FINANCIAL EXPLOITATION OF VULNERABLE ADULTS

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James D. Senescu
Dimitrov, Senescu & Babich, PLLC
1409 Franklin Street, Suite 207
Vancouver, WA 98660
(360) 696-7494 tel.
(360) 696-7499 fax
jim@dsandblaw.com

JAMES D. SENESCU received his B.A. in English from the University of Washington in 1993 and his J.D. in 1997 from Gonzaga University School of Law. Beginning with the Spokane County Prosecutor's Office in 1996, he handled domestic violence person crimes in their newly-formed Domestic Violence Unit. Joining the Clark County Prosecutor's Office (Vancouver, WA) in 1998, he was involved in the creation of Clark County's "Domestic Violence Court," a founding member of the City/County "Domestic Violence Prosecution Center" in 2001, and served as DV Unit Coordinator from 2003-2005. Having prosecuted well over 110 jury trials involving DV, child abuse, guardianship and person crimes, he finished his ten year career as a prosecutor assigned to the Major Crimes Unit handling homicides and major felonies, including crimes involving abuse of vulnerable adults. Since 2006, he has been in private practice as a partner of Dimitrov, Senescu & Babich, PLLC emphasizing in the protection of vulnerable adults and the litigation of cases involving abuse, neglect and financial exploitation of vulnerable adults via guardianships, probates and civil litigation, actively working with law enforcement to this end. He is a founding member of the Clark County Vulnerable Adult Task Force; an Executive Board member of the Clark County "Elder Justice Center;" and presents at countless trainings locally, statewide and regionally on familial and elder abuse issues to law enforcement, prosecutors, financial institutions, clerks, doctors, attorneys, judges, guardians, social workers, medical professionals and other local groups. He was an adjunct faculty member of Clark College in Vancouver, WA, serves periodically as a Pro Tempore Superior Court Judge for Clark County, and is a currently appointed Clark County Civil Service Commissioner.

I. INTRODUCTION

These materials have been prepared to assist attorneys, law enforcement officials and prosecuting attorneys to understand the unique, but sadly expanding area of acts of abuse and exploitation against vulnerable adults. They are a compendium of checklists, laws, and common sense commentary that have been prepared for training attorneys and lay people about how to investigate potential crimes and other bad acts committed against Vulnerable Adults, often under the guise of "helping out." If you find yourself in a situation where you believe that your client, or someone else, has been abused or exploited, these materials should get you thinking in the right mindset as an advocate for a vulnerable adult. Furthermore, providing a copy of these materials to the law enforcement officer, APS social worker or prosecuting attorney may help get the process underway.

Our Goals: To protect our community and our clients from those who prey upon vulnerable adults. To be part of the solution – not just to wash our hand once our client is protected. To not make this "someone else's problem." "Doing the right thing" beyond what is just ethical and required, should be the goal!

Why do we care?: Morality? Fairness? Or because every time the estate of a vulnerable adult is decimated, we pick up the tab! It is ALL of our problems, not just the family involved.

Child Abuse in 60's and 70's: A family problem, denial, nobody would do that to a loved one, the state should not intervene in such personal relationships, not the public's issue. New laws, government intervention, awareness . . .

Domestic Violence in 80's and 90's: A family problem, denial, nobody would do that to a loved one, the state should not intervene in such personal relationships, not the public's issue. New laws, government intervention, awareness . . .

Vulnerable Adult/Elder Abuse in 00's and 10's: A family problem, denial, nobody would do that to a loved one, the state should not intervene in such personal relationships, not the public's issue. ???

Qualify My Position: I feel that if someone is wronged, they should be righted. It isn't ok to take from others. You cannot spend your inheritance while your parents are still alive. Litigation is not a bad thing. TEDRA saves money. Make the good referral. Consider conflicts. Use common sense. Save an estate.

II. EXAMPLES OF COMMON CASES

a. ABUSE OF TRUST leading to bad deeds
   i. Facts – Parents with Alzheimer's/Dementia designate 2 sons as co-successor trustees. Son #1 lives with and cares for parents (and never really had a stable job). Son #2 trusts Son #1 and does not monitor accounts because he trusts Son #1.
   ii. Son #1 encumbers marital residence with $210k mortgage and spends $300k from investment account in 16 months.
   iii. Defense of caring for parents, father consented
   iv. APS and law enforcement involvement

v. How many lawyers were involved along the way?
    1. Who handled the POA?
    2. The trust officer of the bank?
    3. The family lawyer?

b. POA'S used to commit bad deeds
    i. Facts – Daughter appointed POA over mother for finances
    ii. Sells property and deposits into a joint account WROS
    iii. Uses funds in joint account to pay personal debts and obligations
    iv. Defense of caring for mother
    v. Hairdressers

c. GUARDIANSHIPS used to commit horrible deeds
    i. Facts - Guardian, $360k, loans, hadn't filed accountings for years, Ward had Alzheimers, living in Nursing Home, VA threatened with eviction, destitute and helpless
    ii. When police were involved
        1. Background, investigation, deposition, accounting, statements against interest, admissions
    iii. How police were involved
        1. What was done to get police interested
        2. If a long pattern of thefts, identify the easiest to prove, most egregious and focus on those
        3. Understand that they have heavy caseload, be willing to invest time with them
    iv. If a guardianship or other court proceeding, might consider court approval for costs of investigation before incurred (e.g. authority to take deposition)—versus concern of "tipping off" perpetrator of plans
    v. Make order authorizing fees subject to court's determination of whether "liable parties will have to pay if breach of fiduciary duty proven"
        1. Often attorney fee shifting burdens in civil arena involving incapacitated persons: guardianship, trustees, powers of attorneys, etc.
        2. More cooperation possible if perpetrator is aware that entire cost of litigation may be their burden.

III. REPORTERS of bad deeds
    a. If you saw a purse taken (and didn't know what was in the purse) wouldn't you call 911?
    b. If you thought a child was being abused (but didn't know) wouldn't you call?
    c. Permissive vs. Mandatory reporters (working to change the law – but in the meantime – we are all permissive reporters)!
    d. Anonymity!!!

IV. RECOGNIZING AND USING THE LAW TO EFFECTIVELY COMBAT THE ABUSE OF VULNERABLE ADULTS AND TO PROTECT YOUR CLIENTS

Most elderly people spend their entire working lives saving and planning for their "golden years." They build nest eggs to ensure that loved ones will be cared for when it is needed most. Many pay off the mortgages on their homes to be certain they will always have a place to live. They keep their money in savings accounts, certificates of deposit, money market accounts and similar low-risk "investments" to keep it safe from the vagaries of the stock market. They watch every penny they spend knowing that their ability to earn more is gone. They live off of social security, pensions, and interest earned on savings, barely dipping into the principal unless and until absolutely necessary.

Then just when everything seems to be under control, something happens. Their health fails. Their memory starts deteriorating. Their hands start shaking uncontrollably. Their spouse dies. They can no longer drive. Their independence disappears, sometimes gradually, sometimes suddenly. The things they used to take for granted become impossible to do. They become dependent on others for their basic needs: paying their bills, shopping for groceries, cooking their food, cleaning their homes and taking their medications. They find themselves vulnerable and alone.

The typical "Vulnerable Adult" often starts on the road to dependency slowly and reluctantly. A relative, friend or acquaintance is added to a bank account to help pay bills. A power of attorney is then suggested to give the "trusted individual" additional authority to conduct business. Soon, rather than merely providing assistance, the trusted individual starts making unilateral decisions, either because of the declining health or mental abilities of the vulnerable adult; because the vulnerable adult loses interest in their finances or health; because the vulnerable adult starts placing more reliance and trust in this "savior"; or because the trusted individual decides (for a variety of reasons) that the trusted individual knows best.

Many times, the trusted person acts in the best interest of the vulnerable adult. Too often, however, the very person who is entrusted with helping, protecting and caring for the vulnerable adult takes advantage of that position of trust. The vulnerable adult becomes the perfect victim: unable to protect or defend themselves, disbelieved because of their "obvious incapacity", or written off because they "consented" to have the trusted person make decisions for them.

(Note: Just like a child abuse victim or a domestic violence victim, the vulnerable adult may not be able to effectively defend themselves against a family member trying to "help" and the only other line of "defense" may be the attorney that is contacted.)

These positions of trust that the vulnerable adult created by consent or circumstance are flaunted by the perpetrator as an **absolute defense** against the most egregious acts: keeping a vulnerable adult living in deplorable conditions, withholding medical treatment, raiding bank and investments accounts, deeding property to themselves or others and otherwise taking actions that are completely at odds with the vulnerable adult's interests. **Tragically, this "defense" often works**.

For investigators, police and prosecuting attorneys, the production of a power of attorney; proof that the trusted person's name is on the bank account; a trust document

that lists the "trusted person" as the decision maker; sometimes the mere fact that a familial relationship exists **ends the criminal inquiry**. Although there is sometimes a civil remedy that is a counterpoint to a criminal remedy, the common refrain of "it's a civil matter" should be the **last** conclusion that an investigator makes when a vulnerable adult is involved, **not the first**.

Very often, the mere fact that there is a formal or informal trust relationship in existence transforms what might otherwise be a mere civil matter into a criminal matter. For example, a person using a power of attorney to take a vulnerable adult's money from her bank account may actually have **more liability, both criminal and civil**, than if a power of attorney did not exist. This is because Washington law imposes strict rules of conduct where trust relationships exist. Proof of a fiduciary relationship is an element to many crimes, and the existence of a power of attorney is typically all that is required to prove that element.

The following materials seek to educate investigators and other individuals charged with the care and protection of vulnerable adults about some of the essential information needed to determine whether a vulnerable adult has been abused or is at risk of being abused, and what can be done about it. In particular, these material discuss how fiduciary relationships can arise; the different types of fiduciary relationships; the duties that a person in a fiduciary relationship has with a vulnerable adult; some criminal penalties that can arise for violating that trust relationship; and some civil remedies that can be used to make the vulnerable adult safe and restore their dignity, their security and their golden years. In addition, attached to these materials is a checklist of questions that will help the investigator spot red flags and possibly uncover criminal activity committed under the "protection" of a fiduciary relationship. These materials are not all-inclusive. They are, however, a good starting point to help the investigator/attorney identify what issues present themselves in the typical case involving the abuse of a vulnerable adult.

A person need not be a vulnerable adult in order for a crime to arise in a fiduciary setting, but for purposes of this article the underlying assumption is that the victim is a vulnerable adult as defined in RCW 74.34.

LITIGATION FACT: Jury trial statistics in familial abuse cases in four different categories (victim testifying for accused (85%), no victim testifying at trial (79%), victim on board at trial (57%), victim minimizing illegal acts (32%))

V. RULES GOVERNING THE FIDUCIARY RELATIONSHIP

A. The Fiduciary Relationship and the Shifting of the Burden of Proof

In the simplest terms, a **fiduciary** is a person who assumes expressly or impliedly, by words or actions, a **position of trust over another person**. A fiduciary or confidential relationship exists where confidence is reposed on one side and superiority and influence results on the other. Any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former occupies a fiduciary position. A fiduciary owes "the highest degree of good faith, care, loyalty and integrity" to the person under their charge. In general, a fiduciary may never take any action that is in the fiduciary's own best interest, even if it is done in good faith.

There are numerous Washington Court cases that describe the general duties of a fiduciary. A fiduciary relationship can arise formally, such as being designated a trustee, guardian or attorney in fact under a power of attorney. It can also arise informally by virtue of the relationship between the fiduciary and the vulnerable adult. Although the cases often refer to a "trustee" or "guardian", the analysis is the same regardless of the nature of the fiduciary relationship.

In *Estate of Drinkwater*, 22 Wn. App. 26 (1978), the Court set forth the duties and obligations of trustees and guardians. The fiduciary's duties are bolded.

> Trustees and guardians must conform to **stringent standards of responsibility**.
>
> "The law is that a trustee is under a duty to the beneficiary to administer the trust **solely in the interest of such beneficiary**, and, in doing this, **an undivided loyalty** to the trust is required. The trustee is **not permitted to make a profit out of the trust**. . . .
>
> "An administrator stands in a fiduciary relation to those beneficially interested. He is **subject to the universal rule that a trustee is bound to do that which will best serve the interests which for the time are entrusted to his care. His own good faith is not enough**. *Stewart v. Baldwin*, 86 Wash. 63, 68 (1915).
>
> "A guardian **cannot be allowed to make a profit from the handling of his ward's estate**. *In Re Estate of Montgomery*, 140 Wash. 51, 53 (1926), which involved a guardian's attempt to collect a real estate sales commission on property belonging to the estate.
>
> "[T]he trustee **has no right to derive any benefit or advantage from the trust fund; but all his skill and labor in the management of it must be directed to the advancement of the interest of his [ward]**, . . .
>
> "A trustee, having accepted a trust and entered upon the discharge of his duties as trustee, is [prevented] from setting up a claim to the trust estate as against the beneficiary under the trust. A trustee **cannot deal with trust property for his own profit, claim any advantage by reason of his relation to it, or set up a claim against the trust estate**. . . .
>
> "Under no circumstances can a trustee claim or set up a claim to the trust property adverse to the [ward]. . . . **if a trustee desires to set up a title to the trust property in himself, he should refuse to accept the trust**."
>
> The trustee owes to the [ward] the **highest of good faith, diligence, and integrity**. . . .
>
> "The law is that a trustee is under a **duty to the beneficiary to administer the trust solely in the interest of such beneficiary, and, in doing this, an undivided loyalty to the trust is required. The trustee is not permitted to make a profit out of the trust**.

A fiduciary may not exert undue influence over the other party in the fiduciary relationship in order to obtain a gift from the person. *Doty v. Anderson*, 17 Wn. App. 464, 471 (1977). *See Pedersen v. Bibioff*, 64 Wn. App. 710 (1992) (recipient of a gift from a person with whom donee has a confidential relationship bears burden of proving gift was not the product of undue influence).

So important and "sacred" is a fiduciary relationship that the courts of Washington impose the burden of proving that a breach of the fiduciary duties did <u>not</u> occur on the fiduciary, rather than in making the ward prove that a breach <u>did</u> occur in the civil context. The burden of proof remains on the State to prove that a crime has occurred in the criminal context. The following quote sets forth the burden of proof that a fiduciary must meet if under scrutiny in a civil context.

> **The burden of proof is on the fiduciary to demonstrate no breach of loyalty has been committed.** In an accounting, the burden of proving the propriety of challenged transactions rests with the trustee. Obscurities and doubts in the accounting will be resolved against the trustee. (Citations omitted). . . . self-serving testimony is insufficient to meet what we view is the increased burden of proof he bears as a fiduciary. Without documentary evidence, in the form of the underlying bills and other records, he has not met his burden of disproving that he [did not breach his fiduciary duty].

Wilkins v. Lasater, 46 Wn. App. 766, 777-8 (1987) (**Emphasis added**). The Court further stated that even if the fiduciary was acting in "good faith", that alone is <u>not</u> a defense to a breach of trust. In fact, the moment that fiduciary commits an act that is in conflict with his ward's best interest; he has breached his fiduciary duty.

When a confidential or fiduciary relationship exists, the burden is on the caregiver or advisor to **disprove** undue influence by clear, cogent and convincing evidence. *Pedersen v. Bibioff*, 64 Wn. App. at 720; 26 Cheryl C. Mitchell and Fred H. Mitchell, *Washington Practice*, §5.42, at 427 (1998).

Because the burden of proof is placed squarely on the fiduciary to prove that a breach of fiduciary duty (and possibly a crime) did <u>not</u> occur in the civil arena, rather than on the State to prove a crime has been committed, it may make sense to pursue all available civil remedies <u>before</u> seeking criminal relief. In this way, it may be possible to get the perpetrator's **cooperation and assistance, evidence of the fiduciary relationship and breaches of duties, sworn testimony, accounting, etc.** before proceeding with the criminal case in which the perpetrator is likely to assert his right against self-incrimination. Unless the vulnerable is in danger or at risk of serious harm, the perpetrator is likely to flee or dispose of the vulnerable adult's assets, or other circumstance warrants immediate police action, the investigator should consider whether it is actually in the vulnerable adult's best interest to allow the civil case to proceed first.

B. Challenges to Fiduciary Relationships

There are several different challenges that can be raised to the fiduciary's assertion of an absolute privilege to act on a vulnerable adult's behalf. They arise so

frequently in the context of crimes against vulnerable adults and are so frequently overlooked or misunderstood by the investigator that they warrant special mention.

1. Contractual Capacity

Since many fiduciary relationships arise out of a written document, and many of the transactions that the perpetrator is seeking to enforce against the Vulnerable Adult are based on written contracts, it is important for the investigator to be able to discern what documents or contracts are enforceable. Just because a document purports to have a vulnerable adult's signature, is notarized, was prepared by an attorney or has other suggestions of "legality" does not mean that it is enforceable.

A person must have "contractual capacity" in order to execute a power of attorney or most other legal documents, such as a deed, trust, or contract. In other words, the person must have understood the nature, purpose and intent of the document that they have signed in order for it to be enforceable against them. The test for mental competency is stated in the case of *Page v. Prudential Life Ins. Co.*, 12 Wn.2d 101, 109 (1942):

> "The rule relative to mental capacity to contract, therefore, is whether the contractor possessed sufficient mind or reason to enable him to comprehend the nature, terms, and effect of the contract in issue. In applying this rule, however, it must be remembered that contractual capacity is a question of fact to be determined at the time the transaction occurred . . . that everyone is presumed sane; and that this presumption is overcome only by clear, cogent, and convincing evidence. (Emphasis added).

Vulnerable adults often have some degree of diminished mental capacity, such as dementia, Alzheimer's Disease, a history of strokes, or other health-related illness that directly impacts their ability to comprehend the nature, terms and effect of a document that has been signed by them. If the document was executed during a period of time that it was likely that the vulnerable adult lacked the ability to comprehend the document, it is possible that it is not valid.

The attorney/investigator should make a determination of whether the vulnerable adult had the requisite contractual capacity to execute a document or contract at the time the document was signed. This is especially so if it does not appear that the contract in any way benefited the vulnerable adult, such as giving a personal residence to a child, friend, caregiver or other acquaintance for "love and affection." Special attention should also be paid if the person who stands to benefit most from the contract is in charge of administering the vulnerable medications if they could affect the vulnerable adult's capacity if withheld or given an overdose.

The investigator should determine when the document was signed it, who prepared it, what was the vulnerable adult's mental and physical condition when it was signed, whether a fiduciary relationship existed at the time when the document was signed and whether the document purports to be in the vulnerable adult's best interest. Many of the questions that should be asked by the investigator to determine whether the vulnerable knew and understood the nature of the document are included in the questionnaire checklist attached to these materials. If the investigator believes it is

questionable that the vulnerable adult lacked contractual capacity to execute the document, further investigation is warranted.

2. Notaries and Recording of Documents do not necessarily make them Binding.

The mere fact that a document has been notarized or recorded does not prove that the person had contractual capacity or that the document is otherwise enforceable against the vulnerable adult.

Many documents must be notarized in order to be effective, such as all documents transferring an interest in real property. Almost anyone can get a notary license. There is little, if any, training that is required in order to obtain a notary seal. Very few notaries will actually refuse to notarize a document, even when it is not clear to the notary that the person has sufficient capacity to execute the document. Many notaries may be reluctant to question a vulnerable adult about the document they are signing so as not to embarrass them, such as when a bank employee notarizes a document for a long-time customer. In most cases, the notary is only verifying the identity of the person signing the document (if even that), and not that the person was competent or that they had read or understood what they were signing. The notary may actually be a good source of information regarding the mental condition of the vulnerable adult and the circumstances that existed at the time the document was signed. For example, sometimes a notary has to go to the vulnerable adult's home in order to execute the document and may be able to describe the living conditions, interaction between the vulnerable adult and perpetrator, or give other insights into the vulnerable adult's capacity to understand the document being signed.

Furthermore, **recording a document with the Auditor simply makes it a matter of public record and does not confer any "legality" on the document itself. The Auditor's office does not review or verify the accuracy or legality of any document it records**. As long as basic descriptive information is contained on the first page of the document, the Auditor's office will record anything for which they have received a recording fee.

Neither having a notary sign the document nor having it recorded makes a document that was signed by a vulnerable adult lacking contractual capacity, otherwise legally binding.

3. The Unauthorized Practice of Law

One of the most unknown, unappreciated and underutilized tools in ferreting out abusers of vulnerable adults is showing that the perpetrator committed the crime of practicing law without a license. In addition to determining whether the vulnerable adult had contractual capacity to create a formal fiduciary relationship in a written document, any document or contract that effects the vulnerable adult's rights or property interests should be reviewed with heightened scrutiny if it is not clear that an attorney prepared it. If an attorney prepared the document, his or her name should generally appear

somewhere on the document itself. **Intense scrutiny should be applied to any document that the trusted person prepared for the vulnerable adult.** If it is not clear who prepared it, the investigator should ask the vulnerable adult or the perpetrator to identify where it came from.

RCW 2.48.180 makes it a crime to practice law without a license. Section 2(a) defines the unlawful practice of law as: "A nonlawyer practices law, or holds himself or herself out as entitled to practice law." Section (3)(a) states: "**Unlawful practice of law is a crime. A single violation of this section is a gross misdemeanor.** Section (3)(b) provides: "**Each subsequent violation** of this section, whether alleged in the same or in subsequent prosecutions, **is a class C felony** punishable according to chapter 9A.20 RCW. Section (8) provides:

> Independent of authority granted to the attorney general, the prosecuting attorney may petition the superior court for an injunction against a person who has violated this chapter. Remedies in an injunctive action brought by a prosecuting attorney are limited to an order enjoining, restraining, or preventing the doing of any act or practice that constitutes a violation of this chapter and imposing a civil penalty of up to five thousand dollars for each violation. The prevailing party in the action may, in the discretion of the court, recover its reasonable investigative costs and the costs of the action including a reasonable attorney's fee. **The degree of proof required in an action brought under this subsection is a preponderance of the evidence**. An action under this subsection must be brought within three years after the violation of this chapter occurred.

The unauthorized practice of law has been clearly described by the Washington Courts in *Estate of Marks*, 91 Wn. App. 325 (1996).

> The unauthorized practice of law is generally acknowledged to include "not only the doing or performing of services in the courts of justice, throughout the various stages thereof, but in a larger sense includes legal advice and counsel and **the preparation of legal instruments by which legal rights and obligations are established**." *Hagan & Van Camp, PS. v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 446-47, 635 P.2d 730 (1981) (quoting *Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n*, 91 Wn.2d 48 54, 586 P.2d 870 (1978)). **The selection and completion of preprinted form legal documents is also deemed the "practice of law**." *Hagen & Van Camp*, 96 Wn.2d at 447.
>
> Here, the court found the [defendants'] activities in **selecting a will kit, discussing the distribution of assets and whether it was fair, obtaining the inventory of investments, typing the will, and arranging for the signing and witnessing of the will constituted the unauthorized practice of law**. (Emphasis added.)

With the advent of the Internet, computer software and readily available store-bought forms of powers of attorney, wills, trusts or deeds, it is virtually certain that at least one legal document will have been prepared by a non-attorney in every case of financial abuse of a vulnerable adult. This often occurs because the vulnerable adult is

unable or unwilling to go see an attorney; the abuser wants to exact absolute control over the vulnerable adult's finances for his own purposes; or the abuser wants to keep the act a secret. The investigator should always consider whether the perpetrator committed the unlawful practice of law in the course of financially abusing the vulnerable adult. In a recent case of the unauthorized practice of law in which a non-lawyer prepared a power of attorney and quit claim deed for a vulnerable adult, the Washington State Bar Unauthorized Practice of Law Board (which defines the unauthorized practice of law) specifically found that the defendant's ignorance of the law and "good faith" belief that they were merely helping the vulnerable adult by preparing the documents (that the perpetrator used to decimate the vulnerable adult's estate) was not a defense.

4. The Presumption of Undue Influence

In any situation in which a fiduciary receives a benefit from a vulnerable adult, such as receiving a gift, a loan on favorable terms, is named the beneficiary of a bank or investment account, life insurance policy, or anything else that confers a benefit on the fiduciary, there is the possibility that the fiduciary exerted undue influence in order to receive that benefit. Whether a gift to a fiduciary is the product of undue influence is a factual question to be determined in light of the following factors: the donor's age and mental condition; his prior intentions and concerns as to the disposition of his property; the size of the gift and the financial condition in which it leaves the donor; his knowledge and understanding of the terms of the gift; and the presence or absence of independent advice to the donor prior to the gift. *McCutcheon v. Brownfield*, 2 Wn. App. 348, 356-59 (1970). Once there is proof of a fiduciary relationship, the burden of proving that a gift was not procured through undue influence rests on the fiduciary and must be proved by clear, cogent and convincing evidence. *Doty v. Anderson*, 17 Wn. App. 464 (1977).

The court in *In Re Estate Of Esala*, *supra* at 766, quoted *Dean v. Jordan*, 194 Wash. 661, 671-72 (1938), and set out the following important factors for determining whether there had been undue influence, thus invalidating a will:

> "[1] that the beneficiary occupied a fiduciary or confidential relation to the testator; [2] that the beneficiary actively participated in the preparation or procurement of the will; and [3] that the beneficiary received an unusually or unnaturally large part of the estate. Added to these may be other considerations, such as [4] the age or condition of health and mental vigor of the testator, [5] the nature or degree of relationship between the testator and the beneficiary, [6] the opportunity for exerting an undue influence, and [7] the naturalness or unnaturalness of the will. The weight of any of such facts will, of course, vary according to the circumstances of the particular case.

The party asserting the existence of a gift from the vulnerable adult has the burden of proving the transfer actually was a gift "by evidence which is 'clear, convincing, strong, and satisfactory.'" *Doty v. Anderson, quoting Tucker v. Brown*, 199 Wash. 320, 325 (1939); *Whalen v. Lanier*, 29 Wn.2d 299, 312 (1947). Furthermore, once a fiduciary relationship is established between the vulnerable adult and the fiduciary, the fiduciary must prove by clear, cogent and convincing evidence that she

did not exert undue influence upon the vulnerable adult and that the transfer was actually a gift. *McCutcheon v. Brownfield*, 2 Wn. App. 348 (1970).

Whenever the fiduciary claims that the vulnerable adult made a "gift" of funds, real estate, jewelry, or any other item belonging to the vulnerable adult, the investigator ought to consider whether the fiduciary may have exercised undue influence to obtain the gift.

5. Common Misuses of the Vulnerable Adult's Funds

One of the most commonly occurring and overlooked crimes against a vulnerable adult involves the fiduciary's improper use of the vulnerable adult's money in bank or investment accounts. The primary reason that this type of activity is so seldom considered actionable in either the civil or criminal arena is because the fiduciary's name is frequently on the account, often as a "joint owner." The mistaken conclusion that many investigators, prosecutors and civil attorneys make is that as long as the suspect's name is on the account, the suspect had complete authority to make withdrawals or transfer funds out of the "joint" bank account into the suspect's personal account. This is **not** correct.

a. Joint Bank Accounts

Under Washington law, money that held in a joint account is owned by the joint owners **to the extent of their own deposits**. E.g., if mother and son both have their names on the account, with the survivor to receive the balance upon the death of the first joint owner, but all of the money in the bank account is the mother's, the son has **no present right to take any of the money**. The mere fact that a suspect's name appears as a joint owner of an account, even if that person is also designated as the beneficiary of the account upon the vulnerable adult's death, does not give them any authority to take the money from the account for their own purposes. **This is true in both the civil and criminal arenas**.

In *In re Estate of Lennon*, 108 Wn. App. 167 (2001), the son wrote three "Christmas checks" from a bank account that was titled as a joint with right of survivorship account between the son and his mother. 100% of the money in the bank had come from his mother. He gave $2000 to his sister, $2000 to himself and $1000 to a woman who had helped his mother. He denominated the checks as "gifts." The mother was alive when the checks were written but died a few days later. The son was a signator on the account and had power of attorney over his mother. The Court held that the son had no right to unilaterally make gifts of the funds in his mother's account regardless of his status as a signatory of the account or as beneficiary of the account. Even though the son would have been the absolute owner of the bank account had he waited for his mother to die two days later, he had to return the money to the estate. The Court held:

> [The son] argues that he had authority to write the "Christmas checks" from the JTWROS [joint with right of survivorship] account while [his mother] was alive because he was a signator on the account and had power of attorney. . . . The estate argues that although [the son] was a signatory and a joint tenant on the account and had power of attorney, he did not have any ownership interest in

the funds prior to [his mother's] death and had no right to unilaterally make gifts from that account. . . .

The estate's analysis is correct. The Financial Institution Individual Account Deposit Act defines a "joint account with right of survivorship" as "an account in the name of two or more depositors and which provides that the funds of a deceased depositor become the property of one or more of the surviving depositors." When determining the rights of individuals to funds in an account, the act defines a "depositor" as "an individual who owns the funds." **During the lifetime of a depositor, funds in a joint account with right of survivorship "belong to the depositors in proportion to the net funds owned by each depositor on deposit in the account**, unless the contract of deposit provides otherwise or there is clear and convincing evidence of a contrary intent at the time the account was created." **These statutes create a rebuttable presumption that joint accounts with right of survivorship do not give a nondepositing party any present interest in the account funds**. Furthermore, **an attorney-in-fact has no power "to make any gifts of property owned by the principal" unless the document specifically provides otherwise.**

Here, [the mother] was the sole depositor of funds into the account and there is no evidence indicating an intent to transfer a present interest in the funds to [her son]. The power of attorney executed by [the mother] did not grant [the son] the power to make gifts. [The son] does not deny that the checks were written two days before [his mother's] death. Therefore, [the son] had no authority to write the Christmas checks unless he can introduce evidence that [his mother] specifically instructed him to do so. (Emphasis added).

Wrongfully taking money from a joint bank account is a criminal offense: it constitutes theft or embezzlement. In *State v. Mora*, 110 Wn. App. 850 (2002) the court upheld 20 counts of theft each for depleting Mora's mother's account in which he and his wife were listed as joint owners. The Court held as follows:

Joint ownership of bank accounts is governed by statute. *Anderson v. Anderson*, 80 Wn.2d 496, 500-01 (1972). The banking statute provides that **funds on deposit in a joint account belong to each depositor in proportion to their ownership of the funds**. RCW 30.22.090 (2). A joint tenant may have the right to withdraw funds, but this does not mean he or she owns the funds. *In re Estate of Tosh,* 83 Wn. App. 158, 166 (1996) (nondepositing joint tenant of bank account did not acquire ownership by exercising right to withdraw funds).

A "depositor" is one who has the right to payment of funds held under the contract of deposit, without regard to the actual rights of ownership thereof by the individuals named on the account. RCW 30.22.040 (11). The bank is not liable for disbursement of funds to account signatories, regardless of the "actual ownership" of the funds. RCW 30.22.120. Thus, even if Lucia freely and knowingly put Jesse and Machalle's names on her accounts, with or without the

right of survivorship, she established only a relationship with the bank whereby the bank was authorized to honor withdrawal requests. **The signature cards did not make Jesse or Machalle the owners of the money.**

Jesse and Machalle rely on *Doty v. Anderson* for the proposition that adding a signatory to a bank account creates the presumption of intent to confer ownership of the funds. *Doty v. Anderson*, 17 Wn. App. 464 (1977). This is wrong. Doty stands for no more than that a joint tenancy creates a conclusive presumption that both tenants intend the right of survivorship. *Id*. at 466-67. In Doty, a mother named a joint tenant to her bank account shortly before she died. After she died, her son and heir unsuccessfully challenged the joint tenant's right to the money.

When a separate account is changed to add a joint tenant with the right of survivorship, survivorship is a property right which immediately vests in the joint tenant. Upon the death of the other joint tenant, the whole of each of the accounts becomes the survivor's separate property. *Anderson*, 80 Wn.2d at 501 (1967)(interpreting former RCW 30.20.015). But Lucia did not die.

Even if their status as signatories of the accounts did endow Jesse and Machalle with some possessory interest in the funds, it is still theft under RCW 9.56.020 to take the property of another person who has a superior possessory interest. *State v. Pike*, 118 Wn.2d 585, 590 (1992) (theft of one's own property subject to another's lien). Superior possessory interest means that the defendant may not lawfully exert control over the property without the permission of that other person. *State v. Longshore*, 97 Wn.App.144, 149 (1999). (**Emphasis added**).

The investigator should inquire beyond ascertaining that the perpetrator or fiduciary's name is on a bank account to determine whether a crime has occurred.

VI. THE CREATION OF FORMAL FIDUCIARY RELATIONSHIPS

Washington law provides for the formal establishment of "fiduciary" relationships through powers of attorney, trust documents, guardianships and Wills. All of these relationships are created by formal written documents or court proceedings and are governed by Washington statutes and published court decisions.

A. Powers of Attorney

A **power of attorney** is a document executed by a person (called a "principal") while that person has legal capacity, which designates another person (called an "attorney in fact") as the principal's decision-maker.

Powers of attorney are an essential, inexpensive and important way for a vulnerable adult to get much-needed help when they can no longer make decisions or take steps to protect themselves. The problem, however, is that as easy and effective as they are to create, they are just as easy and effective to abuse. **A Power of Attorney is**

the perfect tool for theft and abuse because it is typically unregulated, unmonitored and grants far-flung authority over a person, who is vulnerable by virtue of the very fact that they need assistance.

Powers of attorney are governed by Washington Statutes in RCW 11.94. An attorney in fact is an agent of the principal, and gets their authority solely from the power of attorney, from additional directions from the principal, and from Washington statutes and case law to the extent the attorney in fact is silent on any point.

Most powers of attorney provide that they do not go into effect until the principal is determined to "lack capacity." The principal's doctor typically makes this determination of incapacity. As a result, the attorney in fact typically has no authority to act on the principal's behalf until the determination of incapacity has been made. **If a power of attorney states that it does not go into effect until the principal has been deemed incapacitated, insist upon receiving a copy of the doctor's statement.** The determination of incapacity can be used to prove that the victim is a vulnerable adult, entitled to special protections under Washington law. Any actions that the fiduciary makes under the authority of a power of attorney before the vulnerable adult has been declared to be incapacitated are unauthorized.

Some powers of attorney, however, provide that they go into effect immediately, regardless of the principal's incapacity. These types of powers of attorneys should typically be looked at with added scrutiny, because seldom is it "normal" for someone with capacity (remember they have to have contractual capacity in order to execute a valid power of attorney) to give someone else the authority to make decisions on their behalf. Usually this only occurs when the principal has some need for assistance in handling matters that cannot be done without help. In this situation, the attorney in fact may have authority to act on behalf of the principal at the same time that the principal may act on his own behalf. In the event of a disagreement between the principal's decision and the attorney in fact's decision, the principal's decision controls as long as the attorney in fact is aware of the principal's decision.

Powers of attorney that go into effect immediately while the principal still has capacity are far less common than ones that go into effect upon a determination of incapacity because the typical person wants to be able to make his own decisions as long as he can. Unless the attorney in fact is a spouse or the power exercisable by the attorney in fact while the principal has capacity is narrowly tailored for a specific situation, it typically does not make sense for a power of attorney to go into immediate effect. A common situation where a power of attorney may go into effect immediately while the principal still has capacity is when the principal requests help with his finances, such as in writing checks, paying bills or monitoring investments. The investigator should always carefully read the entire power of attorney and seek the opinion of an attorney about its effectiveness if questions remain regarding the attorney in fact's authority.

1. "Absolute Owner" Doesn't Really Mean That

Very often a power of attorney will contain language that looks like the attorney in fact can do <u>anything</u> he wants with his principal's money, including giving it to himself or others. **This is <u>not</u> correct.**

An attorney in fact has no legal authority to make himself gifts or otherwise transfer the principal's assets to himself or others unless the power of attorney expressly provides that in the document itself. Even if the document does confer gifting powers, it typically is not unrestricted. The typical language in a Power of Attorney says:

> The purpose of this Power of Attorney is to give the attorney in fact the broadest authority to assist the Principal in managing and conducting his financial affairs, giving and granting to the said attorney-in-fact power and authority to do and perform all and every act and thing whatsoever necessary to be done, as fully to all intents and purposes as the Principal might or could do if personally present.

Or

> The attorney in fact over the estate of the principal, as fiduciary, shall have all powers of absolute ownership of all assets and liabilities of the principal of every kind and character, whether located within or without the State of Washington, including but not limited to the power to convey or encumber any real property owned by the principal and all powers granted to trustees by the Washington Trust Act.

Although the attorney in fact (and very often the investigator) may think that this language means that the attorney in fact can do anything he wants with his principal's estate, he simply cannot.

2. Statutory Restrictions on Attorneys in Fact

RCW 11.94.050 limits the authority of an attorney in fact as follows:

> **Attorney or agent granted principal's powers -- Powers to be specifically provided for -- Transfer of resources by principal's attorney or agent**. (1) Although a designated attorney in fact or agent has all powers of absolute ownership of the principal, or the document has language to indicate that the attorney in fact or agent shall have all the powers the principal would have if alive and competent, the attorney in fact or agent shall **not** have the power to make, amend, alter, or revoke the principal's wills or codicils, and shall not have the power, unless specifically provided otherwise in the document: To make, amend, alter, or revoke any of the principal's life insurance, annuity, or similar contract beneficiary designations, employee benefit plan beneficiary designations, trust agreements, registration of the principal's securities in beneficiary form, payable on death or transfer on death beneficiary designations, designation of persons as joint tenants with right of survivorship with the principal with respect to any of the principal's property, community property agreements, or any other provisions for nonprobate transfer at death contained in nontestamentary instruments described in RCW 11.02.091; to make any gifts of property owned by the principal; to make transfers of property to any trust (whether or not created by the principal) unless the trust benefits the principal alone and does not have dispositive provisions which are different from those which would have governed

the property had it not been transferred into the trust, or to disclaim property. (Emphasis added).

In other words, just because a person has a power of attorney for a vulnerable adult, it **does not mean that they can act with impunity**. It is no different than any other act of embezzlement, such as by the employee who steals from his employer or the soccer mom who raids the team's checking account. The vulnerable adult's money is legally under their care, custody and control for the primary benefit of the vulnerable adult. The moment the attorney in fact starts using his principal's assets for his own personal use, adds his name to bank accounts as a joint owner (rather than just for check writing purposes), deeds property to himself, makes himself the beneficiary of his principal's assets, or takes other actions that are inconsistent with his fiduciary duties, this should cause the investigator to consider whether a breach of fiduciary duty or criminal activity has occurred.

All powers of attorney are not alike. Some are five pages long and prepared by a reputable attorney. Some are one page long and obtained from a stationery store. Most are in between. If the document has not been prepared by an attorney, the investigator should ask who prepared it and for whom. Attached to these materials are a series of questions to ask to determine if a power of attorney is suspect. It is very possible that the attorney in fact prepared it for the vulnerable adult to sign, which is the unauthorized practice of law and a crime under RCW 2.48.180, as described earlier in this article. When looking at a power of attorney, it is very important to see exactly what authority the attorney in fact is given, and what authority is not given. If the investigator does not understand all of he terms, he should have it reviewed by an experienced attorney knowledgeable in this area. If an attorney in fact justifies large transfers of money into his personal account by virtue of a power of attorney, be certain to see whether the power of attorney specifically gives the attorney in fact the authority to make gifts to himself of his principal's assets and go through the analysis of undue influence contained in Section B(3). If possible, the investigator should determine the vulnerable adult's intent independently and out of the attorney in fact's presence. Even if it is not a criminal act, it may still be a violation of the attorney in fact's fiduciary duties and be actionable under civil law.

3. Accounting Requirements

The Washington Statutes now provide a mechanism for an interested person, including a "government agency charged with the protection of vulnerable adults" to demand an accounting from an attorney in fact, and to obtain a court hearing in the event of the attorney in fact's refusal to provide an accounting. RCW 11.94.090 allows certain individuals to compel an accounting from an attorney in fact, and to obtain prompt judicial relief if the accounting is not provided.

(1) A person designated in RCW 11.94.100 may file a petition requesting that the court:

(a) Determine whether the power of attorney is in effect or has terminated;

(b) Compel the attorney in fact to submit the attorney in fact's accounts or report the attorney in fact's acts as attorney in fact to the principal, the spouse of the principal, the guardian of the person or the estate of the principal, or to any other person required by the court in its discretion, if the attorney in fact has failed to submit an accounting or report within sixty days after written request from the person filing the petition, however, a **government agency charged with the protection of vulnerable adults may file a petition upon the attorney in fact's refusal or failure to submit an accounting upon written request and shall not be required to wait sixty days**[.] (**Emphasis added**).

RCW 11.94.090 also provides for the additional following relief:

(d) Order the attorney in fact to exercise or refrain from exercising authority in a power of attorney in a particular manner or for a particular purpose;
(e) Modify the authority of an attorney in fact under a power of attorney;
(f) Remove the attorney in fact on a determination by the court of both of the following:
(i) The attorney in fact has violated or is unfit to perform the fiduciary duties under the power of attorney; and
(ii) The removal of the attorney in fact is in the best interest of the principal;
(j) Order the attorney in fact to furnish a bond in an amount the court determines to be appropriate.

Whenever a power of attorney is wielded by a suspect as justification for substantial transfers from the vulnerable adult to the fiduciary or others, the investigator should look very carefully at the transactions to determine whether there are indications of overreaching, undue influence or fraud and consider whether an accounting should be required. If an accounting is demanded, bear in mind the fiduciary's responsibility for completely and accurately accounting for all withdrawals and expenditures, as set forth in Section I(A), above.

B. Trust Relationships

A second type of formal relationship is one created in a **trust** document. A trust is a written document that governs the control, possession, and authority to use, spend, invest, gift, etc. the money or estate of the person who sets up the trust (called the "trustor"). The "trustee" is the person who is nominated under the trust document to administer the trust. A trust document may govern the trustor's estate and be in effect while the trustor is: 1) alive and competent; 2) alive but incapacitated; or 3) may go into effect only upon the trustor's death. For example, a husband and wife may set up a trust with their own funds to govern the use of their funds while they are both alive and well. They may nominate themselves to serve as trustees of the trust. Upon the incapacity or death of one of them, the trust may provide that the survivor continues to serve as the sole

trustee. Upon the death or incapacity of the survivor, the trust may either terminate automatically and the funds be distributed to their beneficiaries, or it may continue under a successor trustee until the term of the trust ends.

The trustee's duties and obligations are stated in the trust document itself, in Washington statutes and in reported cases. As with powers of attorney, the actions of a trustee are typically private and, unsupervised and unregulated. As with powers of attorney, however, there are statutes that may require a trustee to provide an accounting to certain interested parties, as well as a process under RCW 11.96A to obtain court review of a trustee's actions.

C. Guardianships

The third type of formal fiduciary relationship is a court- appointed **guardian**. A guardian is a court- supervised fiduciary relationship. In order to become a guardian, the fiduciary must swear under the penalty of perjury to follow all laws governing the guardianship, and typically must file annual accountings, which require that the guardian obtain court approval of all expenditures of the vulnerable adult's funds or assets. Guardianships are governed by Washington Statutes primarily contained in RCW 11.88 and 11.92. RCW 11.88.010 states the statutory basis for a guardianship:

> **Authority to appoint guardians -- Definitions -- Venue -- Nomination by principal.**
>
> (1) The superior court of each county shall have power to appoint guardians for the persons and/or estates of incapacitated persons, and guardians for the estates of nonresidents of the state who have property in the county needing care and attention.
>
> (a) For purposes of this chapter, a person may be deemed incapacitated as to person when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.
>
> (b) For purposes of this chapter, a person may be deemed incapacitated as to the person's estate when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.
>
> (c) A determination of incapacity is a legal not a medical decision, based upon a demonstration of management insufficiencies over time in the area of person or estate. Age, eccentricity, poverty, or medical diagnosis alone shall not be sufficient to justify a finding of incapacity. (Emphasis added).

The typical guardianship arises when either: 1) the alleged incapacitated person fails to have taken steps to designate a person to make decisions on their behalf in a power of attorney or trust document; 2) when the persons designated in the power of

attorney or trust document are not willing or able to serve; 3) where the alleged incapacitated person refuses to allow their designated person to act on their behalf and revokes that authority; or 4) where it appears that a fiduciary may have breached their fiduciary duties owed to the alleged incapacitated person and the incapacitated person is unable to protect themselves . A guardianship is typically the avenue of last resort because it can be expensive to set up (attorney fees, court costs, and guardian ad litem fees) and it can be highly intrusive into the alleged incapacitated person's privacy because guardianships are matters of public record. It can also be a one of the best tools in an attorney's arsenal to combat abuse of a vulnerable adult.

If a perpetrator is a guardian, the investigator should review the entire court file to discover the nature of the vulnerable adult's incapacity, the fiduciary's knowledge of the degree of incapacity, determine the scope of the guardian's authority, and otherwise review accountings, and pleadings, all filed by the guardian under the penalty of perjury.

D. Informal Fiduciary Relationships

Washington law also provides for the informal establishment of a "fiduciary" relationship. In addition to relationships historically considered fiduciary in character, (e.g., trustee and beneficiary, principal and agent, attorney and client), a "confidential" relationship may exist in fact, regardless of the relationship in law, between the parties. Informal fiduciary relationships can arise between family members or a caregiver and his or her patient, a trusted advisor, a neighbor, or other close relationship where no formal fiduciary relationship exists. This situation arises frequently in the arena of crimes against vulnerable adults.

A **confidential relationship** exists between two persons when 1) one person has gained the confidence of the other, and 2) purports to act or advise with the other's interest in mind. A confidential relationship was found to have existed between a man and his adopted son in *Pederson v. Bibiof*f, 64 Wn. App. 710, 719-20 (1992), where the father relied on and trusted his adopted son to assist him in paying bills and taking care of business matters because the father was unable to read, write or understand written English. The fact that the "dependent" person was never declared to be incompetent to handle his own affairs is not determinative on whether a confidential relationship exists. Nor is it dispositive that there is no evidence of coercion. One Washington case involving a younger man handling the finances of an older woman, held that a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as a trustee of an express trust.

For purposes of determining whether a confidential relationship exists between a child and a parent, the Courts have held,

> While parentage alone does not necessarily establish a confidential relationship between parent and child, the fact of parentage frequently furnishes the occasion for the existence of a confidential relationship. This is true when the parent may become dependent upon the child, either for support and maintenance, or for care or protection in business matters as well, or for both, and the child, by virtue of factors of personality and superior knowledge and the assumption of the role of

adviser accepted by the parent, may acquire a status, vis-à-vis the parent, that will bring about the confidential relationship.

In *Pedersen v. Bibioff*, the Court relied on the following factors to determine that the particular father-son relationship before it rose to the level of a confidential relationship:

> Unable to read, write or understand written English, [the father] relied on others, including his son, James, to pay bills and interpret letters and documents. There was testimony that the relationship between [father] and [son] was characterized by complete trust, love and devotion. [Father] was very hard of hearing and could not conduct ordinary conversation of the telephone. [Son] lived with [father] for several years prior to [father's] death, and there was testimony that [father] relied on and trusted [son] to assist him in paying bills and taking care of business matters. This living arrangement, combined with [son's] superior knowledge of the written English language, placed [son] in the natural position to advise his father regarding many day-to-day affairs. The evidence indicated that [son] acted in such a capacity.

The Court in *Pedersen* held that a confidential relationship existed even though it also determined that the father "was at all times mentally competent and possessed of a strong personality, that he made his own decisions, and that he was competent to handle his own affairs." The *Pedersen* Court distinguished its finding of a confidential relationship from another case called *Lewis v. Estate of Lewis*, 45 Wn. App. 387 (1986), in which the court declined to find a confidential relationship between a woman and her son. In *Lewis*, the court concluded that although the mother had lived with her son for 35 years and that the son had helped her financially, at no time did she depend upon her son to make decisions for her. She was "fully competent" and was not suffering from any physical or mental disability. Although her hearing was impaired, she was able to read and write and did not rely on her son or any of her other children to make decisions for her.

The bottom line is that the Courts will look at all facts before it, including the reliance placed on the child (or caregiver) by the parent to help the parent make decisions. The more vulnerable or dependent the elder person is on his family member or caregiver, the more likely the Court will determine that a confidential or fiduciary relationship exists. Once a confidential relationship can be established, all of the rules applied to formal fiduciaries apply to these informal fiduciaries.

VII. STEPS TO DETERMINE IF THERE IS A BREACH OF A FIDUCIARY DUTY

a. Determine if a fiduciary relationship exists between the vulnerable adult and alleged exploiter
    i. Is there a **power of attorney** in effect? If so, get a copy and read it carefully. If you don't understand all terms or the effect of certain

provisions, ask an attorney experienced in elder law to review it for you.

ii. Who prepared it? Attorney or a stationery form? **May be the unauthorized practice of law under RCW 2.48.180 if non-attorney prepared it.**

iii. When was it signed? Years ago as part of regular estate planning or weeks ago after some crisis occurred (e.g. hospitalization)?

iv. Is it properly witnessed and notarized?

v. Who witnessed it? Neutral third party or acquaintance of attorney in fact?

vi. Was the notary known to either party? Can they testify about the vulnerable adult's capacity at the time of executing the document and the circumstances (e.g., at bank, in lawyer's office, at the vulnerable adult's home)

vii. What is the relationship between the principal and the attorney in fact? Does the relationship make sense? (e.g caregiver getting financial control over vulnerable adult)

viii. Does the attorney in fact have a criminal record? If so, may not be qualified to serve in a fiduciary capacity.

ix. How long has the principal known the attorney in fact? How did their relationship begin? Was the attorney in fact ever the principal's caregiver?

x. Was it likely that the principal lacked capacity or was under the influence of the attorney in fact at the time the POA was signed?

xi. Is the principal physically isolated from others? Does the Attorney in Fact keep the principal away from others or insist on being present during all contacts with the principal?

xii. What do other family members/neighbors/friends/doctors think?

xiii. What authority does the POA give the attorney in fact authority to do? Is it only for health care or does it also include finances?

xiv. Can the vulnerable adult explain to you what the power of attorney is for? Ask open-ended questions, for example, "Can you tell me what this is? What does it do?" Do <u>not</u> let alleged exploiter to be present when asking these questions. They often want to "help" answer questions the vulnerable adult cannot answer. Ask the vulnerable adult a second time the same questions in a different manner to see if they can still provide the same answer.

xv. When did the attorney go into effect: immediately upon execution or only after doctor has determined the person lacks capacity?

xvi. If effective upon doctor's determination of incapacity, is there a doctor's written statement of incapacity?

xvii. Ask the attorney in fact what he has done under the power of attorney. Have they paid themselves for their services? If so, how much? Have they kept records, checks, and bank statements? Can they prove what they did with the money? Do they have an

attorney or accountant working with them? Are they helpful or evasive and/or defensive?

xviii. If claim to have been paid for services, ask attorney in fact if they have tax records showing taxes paid on income, proper deductions made from principal's taxes, 1099s or W-2s issued to AIF, etc.

xix. If they transferred real property or other assets to themselves, ask for copies of all documentation. If real property transferred, what was the consideration paid and why was property transferred: as a gift, for "love and affection" or for services rendered to principal? Get a copy of Excise Tax Affidavit from Treasurer to see if consistent and to determine who signed. If a gift claimed, get copy of Supplemental Gift Affidavit.

xx. Ask Attorney in Fact if they have control over bank or investment accounts and how they are held (e.g, as a POA account, joint with right of survivorship, or solely in the attorney in fact's name).

xxi. Ask for an accounting of the attorney in fact's actions under RCW 11.94. Advise them that you can obtain a court order requiring that they provide an accounting.

b. Are they the **trustee** of a trust?
   i. Who was the trustor? Is either trustor still alive?
   ii. Who are the other beneficiaries? Have they received information regarding the trust?
   iii. What is in the trust estate?
   iv. How is the money held in the bank?
   v. Most of the same questions under the Power of Attorney are applicable here as well.

c. Are they are **guardian**?
   i. Check out the Court File. Look at the Order Appointing Guardian to determine the specific authority of the guardian and the duties imposed upon them.
   ii. Is there a bond? Is the bond sufficient to cover the assets identified in the Inventory or Accounting?
   iii. Determine whether the Guardian is current on all reporting requirements. If over $3000, the Guardian has to file an accounting every year. Are all assets properly accounted for?
   iv. Attempt to interview guardian's attorney. The attorney for a guardian is under an ethical obligation report any misappropriation of money or breaches of fiduciary duty by the guardian. If the attorney withdrew, did they take appropriate steps to protect the ward?

d. Are they a **family member/friend** who is providing for the vulnerable adult's care?

i. If no Power of Attorney, Trust or Guardianship, ask under what authority they are caring for the vulnerable adult's person or estate.
ii. Are they being paid? If so, how much and who determined rate. Who is paying them? If they are paid by the state as part of the COPES program, they are most certainly in a fiduciary position.
iii. If paid, inquire about their taxes.
iv. What level of care does the vulnerable adult need? Very independent or very dependent?
v. What are physical limitations? Sensory deficits? Language barriers? Can they read and write English?
vi. What are mental limitations?
vii. What medications are they on? Who administers?
viii. When was last doctor's appointment?
ix. Is the vulnerable adult isolated or socially integrated? E.g. regular respite care, adult day care, etc.
x. Who is in charge of the checkbook?
xi. Do other family members support the family member?
xii. How long has the family member lived with the vulnerable adult?
xiii. Does the family member have his own residence, family life, etc.
xiv. Is this person an heir or beneficiary of the vulnerable adult's estate?
xv. Does the family member/caregiver have a criminal record?

e. Are they a **caregiver**?
i. Go through the same analysis as in subsection d.
ii. Does there seem to be an "unnatural" affection between the vulnerable adult and caregiver?
iii. Is the caregiver a beneficiary of the vulnerable adult's estate?
iv. Has the caregiver isolated the vulnerable adult's family and friends?
v. What level of training and skill? Are they licensed caregivers?
vi. Where were they formally employed?
vii. Do they have a criminal record?
viii. Have they had credit problems or financial troubles?

f. If a fiduciary relationship exists, inquire into the financial records and relationship
i. Has the vulnerable adult "given" them anything of value?
ii. Was the "gift" before the fiduciary relationship was established?
iii. Has the fiduciary used the vulnerable adult's funds, assets or resources for his own benefit?
iv. How is the vulnerable adult's money held in the bank? Is the vulnerable adult the sole signer; is it a "joint account"? Does the bank reflect the fiduciary's position, e.g is it a POA account, Guardianship Account?

v. Is the fiduciary a beneficiary of the bank account (e.g. joint with right of survivorship)?
vi. Has the fiduciary mixed their money with the vulnerable adult's money?
vii. Is the vulnerable adult getting the type of care that is commensurate with the financial condition? E.g., is the vulnerable adult's money being used for the vulnerable adult's benefit or being saved for the "heirs?"
viii. If they are resistant, there is a good chance that there is something they are hiding.
ix. Talk to the vulnerable adult's lawyer. Are they aware of what is going on?
x. Talk to the vulnerable adult's doctor, even if it is just to express your concerns and encourage the doctor to become proactive.
xi. Get a copy of the current and immediately prior deeds to the vulnerable adult's property. Any title company customer service department will do <u>for free</u>. How is the property held? Has it been changed recently? If so, was it transferred to the fiduciary? If so, is the capacity of the fiduciary listed in the deed, e.g. Attorney in Fact, Trustee, etc.

VIII. <u>GETTING THE POLICE AND THE PROSECUTING ATTORNEY'S OFFICE INTERESTED IN YOUR CASE</u>

a. Relatively new area of law in terms of prosecution—confusion between civil and criminal
    i. Often complex issues involving dysfunctional family relationships.
    ii. The victim's capacity may not be clear-cut: was there consent, coercion, undue influence, all three or none of the above
    iii. Different standards of proof, different remedies
b. Not every case is criminal
    i. Even if criminal, not every case can be prosecuted
    ii. Be realistic and understand priorities may be shifting
    iii. Weigh how difficult to prosecute, amount stolen, likeability of victim, burdens of proof, witnesses cooperation, privileges asserted real or otherwise
    iv. Understand that crimes against the person take priority over financial crimes, regardless of the amount taken
c. Consider the outrageousness of actions, how others would view the conduct, etc.
    i. Try out facts on your colleagues, friends, lay people—do they get incensed at the conduct?
    ii. If theft using a power of attorney, guardian, trust, personal representative, analogize to "treasurer stealing soccer funds"
d. Understand that the prosecutor cannot do investigation, law enforcement must do so – and then it gets referred to the prosecutor

i. It may be necessary to teach law enforcement what crime has been committed, including identifying the criminal statute, educating on fiduciary duties, etc.

IX. CONDUCT YOUR OWN INVESTIGATION FIRST, BEFORE ALERTING POLICE

a. Always report IMMEDIATELY any suspicions of physical and/or sexual abuse regardless of whether you are a mandatory reporter
b. Fifth amendment issues may arise that will prevent the perpetrator from voluntarily giving information to the police
    i. Remember, under ER 801(d)(2) – Admissions by Party Opponent – anything the perpetrator says to anyone is going to come into evidence later when he is denying everything through counsel
    ii. Police are subject to Miranda – citizens including counsel are not
c. Problems can arise if it is reported too soon—stay on civil proceedings
d. Most perpetrators won't know that there are criminal implications—and will be willing to help to make case go away by talking to you
e. Many civil attorneys don't know what criminal implications apply (that is why we are here today)
f. Many police and prosecutors don't know either – but with updates and training – they are becoming more knowledgeable of the dynamics and applicable laws

X. EDUCATE YOURSELF ON THE APPLICABLE LAW

a. Concerning fiduciary relationships
b. Criminal and civil laws
    i. The law is the law – prosecutors aren't the only ones who can look at the criminal statutes (theft, embezzlement, etc.)
c. Know what problems will arise: testimony of victim, admissibility of evidence

XI. WHAT EXACTLY IS YOUR CLIENT'S GOAL? – DETERMINE BEFORE YOU NOTIFY THE POLICE

a. Recovery of assets (may be difficult if perpetrator is in jail or accused of a crime)
b. Protect other potential victims (is it likely they will re-offend)
c. Revenge (what is motivation)
d. What do you do when the client's goal is to protect the perpetrator? Often the perpetrator is the child or loved one.

XII. OTHER IMPORTANT TIPS TO WORK WITH THE PROSECUTOR IN AID OF YOUR CLIENT AND THE PUBLIC

a. Develop a credible and helpful relationship with police, if possible
    i. Don't "cry wolf" on every case
    ii. Provide information, assistance, guidance to make their job easier
b. Understand how a case is reported/assigned/processed within the department
c. Be understanding of their workloads
d. Be willing to take your time to teach them what crimes have occurred
e. Help police refer it to PA – get names and telephone numbers
f. Get invested in your cause – get them (police and prosecutor) invested
    i. It is the right thing to do (if you do the right thing, for the right reasons, the right result will happen)
    ii. Yes, it is true that many times you do not have to follow through (outside of your obligation to your client), but you can, and it is the right thing to do—especially if no one else has the time, the clout, the credibility or the stature to make your client's case important
g. Help prepare forensic accounting—where's the money now?
    i. Can you show that the client's money was not spent to benefit the client?
    ii. Are there fuzzy gray areas due to alleged "care services" provided to your client?
h. Show pictures of VA's living conditions if egregious (remember to simply take a few pictures when you can)
i. Schedule a meeting with police and PA
    i. Give CLE materials, case law, printed statutes, if they are not familiar with this area of law – get them thinking about it
j. Don't be content to report it and forget about it
k. Show willingness to help with future issues in the case
l. Report information to court, if appropriate
    i. Invite/ask officer to attend hearings
    ii. They might be more willing to act if judge shows concern

XIII. CONCLUSION

There are so many aspects to investigating crimes or civil actions against vulnerable adults that it is impossible to describe them all in these materials.

It is important for the attorney/investigator to know the basic laws governing fiduciary relationships, as they will almost always be present in cases concerning vulnerable adults, by virtue of the very fact that they are dependent on others for their basic needs.

Until recently, most non-violent acts against vulnerable adults were treated as merely civil matters.

As you begin to learn and understand the law governing the types of relationships that are usually present in crimes against vulnerable adults, particularly financial crimes, however, the investigations will become more routine and predictable and the results you obtain will become more rewarding.