BY DARCY J. CHAMBERLIN & JANNA S. DUTTON

# It's Not All About Death and Taxes: Preventing Elder Financial Exploitation Through Estate Planning


**DARCY J. CHAMBERLIN** *is a principal with Chamberlin Law Group focusing on trust and estate matters.*

darcy@clgattorney.com



**JANNA S. DUTTON** *is the founding shareholder in the estate planning, probate, and elder law firm of Dutton Casey & Mesoloras PC.*

jdutton@duttonelderlaw.com


**THE LIMITATIONS OF REVOCABLE LIVING TRUSTS BECOME EVIDENT FOR CLIENTS** whose quality of judgment is slowly declining. Such clients may not recognize their own decline or that they are even vulnerable to exploitation. These blind spots may lead them to engage in unsound financial transactions. As estate-planning attorneys, we should look beyond our role as document creators and protect our impaired clients from con artists, bad trustees, and untrustworthy relatives.

## Discussing exploitation risks at the initial consultation

Assessing the risks of financial exploitation should be discussed during the initial consultation with the client. What should be part of that conversation? Wealth and family dynamics are among the most significant factors that determine one's susceptibility to financial exploitation. Research has demonstrated that major risk factors include advanced age, being unmarried, recent loss of a spouse, having no children (or being estranged from them), isolation, and middle- to upper-class wealth.[1] Evaluating the fiduciaries whom a client expects—or hopes—to step in and manage his or her assets when the client is most vulnerable also should be a primary discussion topic.

The effectiveness of revocable living trusts and powers of attorney are dependent on a solid awareness of these matters. This knowledge also will inform how to draft such issues as limitations on the ability to amend and revoke financial documents, accountability of financial fiduciaries to third parties, and when fiduciaries should cease to act.

## Selecting and defining the role of fiduciaries

Most clients expect to continue to manage their own assets. If they are motivated to use a revocable living trust as a component of their estate plan, they also will fully expect to be their own sole trustee. The discussion then shifts to designating successors. But if the client opts for a

1. Namkee G. Choi & James Mayer, *Elder Abuse, Neglect, and Exploitation Risk Factors and Prevention Strategies*, 33 Journal of Gerontological Social Work 2, 5-25 (2000).

**As financial exploitation of the elderly becomes a growing social concern, estate planners must address the issue. This article reviews trust and estate issues involved in exploitation of the elderly and suggests provisions that can be used to protect your clients.**

fiduciary, then several key factors should be examined before someone is named.

**Characteristics of a good fiduciary.** Honest and attentive fiduciaries are essential for protecting a client who is suffering from cognitive decline. This is not a time to choose the oldest child merely because that child is the oldest—or to propose that two children who share a life-long hatred of one another work as cotrustees. Designating an elderly spouse as the first-in-line fiduciary also may not be prudent. With more communication options (e.g., Skype and FaceTime) and online access to account statements, a child who lives nearby is not always the obvious first choice. You also need to assist the client in identifying the qualities of a good trustee or agent under a power of attorney for property: financial acumen, trustworthiness, time, willingness to communicate, and lacking a history of family conflict. Your client should not use a trust to force a resolution of sibling rivalries.

**Professional fiduciaries.** Clients should vest significant authority in a fiduciary who will be acting for them when they are no longer able to act. After we review the characteristics of a qualified fiduciary, some clients struggle to identify a candidate that fits that role. It is better to acknowledge this at the outset than settle for a candidate who may not be willing to act when called upon or who may act against the client's best interests. In these cases, recommending a corporate trustee may be appropriate. Regardless, do not assume that a client has a network of family and friends who are capable and willing to step up. The number of "orphan" elders, a term referencing the "coming wave of childless and unmarried Baby Boomers who are aging essentially alone,"[2] is on the rise.

**Using cotrustees.** Should you counsel an older client to name a cotrustee at the outset? This approach creates built-in monitoring. For example, the trust could mandate that the consent of the cotrustee be required before investment purchases are made. Cotrustees provide additional protection against an unscrupulous broker who sells risky, high-commission investments or against the client's own declining ability to handle financial transactions. Further, having a cotrustee who is already familiar with the client's finances can ease the transition when the client is no longer interested in taking an active role in his or her financial affairs.

**Building transparency into the plan.** In our experience, petitions for guardianship not only arise as a result of the agent's bad behavior, but because the agent refuses to share information with other family members. The lack of transparency or accountability can raise suspicion, especially when other family members are jealous that authority has been given to one party. Including a provision that requires the agent(s) or trustee(s) to provide copies of statements, reports of receipts and disbursements, and other supporting documentation to interested family members may help dispel concerns that the fiduciary is acting improperly[3] or prompt a timely intervention in case of bad behavior.

2. Amy Acheson, *Supporting 'Orphan Elders,'* NAELA News, 6 (Jan/Feb/Mar 2016), www.trustsestateselderlawct.com/sites/default/files/NAELA_SupportingOrphanElders.pdf.

3. See *J.P. Morgan Chase Bank, N.A. v. Longmeyer*, 275 S.W.3d 697 (KY 2009). The Kentucky Supreme Court approved the actions of a trustee who notified the remainder beneficiaries that the grantor revoked his trust. The court ruled that the trustee had an affirmative duty to notify beneficiaries of a revoked trust. KY. Rev. Stat. Section 386.714 removes doubt that should the trustee suspect that the grantor was unduly influenced or lacked capacity to revoke, the remainder beneficiaries had a protectable interest.

TAKEAWAYS >>

- Estate-planning attorneys should assess their clients' risk for exploitation, discuss ideal fiduciary candidates before documents are drafted, and consider including clauses that promote transparency and anticipate a decline in the grantor's decision-making abilities.
- When a client struggles to identify a qualified fiduciary, consider appointing a corporate trustee.
- Customizing powers of attorney and fiduciary roles and clarifying expenses for which fiduciaries may be reimbursed may prevent suspicion among family members.

CLIENTS SHOULD VEST SIGNIFICANT AUTHORITY IN A FIDUCIARY WHO WILL BE ACTING FOR THEM WHEN THEY ARE NO LONGER ABLE TO ACT. AFTER WE REVIEW THE CHARACTERISTICS OF A QUALIFIED FIDUCIARY, SOME CLIENTS STRUGGLE TO IDENTIFY A CANDIDATE THAT FITS THAT ROLE. IT IS BETTER TO ACKNOWLEDGE THIS AT THE OUTSET THAN SETTLE FOR A CANDIDATE WHO MAY NOT BE WILLING TO ACT WHEN CALLED UPON OR WHO MAY ACT AGAINST THE CLIENT'S BEST INTERESTS.

**In powers of attorney for property:** "My Agent shall render statements of account of receipts, disbursements, principal on hand, and transactions conducted on my behalf upon reasonable request of any of my spouse or children."

**In trust agreements:** "The Trustee, other than the Grantor, shall render statements of account of receipts, disbursements, principal on hand, and transactions conducted on behalf of the Trust upon reasonable request of any of Grantor's spouse or children."

## Customizing powers of attorney or trusts

**Avoid family conflict by defining fiduciary compensation.** It is fairly common for other family members to complain that the agent is using funds that benefit the agent. Consider the possible consequences if the client, grateful that the child agent is living with her, permits the child to reside with the client rent free. Does the client expect this to change if the child agent hires a live-in caregiver to assist the client? If the trust owns the home, there should be specific directions to the trustee. Also, to prevent future conflicts, consider spelling out what the client means by "compensation" in the power of attorney or trust—especially if the client does not expect that a child, acting as fiduciary, will be compensated.

**In powers of attorney for property:** "My Agent is not entitled to compensation but is entitled to reimbursement for costs reasonably incurred while acting as my Agent, including, but not limited to: phone bills, postage, and travel expenses, if necessary, to observe my care."

**In trust agreements:** "If any of my spouse or children is acting as Trustee, he or she is not entitled to compensation for acting as Trustee but is entitled to reimbursement for costs reasonably incurred while acting as Trustee, including, but not limited to: phone bills, postage, and travel expenses, if necessary, to observe my care."

**An alternate provision for power of attorney or trust:** "My agent (or Trustee) will be compensated at a rate of $___ for services rendered pursuant to this instrument. The agent (or Trustee) shall keep a log of time spent and a description of the services rendered."

**"Springing" vs. immediate powers.** Attorneys commonly prepare powers of attorney that become effective only when a treating physician has certified, in writing, that the client lacks decision-making capacity. But in emergency situations when there is conflict, physicians are very reluctant to provide these certifications for fear of liability. This reluctance can result in guardianship litigation. In anticipation of a physicians' growing reluctance to "certify" decision-making capacity, consider authorizing a majority of specific family members to certify instead.

**In powers of attorney for property:** "This power of attorney shall become effective upon the written determination of the majority of my children and my spouse who are able to act, namely, _____, that I am unable to give prompt and intelligent consideration to financial affairs."

**In trust agreements:** "I shall be incapacitated if I am under a legal disability or am unable to give prompt and intelligent consideration to financial affairs. The determination of my inability shall be made in writing, signed by the majority my children who are then living and able to so act, (or _____) and delivered to the trustee. The trustee may rely conclusively on that writing."

What is the effect of a determination of incapacity? It should not only mean that the grantor is unable to act as a trustee, but also that the grantor does not have the capacity to amend or revoke his or her document.

**For example:** "Upon the determination of my incapacity, I shall be removed as trustee, and, during any period in which I have been declared to be incapacitated, unless a court of competent jurisdiction has determined that I am legally competent to act,

### ISBA RESOURCES >>

- ISBA CLE Event, *Sixth Annual Elder Law Boot Camp: Assisting the Exploited and More*, Apr. 25-26, 2019, isba.org.cle.
- Steven T. Mann, *Technology at End-of-Life: Estate Planning for Millennials*, The Counselor (Oct. 2017), law.isba.org/2BPAZBh.
- Jeffrey R. Gottlieb, *A New Weapon Against Elder Abuse: Presumptively Void Transfer to Caregivers*, 103 Ill. B.J. 24 (Jan. 2015), law.isba.org/2TtWBNR.

I shall be i) restricted from making withdrawals and giving directions under this Article, ii) prohibited from amending or revoking this instrument or being appointed as trustee, and iii) disqualified from appointing successor trustees and approving trustee accounts, in which event the persons who would exercise those rights if I were then deceased shall exercise them in my place. No person shall have a duty to seek a judicial determination regarding my legal competency."

This is a serious issue. Not all incapacity has a traumatic onset so obvious that "next-in-line" fiduciaries immediately know it is time to act. Additionally, some cognitively impaired clients may be influenced by their exploiters and refuse to allow their physicians to certify their incapacity. Instead of creating a springing power that must be triggered by delineated circumstances, in our opinion, drafting the agency to be immediately in effect is the better practice for older clients.

**When should fiduciaries cease to act?** A Health Insurance Portability and Accountability Act (HIPAA) release requirement should be considered in connection with an acting fiduciary. The concern to be addressed here is, "What happens when the fiduciary, due to age or illness, can no longer effectively carry out his or her responsibilities?" Should the document require the fiduciary to provide a HIPAA release upon request by an interested party? This may be appropriate to assure that the selected fiduciary still maintains the requisite capacity to continue serving. This is especially important when your client is appointing someone of equal or older age as a successor trustee (such as a spouse).

**In powers of attorney**: "Upon the request of a person appointed to act as successor agent, the acting agent shall be deemed incapacitated and unable to act as agent unless within 30 days of such request the agent authorizes the use and disclosure of the agent's individually identifiable health information or other medical records in the manner required by the Health Insurance Portability and Accountability Act of 1996 and any regulations thereto."

**In trust agreements**: "Upon the request of a person appointed to act as successor trustee, the trustee shall be deemed incapacitated unless within 30 days of such commencement the trustee authorizes the use and disclosure of the trustee's individually identifiable health information or other medical records in the manner required by the Health Insurance Portability and Accountability Act of 1996 and any regulations thereto."

In addition, the trust or agency document can include provisions that automatically remove the authority of the successor fiduciary at a certain age. For example, when the successor turns 75 or 80.

## Should anything be irrevocable?

Revocable living trusts and powers of attorney for property are, on their face, revocable and amendable. But should they be so? Guardianship is difficult when dealing with a client subject to undue influence. Clients experiencing cognitive decline may be easily manipulated and influenced to change their estate-planning documents. Should you place safeguards in the documents to protect against revoking or amending a document as a result of undue influence?

The Illinois Appellate Court for the Third District approved such an arrangement in *Dunn v. Patterson*.[4] The defendant attorney, Lawrence Patterson, had created an estate plan for Charles and Charlotte Dunn and had placed the following conditional revocation clause in the Dunns' trusts and powers of attorney:

> QUALIFIED RIGHT TO AMEND AND/OR REVOKE. Charles W. Dunn and Charlotte D. Dunn acting jointly or the survivor of them, may, at any time or times, amend or revoke this Joint Declaration of Trust, in whole or in part, by instrument in writing (other than a Will) delivered to the acting Trustee; subject however to the receipt of the written consent of Attorney LAWRENCE F. PATTERSON, whose signature on said written consent form is Medallion Certified (whether Attorney Lawrence F. Patterson is then acting as the Attorney at Law for either one or both of us, or has been discharged as said Attorney for either one or both of us, orally or in writing) or, in the alternative, receipt of the written consent of a Court having jurisdiction, upon Petition filed by said Attorney or by any other interested person.[5]

When the clients went to a different attorney to make changes to their estate-plan documents (instead of meeting with Patterson first), the new attorney wrote a letter demanding that Patterson release this amendment consent provision. Patterson replied that he either needed to meet with the clients first or they could petition the court. The Dunns went to court and the trial court deemed Patterson's provision was void and against public policy.

On appeal, the appellate court ruled otherwise:

NOT ALL INCAPACITY HAS A TRAUMATIC ONSET SO OBVIOUS THAT "NEXT-IN-LINE" FIDUCIARIES IMMEDIATELY KNOW IT IS TIME TO ACT. ADDITIONALLY, SOME COGNITIVELY IMPAIRED CLIENTS MAY BE INFLUENCED BY THEIR EXPLOITERS AND REFUSE TO ALLOW THEIR PHYSICIANS TO CERTIFY THEIR INCAPACITY. INSTEAD OF CREATING A SPRINGING POWER THAT MUST BE TRIGGERED BY DELINEATED CIRCUMSTANCES, IN OUR OPINION, DRAFTING THE AGENCY TO BE IMMEDIATELY IN EFFECT IS THE BETTER PRACTICE FOR OLDER CLIENTS.

4. *Dunn v. Patterson*, 395 Ill. App. 3d 914 (3d Dist. 2009).
5. *Id.* at 915.

> In plain English, it is undisputed that Patterson consulted with the plaintiffs regarding several estate planning documents. After consulting with Patterson, the plaintiffs recognized that with their advancing age, there was a probability of diminished mental faculties and therefore susceptibility to undue influence or unsound decisions. They were apparently happy with the documents when they were written and on advice of counsel agreed to provisions which indicated that before they changed the documents, they had to seek the consent of either: (a) their fiduciary (Patterson); or (b) a court of competent jurisdiction. Patterson agreed to act as the fiduciary and, in so doing, he promised to use the utmost good faith with respect to granting or withholding such consent.[6]

The *Dunn v Patterson* matter led to grumbling by some members of the bar who viewed this type of provision as a money grab. But considering the growth in financial exploitation, offering an option to condition revocation or amendment on the consent of a disinterested third party (not necessarily the attorney) or committee of trusted family members and advisors may be the right solution for a particular client.

> **In a trust agreement:** "The grantor, at any time or from time to time, with the written consent of the first of the following 'disinterested third parties' willing and able to act, may revoke, terminate, or modify this agreement and the trust created hereunder to any extent and in any respect, which consent shall be provided if the disinterested third party believes to be in the best interests of the grantor, without regard for its effect on remainder or other successor beneficiaries. A disinterested party means any individual who has no present or future beneficial interest in the estate of _____, and whose family likewise has no present or future interest, who does not owe a duty of support to any person having such an interest, and is not the transferor of any property held in trust hereunder. No later-dated trust or amendment shall be considered valid unless counter-signed by the designated disinterested third party as provided herein."

A similar provision could also be included in a durable power of attorney for property.

## Conclusion

For our older estate-planning clients, protection from future financial exploitation is as important as avoiding probate and estate taxes. As estate-planning attorneys, we should consider the risks, discuss these risks with our clients, and draft language that protects our clients from common situations associated with financial exploitation. IBJ

6. *Id.* at 924-25.