

## **EXPLOITATION RISKS FOR THE AT-HOME WARD**

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The proportion of the United States population age 60 years or older will dramatically increase in the next 30 years as 76,000,000 baby boomers approach retirement and old age.<sup>1</sup> An estimated five million elders are victimized by financial exploitation every year.<sup>2</sup> In short, elder abuse is a significant problem and is anticipated to rise sharply with the corresponding growth of our elderly population. The purpose of this article is to discuss: (1) the types of exploitation which frequently occur with wards who continue to reside in their home, even after a guardianship is in place; (2) the impact of exploitation upon the elderly; and (3) the necessity for guardians to be proactive in preventing exploitation.

**Understanding Exploitation.** Elder abuse is generally defined as the willful and unjustified infliction of pain, injury or mental anguish upon an older person or a vulnerable person.<sup>3</sup> There are many types of elder abuse including physical, sexual, emotional, and psychological. However, exploitation relates to any act taken by a person, who has the trust and confidence of an older person, to obtain control through deception, intimidation or undue influence over the older person's money, assets or property with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of his money, assets or property.<sup>4</sup> In 90 percent of all abuse cases the perpetrator is a family member or caregiver. The reasons for exploitation of the elderly are diverse but range from "need" to "greed". Often times, family members who have taken care of a loved one before guardianship believe that they are entitled to something for their sacrifice. However, in many instances it is simply a matter of being able to take advantage of a senior who may now have physical or mental limitations. A guardian of the estate will promptly secure assets of the ward by transferring funds into a guardianship account and/or precluding the ward's ability to access the funds. While these steps substantially inhibit a ward's susceptibility to future exploitation, guardians should be aware that this alone may be insufficient.

**Prevalence in Our Community.** The Las Vegas Metropolitan Police Department's Abuse/Neglect Detail is a uniquely designed unit that focuses not only on the criminal

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<sup>1</sup> 2010 Elder Justice Act, Section 2.

<sup>2</sup> National Fraud Information Center, White Collar Crime Center, U.S. Dept. Of Justice, Bureau of Justice Statistics.

<sup>3</sup> NRS 200.5029(1)

<sup>4</sup> NRS 200.5029(2)

investigation of child abuse and neglect but also elder abuse, neglect and exploitation. The Unit combines the expertise of eight civilian investigators with that of two highly trained commissioned officers. In 2007 the Abuse/Neglect Unit investigated 337 reports of elder abuse as well as 14 deaths of seniors as a result of abuse or neglect. Between July 1, 2008 and July 30, 2009 there were 2,744 reported instances of abuse, neglect, exploitation and isolation reported to the Nevada Division of Aging Services, Law Enforcement and the Clark County Social Service Citizens Protective Service Program.<sup>5</sup>

In January 2009 Detective Eric Washington, a Las Vegas Metropolitan Police Detective, received probation after conning an 87-year old man out of \$1,411.50.<sup>6</sup> In another instance, State officials issued a warrant for a man charged with senior exploitation between 2005 and 2008. The alleged exploiter was a real estate developer who obtained funds from seniors and had received at least \$400,000.00 from a 67-year old man diagnosed with several mentally incapacitating conditions.<sup>7</sup> More recently was the reported indictment<sup>8</sup> of an ex-guardian for embezzlement and elderly exploitation in January, 2010.<sup>9</sup>

The most troubling part about these statistics is that it is estimated that only one in 25 cases of elder financial exploitation is reported.<sup>10</sup> The reasons for the failure to report should not be surprising to guardians. Most seniors are embarrassed to advise the guardian they were taken advantage of. Moreover, wards may fear the loss of whatever little independence they have while residing in their home and are concerned they will be removed to an assisted care or skilled nursing care facility. In addition, some wards simply do not recognize exploitation has occurred because they are suffering from cognitive impairments.

**Impact Upon the Elderly.** Exploitation can compromise the independence and security of the Ward. Aside from the adverse financial consequences, it can also have a significant impact upon the ward's mental state and lead to depression, hopelessness and even suicide. Not surprisingly, the mortality rate for elderly victims of financial abuse is significantly higher than non-victims.<sup>11</sup> As a result, the importance of being proactive in preventing exploitation cannot be emphasized strongly enough. Guardians are required to carefully evaluate the options available to the Ward and choose the one that best meets the needs of the ward while placing the least

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<sup>5</sup> Nevada Division of Aging Services, 2009 Reports of the Elder Abuse Reporting System.

<sup>6</sup> Las Vegas Review Journal, February 8, 2009.

<sup>7</sup> Las Vegas Review Journal, June 23, 2009.

<sup>8</sup> Reno Gazette-Journal, January 20, 2010.

<sup>9</sup> Exploitation by guardians is certainly not a problem endemic only to Nevada. See: "Guardian faces theft counts", Omaha World-Herald, April 11, 2010.

<sup>10</sup> National Fraud Information Center.

<sup>11</sup> Elder Self-neglect and Abuse and Mortality Risk in a Community-Dwelling Population, The Journal of the American Medical Association, Vol. 302 No. 5, August 5, 2009.

restrictions on his or her freedom, rights, and ability to control his or her environment.<sup>12</sup> Once a ward has been exploited a guardian may conclude that more supervision is needed or a transfer to a care facility is appropriate.

**Duties of Guardians to Prevent Exploitation.** Guardians have a fiduciary duty to protect the assets of a ward. However, the guardian is also required to move a ward to a more restrictive environment only after evaluating other medical and health care options and making an independent determination that the move is the least restrictive alternative. The guardian must consider whether the move fulfills the current needs of the ward and serves the overall best interest of the ward.<sup>13</sup> Undoubtedly, if there are reasonable steps that the guardian can take to promote the independence of a ward and avoid the resulting adverse affects of exploitation, the guardian is obligated to do so.

**Exploitation Even When Guardianship In Place.** Guardians are often under the mistaken impression that there is little likelihood of exploitation once a guardianship is in place because the ward no longer has access to his or her funds. However, there are numerous ways in which wards who continue to reside at home may be exploited even after the guardianship has commenced.

One of the most common methods of exploitation for the at-home ward is through identity theft. In Anchorage, Alaska a 57 year old man plead not guilty to 17 counts of identity theft, fraud and criminal impersonation. He used the information of an 82 year old man to acquire seven credit cards to which he charged \$34,000 in merchandise. One elderly care provider in Huntsville, Georgia was recently arrested for financial identity theft and elder abuse. Her 43 victims range in age from 60-100. In Birmingham, Alabama a certified nursing assistant was charged with elder abuse, neglect and identity theft. She took personal information from a nursing home patient and purchased over \$5,000 in goods and services.

Personal information is usually obtained from a senior in one of three methods: home visits, telephone solicitations, or the internet. While a guardian may remove checkbooks and credit cards from the ward's home, they infrequently remove old bank statements, receipts and other financial records which have been put away in boxes. In many instances, seniors will have stored copies of tax returns and statements relating to retirement accounts. Access to the ward's home can easily be obtained by a caregiver, repairman or neighbor and once these records are removed from the house by the perpetrator they are unlikely to be noticed. And although the ward may no longer be driving, he may still keep a driver's license in a wallet or purse which can be easily and quickly removed by someone intending to misappropriate assets.

For many wards who continue to reside at their home the use of the telephone is an important means of continuing to stay in contact with family and friends. Guardians are always hesitant to restrict use of this means of communication (and rightfully so). However, seniors often fall prey to telemarketers and other predators who will use this tactic to obtain information which can be used to apply for credit cards in their name. According to the Association for the Advancement of Retired Persons, 56 percent of telemarketing calls are made to individuals over

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<sup>12</sup> National Guardianship Association Standard of Practice 8(I).

<sup>13</sup> National Guardianship Association Standard of Practice 12(A).

the age of 50. The seriousness of this problem was recognized by the United States Congress in 2007 when it appropriated funds to four programs through the Department of Justice's Office for Victims of Crime specifically designed to address telemarketing fraud schemes that target elder Americans. Seniors who feel isolated may often be all too prone to lengthy discussions with persons who are attempting to secure personal information. Another common telephone scheme involves the exploiter's pitch that he is raising funds for a well known charity.

Identity thieves use similar tactics on the computer which are commonly referred to as "phishing". The ward may receive an email that looks like it comes from an official source, such as a bank, credit card company, online auction, or even a government agency. The email claims there is some urgent reason why he or she needs to go to a Web address which will look amazingly official, including appropriate logos of the agency. Once at this Web address, the ward will be asked for personal information. The IRS has recently warned of a phishing scam in which thousands of persons received emails stating their income tax return was going to be audited unless the person linked to a Web page which asked for bank account numbers, Social Security number, employers, income and much more.<sup>14</sup>

The at-home ward will invariably desire as many of his or her personal belongings to remain as long as they are residing at the home. Guardians are required to file an Inventory of their ward's personal property within 60 days of their appointment.<sup>15</sup> However, as long as these items remain at the home they are available to potential exploiters. Accordingly, it is important that guardians have detailed knowledge of the ward's personal property and appraise the value of his or her items. Most guardians will remove jewelry from the ward's residence for safekeeping. But, the guardian should also be aware of the value of furnishings, lithographs, paintings, and unique personal property as these items may also be stolen or given away by a ward during a period of confusion or as a result of undue influence.

Another type of exploitation of the elderly involves revision of their estate plans to benefit the exploiter upon the ward's death. The actions of a guardian may be affected in numerous respects by the ward's estate plan. For example, in considering whether it is in the best interest of the ward to dispose of the ward's property, the guardian is supposed to consider, among other things, the provision of the ward's estate plan as it relates to the property.<sup>16</sup> Perhaps one of the most notorious recent cases of this type of exploitation involves the criminal conviction of Anthony Marshall, the son of Brook Astor, a well-known philanthropist, after he gained access to her 60 million dollar estate by convincing her to revise her estate plan and designate him as the sole beneficiary during a time that she was suffering from Alzheimer's. In these turbulent economic times this pattern of exploitation is on the increase.

Nevada guardians face several difficulties in preventing this type of exploitation. Unlike most states, Nevada recognizes holographic wills<sup>17</sup> which can be used to easily change the beneficiary of the ward's estate plan without the knowledge of the guardian. Previously, a

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<sup>14</sup> Internal Revenue Service Alert 2009-71, August 4, 2009

<sup>15</sup> NRS 159.085; National Guardianship Association Standard of Practice 18(VII)

<sup>16</sup> National Guardianship Association Standard of Practice 19(III)(D)

<sup>17</sup> NRS 133.090

holographic will was required to be entirely in the handwriting of the testator. However, the statutes were revised in 1999 to provide that the holographic will must be signed and dated by the testator and only the “material portions” of the will must be in the testator’s handwriting. As a result, forms which provide for the completion of certain parts by the testator are now considered valid holographic wills. No witnessing or notarization of the holographic will is necessary. As a result, a ward could easily revise an estate plan unbeknownst to the guardian.

Other circumstances which promote the possibility of exploitation is the uncertainty in which the Nevada courts will determine the level of capacity required to amend revocable living trusts. In order to revise a will the testator need only have “testamentary capacity.” Testamentary capacity is defined as a person’s legal and mental ability to make a valid will. The testator must understand the nature and extent of his property, his relation to those who have a claim to benefit from the property left by him and a general understanding of the practical effect of the will executed.<sup>18</sup> In many instances, although a ward may be adjudicated incompetent for purposes of guardianship, he or she may still have the requisite capacity to execute a will or codicil.<sup>19</sup> However, Nevada courts have generally ruled that a person with a revocable living trust would be required to possess a higher level of capacity to amend their trust to revise beneficiary designations known as “contractual capacity”. As a result, it would be significantly more difficult for wards to be found to have this more stringent level of capacity. Recently, it appears at least some Nevada judges will commence applying the testamentary capacity standard to wards seeking to amend their revocable living trust. While this approach is consistent with several other states, it may give rise to an exponential increase in the number of estate plans which result from exploitation of a senior.

Finally, the guardian should guard against exploitation that frequently occurs by caregivers. The caregiver has the most access to the ward and it is not uncommon for the ward to form a relationship with the caregiver as a result of the dependence upon their services. This type of exploitation more easily occurs when the at-home ward has physical limitations and has limited interaction with people other than the caregiver.

**Measures a Guardian Should Take to Prevent Exploitation and Abuse.** Even if a ward has cognitive impairments, it is important to communicate to both the ward and the care giver the possibility of exploitation despite the appointment of a guardian. Guardians should make an extensive search of the ward’s residence to ensure that all financial records have been removed as well as any records of maiden names, social security numbers or other relevant data which could facilitate identity theft. These documents should be shredded or stored away from the residence. Guardians should also be familiar with the types of mail which may indicate identity theft or consumer fraud: stacks of unsolicited mail proclaiming the recipient to be a "guaranteed winner"; unusual number of packages containing inexpensive costume jewelry, plastic cameras, watches, etc.; and, excessive numbers of magazine subscriptions. The ward’s telephone number should be registered with a national or local Do-Not-Call Registry and caregivers should be directed to be attentive to any conversation in which the ward is providing personal information. The guardian should inquire regarding the ward’s on-line activity and investigate any sites in which the ward was requested to provide any information. Again, under these

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<sup>18</sup> Estate of Clegg, 87 Cal. App. 3d 594, 151 Cal. Rptr. 158 (1st Dist. 1978).

<sup>19</sup> Estate of Posey v. Bergin, 299 S.W.3d 6 (Mo.App. E.D.,2009).

circumstances the ward should be counseled not to provide any personal information. The guardian should also conduct periodic credit checks of the ward in order to monitor the opening of any new credit cards.

The guardian should also remind the ward that personal property should not be given away. A detailed inventory of the ward's personal property (other than what would necessarily be filed with the Court) which contains descriptions of the items and their location should be prepared and photographs taken of the more valuable items. In addition, the guardian should periodically review the inventory to ensure that items have not been removed and maintain a log reflecting the date of each review.

Guardians should take into their possession all of the ward's estate planning documents whether they are originals or not. The guardian should also consider whether it is appropriate to have the physician determine if the ward has testamentary capacity. In addition, the ward should be advised of the importance of not signing any documents without first consulting with the guardian.

Finally, close scrutiny should be given to the selection of caregivers. Guardians should confirm the agency is licensed and bonded. Moreover, it is important to know the background of the particular caregivers that provide services to the ward. Guardians should be cognizant of the possibility of exploitation by a caregiver and should be attentive to any changes in the relationship between the ward and caregiver. The guardian should be concerned about a caregiver who becomes overly interested in the ward's finances or any pattern that indicates the caregiver is isolating the ward from communicating with her family or friends. Unannounced visits to the ward are highly recommended.

Guardians should remain vigilant for exploitation of their ward even after the ward's assets have been secured. As the proportion of our elderly population continues to grow there will undoubtedly be more instances of senior exploitation. The guardian should be proactive in monitoring the ward for possible exploitation. Despite the strenuous efforts of a guardian, exploitation can still occur. Under such circumstances the guardian should report the exploitation to local law enforcement or the Nevada Aging and Disability Services Division as soon as possible. If you have any questions or are unsure if your loved one is being exploited, please call us at (702) 798-4955.

**The information presented herein is general information only and should not be considered legal advice nor should you rely solely upon this information in taking any actions regarding your matter. While no attorney-client relationship is formed by supplying this information, please do not hesitate to contact us at (702) 798-4955 to schedule a time to discuss your particular circumstances.**