

# Elder Law Litigation and the Lessons I've Learned

*By Doug Chalgian*



Elder law litigation is on the rise. But little has been written about it, and from what I see in probate courts around the state, little is understood.

Generally speaking, these are cases in which the people whose resources or care are the subject of the dispute are alive (at least at the time the relevant events occur), but suffer from cognitive impairment and, as a result, are unable to police their own situations. These are cases that place the murky legal theories of “capacity” and “undue influence” on an even more fantastic and inscrutable background of personalities and family dynamics.

I've come to love this practice niche, and I've been fortunate to have had cases that I believe (if I tell the stories well) illustrate the types of facts, legal theories, and procedural challenges in which these matters arise and are resolved. As they say, the stories are real, but the names have been changed...

### Lesson 1: Cognitive Impairment Is Much More Than Memory Loss

Let's call him Joe.

Joe never left the farm he was raised on. In his 82 years, he traveled outside the confines of his rural Michigan county maybe a dozen times. He graduated from high school, but everyone acknowledges that as a child he was “different”—not good with school work, odd, and quiet—what today we might call autistic. Never married. No kids.

Now, after a life of milking cows and putting up hay, he deeds the farm to a farmhand, a younger man who has lived on or near the farm for nearly 40 years and with whom Joe has developed as much of a human connection as he has with any human (which ain't saying much). Joe has no concept or interest in the tax ramifications of this decision. He can't explain how he will support himself if his care costs should increase and he might need the equity in the farm to provide for his needs. The only real explanation he can offer for his decision is that he believes that by giving the farm to the farmhand, he has taken a step that provides the best chance of him not being sent to a nursing home, or as he calls it, the “nut house.” The farmhand, he believes, will take care of him.

Tests reveal that Joe probably has a low IQ to begin with and that he is also experiencing the normal decline of aging (a slowing of the mental process). Typical tests for dementia show some memory loss, but not significant. When he talks about the farm and what he wants to happen to it after he is gone, he gets tearful (depression?).

So, is the deed valid? If we look at just the issue of memory loss, the deed would be valid. But the concept of capacity is a much different thing. The problem is that courts are looking for simple markers and magic words to guide their decisions. Mention Alzheimer's and you automatically win points. Without it, courts often struggle.

In many cases, the challenges for the elder law litigator are (1) to dig deeper and (2) to get the court to listen. Elder law liti-

gators should know what “normal” aging is and that there are many forms of “dementia”—some that primarily affect memory loss, but others that affect different areas of the brain. Elder law litigators need to educate themselves on the difference between memory loss and other forms of cognitive impairment that are

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not as commonly discussed or recognized, such as diminished “executive function.” They must know how to work with doctors who specialize in the diagnosis and treatment of cognitive impairment and should understand what types of tests are needed to develop a true picture of capacity.

### Lesson 2: People Are People First, Then They Grow Old (or The Bigger They Are, the Harder They Fall)

While I was in chambers talking to a seasoned probate judge about a particularly difficult case, the good judge, referring to the elderly gentleman who was the subject of the case, observed in an offhand way: “Doug, that's me and you when we get old.”

He was talking about an 87-year-old college professor who was making incredibly irrational decisions and fighting everyone who dared suggest that he might be cognitively impaired. This man had published many books, had spoken regularly at national conferences, and could carry on a conversation with the best of us (unless you asked the wrong types of questions). But there



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was no way to deny it: he was severely demented. It was only the high level of intelligence that he started with (what some geriatricians would call “reserved capacity”) that allowed him to fake it so well.

In the course of the litigation, the professor had fired several local doctors who had the audacity to advise him of his condition, and then he got lost in an airport while trying to make a connection to the Mayo Clinic on a last-ditch effort to locate a doctor who would support his position that he was perfectly capable of managing his own affairs.

This case provided me with a clear appreciation of the rule that, in the world of cognitive impairment, we are who we are first and that cognitive impairment doesn't take away our quirks, hang-ups, mental illnesses, or idiosyncrasies. In fact, in many cases it only makes them worse.

A corollary of this rule goes to the point being made by the judge: people who held positions of authority and influence often present the most difficult challenges when cognitive impairment humbles them and forces them to give up control. It is an important point to understand because so many of the most challenging elder law cases involve difficult people—who only become more difficult when cognitive impairment sets in.

### Lesson 3: For the Elderly, the World Can Be a Cold and Scary Place (or Incapacity and Vulnerability Are Two Different Things)

When I think of this client—call her Mary—I also have to recall her dog, Sandy. Coming into Mary's tiny home always meant being greeted by Sandy, hearing Mary tell about how she found Sandy at a dog shelter after Sandy and Sandy's littermates had been abandoned at a highway rest stop, admiring Sandy as she performed her “tricks,” and sitting in the car after I left, struggling to remove Sandy's hair from my clothes.

Now put yourself in the place of a 75-year-old widow with limited resources, a fixed income, a small savings, maybe a house

that is paid off. Your kids are not close, either physically or emotionally. You are old. You are lonely. Your mind still works fine, but you worry and you hear things.

You are invited to “educational” seminars, where you are provided a free meal. You would never admit it, but you enjoy having company when you eat and the attention of someone who treats you like an adult...like you matter. Someone wearing a suit and tie, with credentials of some sort, tells you that your financial situation is at risk if you don't buy this financial product or get that legal document.

You start to believe:

- I have to “avoid probate.”
- If I go a nursing home, the state will take my home and “everything I've worked for.”
- If I don't do something, the “death tax” and other taxes will waste my estate.
- If I want to stay in my home, I need to have a plan.

Frequently, the victims of these scams are old but clearly not incompetent. They realize they have been taken, but are hesitant to reveal the crime.

The people who exploit seniors in America understand these dynamics and are extremely sophisticated about using scare tactics as well as emotional appeals to take advantage of their victims. In an audience of two or three dozen seniors, these predators can quickly identify the few who meet the profile: lonely, some resources, maybe a little cognitively impaired. Soon they are raking in commissions—big commissions—selling annuities, reverse mortgages, “living trusts,” and other products that are, more often than not, overpriced and of little or no value to the person to whom they are being sold. (Ever meet with a client whose entire estate is worth about \$100,000 but who spent thousands of dollars for a massive trust agreement designed to “protect” his estate from taxes that are levied only on the estates of multi-millionaires? Or a client who was convinced to take out a reverse mortgage on her home, not because she needed the extra money, but only so she could then be sold an annuity?)

These cases pose different challenges. Frequently, the victims of these scams are old but clearly not incompetent. They realize they have been taken, but are hesitant to reveal the crime. They are embarrassed about being so “dumb” and worry that their children will see it as just further evidence that they don't know what they're doing. These victims are not incompetent, but they are vulnerable.



The elder law litigator will see these cases. Unfortunately, Michigan's consumer protection laws are weak, and obtaining legal relief often involves more cost than can be justified. But on the other side, the bad actors like to work in the dark and are often willing to cough up commissions rather than face the prospect of someone shining a light on what they do.

#### Lesson 4: Among the Aged, Negotiations and Love Songs Are Inseparable

Tom was comfortable. Good retirement. Significant assets. But completely devastated when his wife of 60 years passed away. For weeks after the funeral he would go to her graveside each day and cry for hours.

Tom was suffering from the early signs of dementia, but as long as his wife was around, everything remained covered up. Without her, he feared, his cover would be blown. Now, with the loss of his wife, he was demented *and* depressed. And then he met "her," the younger woman (early 60s). She had limited income, few resources, and significant creditor problems. But to Tom she offered the promise of someone who could look after him, keep him out of an institution, and allow him to continue to disguise his declining cognitive capacity.

So what is the capacity to marry? To enter into a prenuptial agreement? These are the issues that come up in a significant, and growing, number of elder law cases.

Although Tom's story is typical of those who end up in court, the elder law litigator should understand that Tom's story represents only the extreme tip of the iceberg. In the minds of nearly every elder who is considering entering into a committed relationship are thoughts like: If I get sick, will she stick around? If something happens to him, am I obligated? Are my resources exposed to satisfy her care needs? Will this impact my insurance coverage? My social security benefits?

In today's world, love, dating, marriage, and remarriage among the elderly are focal points of litigation. Elder law litigators will see these cases and will frequently be called in after the fact by children interested in fixing what they perceive as "bad decisions" that affect their expectations and rights to an estate and the ability to make decisions about their parents' care. These cases are complicated by the laws that give a spouse or surviving spouse the highest priorities for making decisions about deceased and incapacitated individuals and their affairs (including guardianship appointments, conservatorship appointments, and funeral arrangement authority) and that make little or no distinction between the spouse of 60 years or 6 months.

Paul Simon sang, "Negotiations and love songs are often mistaken for one and the same."<sup>1</sup> The Beatles sang, "Will you still need me, will you still feed me, when I'm sixty-four?"<sup>2</sup> With the arrival of Baby Boomers to the ranks of senior citizens, these musical refrains capture biting real considerations for older folks who find themselves in the dating game.

#### Lesson 5: Does It Pass the Smell Test?

Elder law and probate lawyers like to think that they are at an advantage when traditional civil litigators come to probate court—and that's true. We know the law and the nature of the probate court process. But there also is much that we can learn from seasoned litigators—most importantly, how to tell a story.

Most elder law cases revolve around issues of capacity and undue influence. The dirty little truth about these cases is that the legal jargon we hold so dear—"the ability to make informed decisions," "understood the nature of the agreement," or "knew the natural objects of his bounty"—are all but meaningless. In these cases, fact-finders mold the law to support the result they believe is just. Or look at it this way: Does it pass the smell test?

Every case involves facts that are favorable to your position and facts that weigh against the result you seek. The key to good litigation of all sorts, but especially elder law litigation, is to identify, and hammer in on, those facts that support your position and to weave those facts into a story that allows the fact-finder to come to the conclusion that the people you speak for are the good people—and the people on the other side are not so good. Never lose track of the truth that, except in cases decided by the most conscientious probate judges, fact-finders will never digest all the relevant facts. They need a story, and your job is to provide it.

#### Conclusion

Elder law litigation is on the rise. As the population of older adults increases, as more people are distanced physically and emotionally from their children, and as cognitive impairment in all its various forms continues to afflict the aging population, the practice of elder law litigation will only continue to blossom. These cases offer unique challenges, but also require the lawyers who handle these cases to have specialized skills, knowledge, and sensitivities. ■



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#### FOOTNOTES

1. Paul Simon, *Train in the Distance* (Simon), on Hearts and Bones (Warner Bros Records 1983) and Negotiations and Love Songs (Warner Bros Records 1988).
2. The Beatles, *When I'm Sixty-four* (Lennon/McCartney), on Sgt. Pepper's Lonely Hearts Club Band (Capital Records 1967).