

Elder Abuse: Tragedy and Triumph
A Practitioner's Perspective

By: Gary E. Bashian, Esq.*

“My isolation leaves me weak,
however just my cause.
But opposing you, old as I am,
I will stop at nothing.”
- Sophocles.

As practitioners, Jurists, and medical professionals alike have all increasingly recognized, elder abuse is one of the most alarming, fastest growing, and tragic social issues of the early twenty-first century.

Although there is much disagreement if this trend is attributable to an increase in reporting, a greater formal acknowledgement of the issue, a larger and more inclusive definition of what constitutes elder abuse itself, or if elder abuse is indeed occurring with greater frequency, the unsettling fact remains that with life expectancy increasing and greater numbers of the American population enter senior citizenship, abuse rates for people over the age of sixty-five are rising.

Consequently, many of us who practice in the fields of Elder Law, and Wills, Trusts and Estates, have been encountering examples of elder abuse with greater frequency. Often, the depth of the damage caused by elder abuse remains completely unseen to the outside world, yet can come into glaring focus when an attorney begins to work with elderly clients to craft an Estate and/or Medicaid plan. During the initial client interview, a review of medical and financial records, or conversations with the abuser themselves, patterns can emerge which point to some form of abuse that has not been previously identified or addressed. Indeed, attorneys in this field are uniquely poised on the front lines of this epidemic given our experience with elderly clients in general, and the access to their personal information we are granted in the course of our representation of them.

Indeed, Model Rule of Professional Conduct 1.14 contemplates a situation where an attorney working with a client of diminished capacity suspects that the client is at risk of “substantial physical, financial, or other harm,” and it permits the attorney to take reasonably affirmative actions in order to protect a client that cannot act in their own interest.

Furthermore, if necessary, an attorney can Petition the Court pursuant to Mental Hygiene law § 81.06 to institute a Guardianship proceeding on behalf of an allegedly incapacitated person, as anyone, even a stranger, is authorized to do so by the statute. As many victims of elder abuse are in fact incapacitated, this willingness of both the legislature and the Courts to allow virtually anyone to institute a Guardianship proceeding on a qualifying individual's behalf speaks directly to the need to provide open and relatively unencumbered access to the protections and services offered through an Article 81 proceeding, especially where the individual is a victim of abuse.

However, while attorneys may be well situated to identify the victims of elder abuse more readily than other professionals, the methods and legal means for helping them with their various situations are not as obvious where there are no outward symptoms of incapacity, or if a client has recovered from a period of incapacitation wherein they were abused. As many members of the bar may have realized from their attempts to combat elder abuse, there are relatively limited legal methods that one can identify which are commonly used to address this issue; especially where the abuse is primarily of an economic nature.

Absent physical abuse, the police and District Attorney's office can be uncertain if economic abuse is criminal conduct, or more appropriately litigated in the Civil Courts. Conversely, the Civil Court system will regularly direct attorneys representing elder abuse victims to law enforcement as such abuse, although at least sharing a boundary with tort, appears to them to be more firmly planted in criminality.

This, for lack of a better term, jurisdictional quandary, is understandable as there is little case law which speaks directly to the issue of elder abuse, or its remedies in either the Civil or Criminal Courts. As many cases of elder abuse take place within the family, they are presumably resolved, if at all, by settlement, or never make it onto the Court's Civil or Criminal docket in the first place.

Unfortunately, this situation leaves everyone involved, except perhaps the abuser, frustrated and wondering how to proceed. We may know we have a client that clearly deserves and needs redress in the Courts, but we are left with few practical guidelines, established protocol from the Courts or bar association, or case law to follow given the nature of the abuse.

This problem is further compounded by the fact that, despite the rather clinical terminology, "economic elder abuse" is somewhat amorphous; it can take on many forms, and has many degrees ranging from the very small to the staggeringly large. In general terms, "economic abuse" can be loosely defined as financial harm visited upon a senior by improper means, often by either fraud or coercion. Usually, this manifests itself as the outright taking of monies/assets/property from the victim directly by the abuser, the transfer of monies/assets/property from the victim to another by the abuser, or the withholding of monies/assets/property from the victim by the abuser.

As alluded to earlier, when economic abuse such as this is revealed while the elderly person is still alive, and a Guardianship proceeding is not viable due to the victim's retention of their physical and/or mental capacity, our system offers few apparent and/or immediate remedies. The lack of systemic tools one can access specifically designed to help a client/victim of elder abuse seriously hampers efforts for advocacy on their behalf. Traditional tort actions such as battery, conversion, replevin, and the like can fall woefully short and fail to provide complete restitution. Equally as insufficient, the filing of a notice of pendency or a suit for breach of fiduciary duty pursuant to a Power of Attorney may not be available methods of dealing with the problem, and if they are, are time consuming and costly.

Given the need for providing immediate and comprehensive protection to an elderly client who has been the victim of economic elder abuse while a longer term litigation strategy

can be developed to help the client, we have found and used a Temporary Restraining Order, and thereafter preliminary injunctive relief, is an ideal tool to preserve the status quo while further restitution is sought on a client's behalf.

Article 63 of New York's Civil Practice Law and Rules governs Temporary Restraining Orders (hereinafter also known as a "TRO") and preliminary injunctive relief.

A creature of Equity, an injunction can be used to both restrain and compel the actions of an abuser so long as the requirements for its issuance are met. Brought by an Order to Show Cause, the party seeking an injunction must show 1) a likelihood of success on the merits, 2) the extent to which the plaintiff is being irreparably harmed by the defendant's conduct, 3) the extent to which the defendant will suffer irreparable harm if the TRO issues, and 4) that there is no other adequate remedy at law which can provide the requested relief. Part of the Court's analysis in determining if the requested injunction should issue involves a balancing of the interest and harm that will befall each party if the relief is granted or not. Issuance of the both the TRO and any subsequent preliminary injunction are at the discretion of the Court.

If ordered, a TRO can immediately freeze the assets of an abuser, prevent any and all types of transfers of property in their possession or control, force the turnover of the victim's income that has been misappropriated, and/or compel turnover of personal, financial, insurance, and any other documents and records that the abuser maintains possession of. Injunctive relief can appoint an independent receiver to manage property, restrain contact between the individuals involved, and provide for a host of other tasks so long as the Court is shown that they are reasonably necessary steps that will prevent continued irreparable harm to the victim.

The directives of a TRO remain in place until a hearing can be had on the matter, where opposition is afforded to argue their case, and where it will either be extinguished or survive as a preliminary injunction

Importantly, it should be noted that the purpose of the injunction is preservation of the status quo, not necessarily to force an immediate resolution or restitution concerning the underlying allegations. When drafting the terms of a prospective Order, one must be certain to remember the purpose of the injunction, and not to overreach in the relief requested. As a general rule of thumb, the remedy sought should be conservative, limited to the least restrictive forms of relief that can be crafted, and of course be within the confines of the statutory requirements. Additionally, as with all remedies at equity, the movant must not come to the Court with "unclean hands" or else the requested relief will be denied.

Procedural requirements aside, much of the utility derived from injunctive relief comes not just from its ability to restrain or compel, but its plasticity as it can be a remedy tailored to fit the uniqueness of a victim's situation. Given that the vast majority of elder abuse victims suffer abuse at the hands of those close to them such as family, "friends," and health care providers, all of whom are in positions not only to camouflage their abuse, but to coerce their victims into remaining silent, or worse, actively concealing the harm to themselves, a well-crafted TRO and preliminary injunction can quarantine both individuals and assets before the damage inflicted by the abuse metastasizes, and causes greater damage than that which has already been done.

The relief sought can seek to undo improper transfers, be used as a means of facilitating a settlement including the return of property, and of course offer a protective shield against further wrongdoing.

While there tends to be a disbelief in the general public about the pervasiveness and nature of elder abuse, perhaps a willful ignorance, apathy, an honest unawareness, or any number of other reasons that this issue has not been afforded more attention, as both attorneys and members of our communities we must remain attentive to the needs of those who cannot always defend themselves, and continue to be adaptive and creative in our practice of law when finding ways to best serve them.

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