# Best Practices for Family Exploitation Cases

By Doug Chalgian

From the perspective of the child who moved to New Jersey 30 years ago, the sibling who moved back into the family home to live with (and be supported by) his aging mother is a ne'er-do-well scam artist who took advantage of and manipulated his mother as her health declined so that, in the end, her entire estate passed to him by one means or another.

From the perspective of the son who lived with his mother during those final years of life, he sacrificed to allow his mother to enjoy her final years in a safe environment outside of assisted living, and she favored him out of appreciation for that sacrifice.

The names and details change, but this case plays itself out many times every year in courts throughout Michigan. While aspects of these cases are repetitive, they are rarely mundane. Rather, family exploitation cases are almost always as intriguing, murky, and rich as the human conditions and relationships from which they arise. Handling these cases requires lawyers who are familiar with both probate law and the tools and processes of civil litigation. But most importantly, these cases require lawyers who know how to tell (and enjoy telling) stories.

## Causes of action

The simplest of these cases arise after the death of a parent and involve contesting only the will or trust. But often these cases arise during the life of the parent or occur after the parent's death but involve allegations of exploitation related to things that happened while the parent was alive.

When the parent is alive, the case may require the appointment of a conservator to initiate litigation. When the parent is deceased, the action may require opening an estate and having the personal representative pursue recovery.

In those simple cases where only a will or trust is at issue, the attorney for the out-of-state child will plead lack of capacity and undue influence. But in a majority of these cases, there are also joint bank accounts, deeds (including, perhaps, so-called "lady-bird deeds"), altered beneficiary designations on retirement accounts or life insurance policies, or questionable fund transfers, credit card charges, and ATM withdrawals. In these expanded exploitation situations, in addition to undue influence and lack of capacity, the attorney seeking recovery will want to consider pleading convenience account, conversion, constructive trust, breach of fiduciary duty, fraud, or unjust enrichment. The attorney may also consider ex parte or preemptory motions to freeze assets, or require accountings. Jury demands are often appropriate as well.

## Capacity

Evaluating these cases always begins with questions about competence. That's because, in addition to being a standalone basis for setting aside a transaction, the level of understanding (or vulnerability) of an older person is also an underlying consideration in nearly every case regardless of the cause of action.

Standing alone, a suit that seeks to set aside a transaction for lack of capacity is complicated enough. For one thing, the law is replete with standards that define competence.

To impose a conservatorship over an adult, the petitioner must show that the subject of the petition is unable to "effectively" manage his or her property and business affairs.[1] For a guardian, the standard requires a finding that the person is unable to "make or communicate informed decisions."[2] The standard of capacity to create a valid will or trust requires the testator or settlor to "understand in a reasonable manner."[3]

Caselaw has held that in order to create a valid power of attorney, the principal must have "the ability to engage in thoughtful deliberation and use reasonable judgment with regard to its formation."[4] In the recent case *Menhennick Family Trust v Menhennick*, the

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Michigan Court of Appeals held that the capacity to enter into a shareholder's proxy agreement is not necessarily the same standard as creating a power of attorney.[5]

Arguably, every so-called "standard" expressed in the law fails to enlighten because of its circular nature. Whether the decision was *informed*, *reasonable*, or *thoughtful* simply leaves the factfinder with different words, all of which invite the factfinder to make a subjective assessment of whether the individual really knew what he or she was doing. To its credit, the *Menhennick* Court articulates the obvious, which is that the test of capacity is itself a function of the complexity of the decision being made. The more complicated the decision, the more competence required.

This leads to the role of medical evidence in these cases. While capacity is a legal question, most factfinders (judges and juries) are quick to defer to the opinion of a medical expert or rely on conclusions ferreted out of medical reports.

So, yes, these cases involve poring through medical records. But because it is extremely rare to find a contemporaneous geriatric psychiatric evaluation in those records, medical evidence is seldom conclusive. Instead, what is typically gleaned from these records are comments by a treating physician about the patient's "orientation" or superficial capacity evaluations conducted by a hospital social worker. As a result, lay witness testimony is commonly relied on and experts are frequently engaged.

Testimony of a layperson is admissible to establish capacity.[6] For example, testimony from a caregiver who heard an older adult repeat the same story over and over or from a friend who helped an older adult return safely from the neighborhood grocery store when he got lost two blocks from home can provide compelling evidence and can also be relied on by a testifying medical expert.

To be relevant, medical evidence must be contemporaneous to the event at issue. Notwithstanding changes in the way we now understand the course of age-related cognitive decline, the concept of the "lucid moment" survives, and the law remains as set forth in this 1965 decision of the Michigan Supreme Court:

> It is further the settled law of this jurisdiction that the testamentary capacity is judged as of the time of the execution of the instrument, and not before or after, except as the condition before or after is competently related to the time of execution.[7]

As such, the lucid moment argument remains an effective tool for discounting (and, at times, precluding) the admission of medical reports that are not significantly contemporaneous to the event at issue.

## Undue influence

Second only to lack of capacity, undue influence is the cause of action most often invoked in these cases. As previously suggested, capacity and undue influence are interrelated.

For instance, in an undue influence case, a parent may have been suffering from some level of age-related cognitive impairment but may have nonetheless retained the requisite capacity to accomplish the transaction at issue. In proving that the parent was pressured into a decision he or she would not otherwise have made, the impairment can be offered to show that the parent's volition was more easily overwhelmed by the pressure of the alleged undue influencer. Simply put, the more impaired the individual, the lower the threshold to establish undue influence.

Make no mistake; the bar for establishing undue influence is extremely high:

> To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, are not sufficient. *Kar v Hogan*, 399 Mich 529, at 537, 251 NW2d 77 (1976).

Importantly, the law provides a mechanism for imposing a presumption of undue influence on a purported bad actor. To invoke the presumption, three facts must be established: (1) there existed a fiduciary relationship between the party acting and the party purportedly exercising undue influence, (2) the party purportedly exercising undue influence had the opportunity to influence the party engaged in the transaction with respect to the transaction at issue, and (3) the party who allegedly exercised undue influence benefited from the transaction.[8]

And while establishing the presumption comes up in a majority of these cases and can be helpful to the party seeking to set aside the disputed transaction, the mere existence of the presumption does not shift the burden of proof in the case and can easily be rebutted. While there is much debate about the mechanics of creating and rebutting this presumption, in most cases, the value of the presumption amounts to, at best, a way to avoid summary disposition and get the matter to the jury.

As mentioned, capacity intersects with the concept of undue influence. Accordingly, the same types of medical evidence may be offered in undue influence cases. In undue influence cases, other types of evidence might be offered to establish what

is popularly referred to as "vulnerability." Research supports the idea that older people—even those without cognitive impairments—may be subject to manipulation as a result of social conditions such as isolation and lack of empowerment.[9]

## Conclusion

Knowing what to plead and where to look for admissible evidence are important skills for attorneys undertaking these matters. Because these cases bubble up from the murky waters of aging, cognitive decline, and family relations, the ability to organize the evidence into a believable narrative is often the key to prevailing. In my experience, when both sides are right and both sides are wrong, the best storyteller usually wins. ■

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## ENDNOTES

1. MCL 700.5401(3)(a).
2. MCL 700.1105(a) and MCL 700.5306(1).
3. MCL 700.2501(2)(d).
4. *Persinger v Holst*, 248 Mich App 499, 507; 639 NW2d 594 (2001).
5. *Menhennick Family Trust v Menhennick*, unpublished per curiam opinion of the Court of Appeals, issued November 27, 2018 (Docket No. 342391).
6. See, e.g., *In re Estate of Clemence*, unpublished per curiam opinion of the Court of Appeals, issued October 31, 2017 (Docket No. 332099).
7. *In Re Powers Estate*, 375 Mich 150, 158; 134 NW2d 148 (1965).
8. *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976). It is also important to note that to establish the existence of a fiduciary relationship for the purpose of giving rise to the presumption, it is not necessary that the fiduciary relationship be evidenced by a formal document, such as a power of attorney. Rather, simply being involved in the management of the person's affairs on an informal basis can be sufficient.
9. See, e.g., the work of Dr. Peter Lichtenberg, Wayne State University School of Gerontology, including Lichtenberg et al, *Quantifying Risk of Financial Incapacity and Financial Exploitation in Community-dwelling Older Adults: Utility of a Scoring System for the Lichtenberg Financial Decision-making Rating Scale*, Clinical Gerontologist (posted June 25, 2018) <https://www.tandfonline.com/doi/full/10.1080/07317115.2018.1485812> (accessed January 18, 2019).