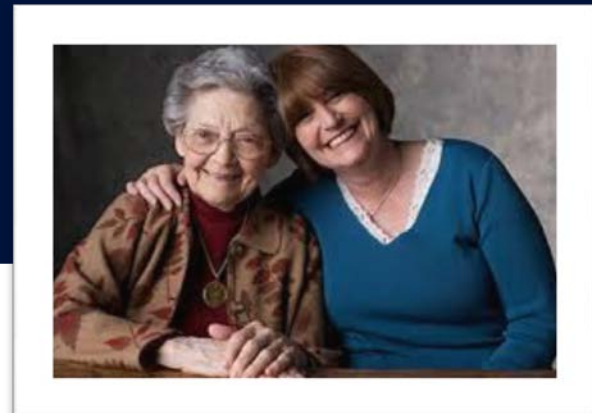
➤Incapacitated:

Incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment alone shall not be considered sufficient evidence.

CAPACITY
STANDARD

Capacity Standards

- Agent
- Trustee
- Conservator/Guardian



Each Tool Utilizes
a Fiduciary

In a fiduciary relationship, one person, in a position of vulnerability, justifiably vests confidence, good faith, reliance, and trust in another whose aid, advice or protection is sought in some matter. In such a relation the law requires the fiduciary to act at all times for the sole benefit and interest of the one who trusts. A fiduciary duty is the highest standard of care required by law.

What is a Fiduciary?



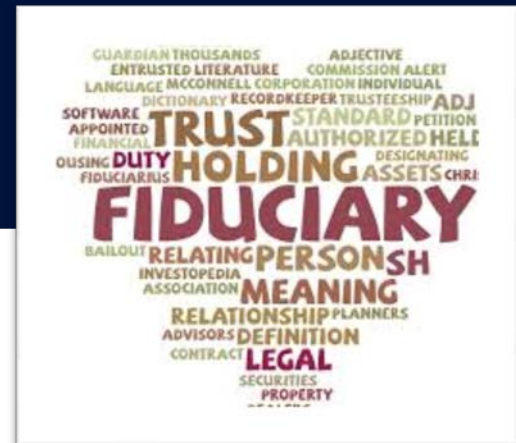
- Honesty & Integrity
- Has the requisite skills required
- Experience
- Has the time required
- Is willing to undertake the task in compliance with fiduciary duties

Criteria for Selection of a Fiduciary



- Good faith administration of the principal's/beneficiary's affairs in accordance with instructions and their best interests.
- Administer the principal's/beneficiary's affairs solely in their interests and avoid conflicts of interest.
- Use prudence and reasonable care.
- Protect the principal's/beneficiary's property.
- Maintain records and keep the principal/beneficiary informed.

Fiduciary Duties Owed to Principal/Beneficiary



- Civil action for an Accounting
- Civil action for Compensation
- Civil action for Constructive Trust
- Criminal action for Embezzlement or Larceny
- Criminal action for Abuse & Neglect of Incapacitated Person
- Criminal action for Financial Exploitation of Mentally Incapacitated

Remedies for Breach of Duties



Joint Bank Account

- Ownership is based on proportion of net contributions, except married couples are treated as owning the account equally.
- The co-owners are treated as occupying the relationship of Principal & Agent, thereby giving rise to fiduciary duties.
- Advantage: Low cost and effort to establish.
- The lack of (i) a formal relationship, (ii) instructions and (iii) oversight raises significant risks of abuse.
- The joint account may create unintended survivorship rights.
- Solution: Carefully select the co-owner.
- Solution: Require joint signatures.
- Solution: Insist on oversight of the account by a third party.
- Solution: The account should not contain large amounts of funds.



Informal Relationships

- The P.O.A. or A.M.D. creates a formal Principal & Agent relationship.
- The agent in both cases is a fiduciary.
- Mandatory duties: 1) Act in accordance with Principal's expectations, if known, otherwise best interests, 2) good faith, & 3) within scope of authority.
- Default duties (i.e., they can be waived) include act with care, avoid conflicts of interest & keep records.
- Risks: Lack of instructions & oversight.
- Solution: Carefully select the agent.
- Solution: Create memorandum of instructions.
- Solution: Provide for oversight using co-agents.



Power of Attorney/ Advance Medical Directive

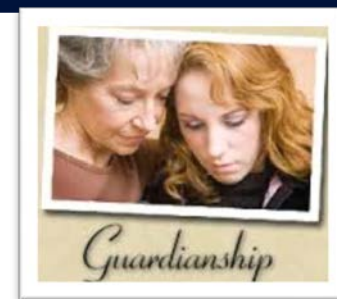
- Agreement between Grantor and Trustee for the benefit of a beneficiary.
- Trust agreement provides instructions to the Trustee.
- The elderly frequently create revocable trusts for a trustee to manage their assets during their incapacity.
- The Trustee owes fiduciary duties to the beneficiary including loyalty, prudence, and following the terms of the trust.
- Risk: Lack of oversight of the trustee.
- Solution: Carefully select trustee.
- Provide Detailed instructions.
- Solution: Provide oversight using a co-trustee or trust protector.

Trust



- Court-appointed fiduciary.
- Conservator: Manages assets and financial affairs.
- Guardian: Makes medical and personal decisions.
- Risk: Requires client be incapacitated before it can be used.
- Risk: Expensive and time consuming.
- Risk: Client does not select his Conservator/Guardian.
- Solution: Available when client made no prior planning for incapacitated.
- Solution: Provides a remedy when co-owner, agent, or trustee relationship is not working in clients' best interests.
- Solution: Provides for oversight by the Commissioner of Accounts.
- Solution: Provides for protection by surety bonds.

Conservatorship/ Guardianship



Failing to *effectively* draft and implement disability planning with appropriate fiduciaries will result in an increased likelihood of elder abuse.



Conclusion

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