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Attorneys Face Difficult Ethical Challenges In Trying To Protect Clients From Financial Elder Abuse/Exploitation

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Section 825.101(4), Florida Statutes, defines an elderly person as:

a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired.

The financial exploitation of elders has become an all too common phenomenon, especially considering that such exploitation is frequently perpetrated by family members, friends, caregivers, "lovers" or other trusted persons. While there are numerous warning signs of financial exploitation of elders, prevention is difficult, especially in the case of children of the elderly person who are fearful about the balance between protecting their parent and questioning their judgment. Often the elder victim defends the abuser, unwilling to acknowledge that someone they care about may be taking advantage of them; for this reason, even in states such as Florida that have statutory protections, the laws are difficult to enforce without the cooperation of the person who is the subject of abuse.

Such financial exploitation is best combatted before the potential abuser obtains a clear path to financial assets of the elderly client. Protections incorporated into estate plans may be an effective way to prevent such financial exploitation. Estate planners and financial advisors, therefore, need to consider alternatives to help prevent the exploitation before it can occur. However, as noted below, lawyers can find themselves in civil litigation and face ethical charges when trying to be proactive in helping their clients. *Dunn v. Patterson*,¹ is an excellent example of how a well-intentioned lawyer created an estate plan to protect his clients from elder abuse, but later found himself engaged in years of litigation. While ultimately he was cleared, the *Dunn* case provides due warning to attorneys who may otherwise be willing to be proactive in protecting their clients.

What is Financial Exploitation of Elders?

The 2015 U.S. Census reported that Florida has approximately 4 million residents age 65 and older. The percentage of persons 65 and over has grown from 17.3% in 2010 to 19.4% in 2015.² As individuals become elderly, many experience a decline in their mental and/or physical capacities, and become unable to care for themselves. As a result, they become dependent on others to care for them. The introduction of third parties increases the opportunity for abuse. In the estate planning context, abuse frequently includes financial exploitation.

On its website, the Florida Department of Children and Family Services (the "FDCF") defines "adult exploitation" in two ways:

Adult exploitation means a person who stands in a position of trust and confidence with a vulnerable adult knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.

OR

That a person who knows or should know that the vulnerable adult lacks the capacity to consent, obtains or uses, or endeavors to obtain or use, the vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.³

As for a definition of "financial exploitation," the Florida Department of Elder Affairs (the "FDEA"), in its brochure titled "The Power to Prevent Elder Abuse is in Your Hands," describes "Financial" or "Material Exploitation" as the "[i]mproper use of an elder's funds, property, or assets; cashing checks without permission; forging signatures; forcing or deceiving an older person into signing a document; using an ATM/debit card without permission."⁴

The FDEA website and its brochure also list available resources and hotlines to contact in the event of actual or suspected elder abuse. The FDCF investigates abuse and exploitation of elderly and disabled adults. The Adult Protective Investigations Division of the FDCF handles such investigations. When the investigation is complete and the case has been closed with indications of abuse or exploitation, the FDCF must notify and send copies of its case synopsis to both local law enforcement and the State Attorney's Office.⁵

On January 27, 2017, the authors contacted the Adult Protective Investigations Division. The authors informed the Adult Protective Investigator of the focus of this article and asked for input on the number of complaints filed as compared to the FDCF's ultimate ability to enforce a potential action against an alleged abuser. We were advised that only approximately 5% of those reported resulted in prosecution. Without the cooperation of the individual who is the subject of abuse, the laws providing protection are difficult to enforce.

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Frequently, the elder individual who is being abused is unwilling to speak to authorities because he or she believes that the alleged abuser may be the only person that keeps him or her from being placed in a nursing home. As a result, the elder individual is unwilling to acknowledge that someone upon whom he or she is reliant and/or has an emotional attachment, may be taking advantage of him or her.⁶

When investigating potential exploitation, the Adult Protective Service Program is privy to whatever documents the elderly individual and the elderly individual's financial institution(s) will release. Pursuant to Section 415.104(1), Florida Statutes, the FDFS shall, upon receipt of a report alleging abuse, neglect, or exploitation of a vulnerable adult, begin a protective investigation within 24 hours. Currently, Florida has 290 Adult Protective Investigators statewide. The Adult Protective Services Program Office reports that approximately 50,000 elder abuse cases were reported in fiscal year 2015-2016, of which approximately 10,000 reported financial exploitation.

Difficulties When Lawyers Try To Be Proactive

The *Dunn* case exemplifies how a well-intentioned lawyer found himself in six years of litigation.⁷ Patterson, an Illinois attorney, represented the Dunns in connection with their estate planning. He suggested an estate planning program that he called the "Peace of Mind Primary Estate Plan" (the "Estate Plan").⁸ Each document that Patterson created for the Dunns included a "qualified amendment and revocation" provision, requiring that any amendment or revocation of the documents be executed either with the written consent of Patterson (who was a trust protector) or by order of the court.⁹ Patterson advised his clients that the trust protector provision was used to protect the original purpose of the trust from changes made through undue influence or elder abuse.¹⁰ Patterson entered into a written retainer agreement with the Dunns in which the Dunns agreed to pay Patterson \$225 per hour, with total fees not exceeding \$2,850 without the Dunns' consent.¹¹

The Dunns executed their documents on June 12, 2006.¹² Five months later, on November 14, 2006, Patterson received a letter from another attorney, Timothy McJoynt, informing Patterson that he had been retained by the Dunns to modify the Estate Plan and that the Dunns "no longer wanted their ability to revoke or amend their estate planning documents to be contingent on Patterson's approval and, therefore, wished to remove his name from the documents and make other minor amendments."¹³ Patterson responded by letter on November 16, 2006 stating, in pertinent part, "For my clients to make any changes in their plan it is necessary for both of them to discuss those changes with me and for me to then determine whether the changes are consistent with the interests and protections embodied in the original plan" and that if the Dunns were unwilling to personally meet with him, their only other alternative was to petition the court for

leave to amend the documents. On April 27, 2007, the Dunns filed suit against Patterson, seeking declaratory judgment that Patterson's "qualified revocation and amendment" provisions in the estate plans were void as against public policy.¹⁴

The Circuit Court found that the "qualified revocation or amendment" provision requiring Patterson's approval was contrary to public policy and void because it ignored the provisions of Supreme Court Rule of Professional Conduct 1.2—that an attorney is obligated to abide by his client's decision so long as the direction given by the client is not contrary to law, unethical, or otherwise in violation of an ethical or legal obligation—and entered judgment on the pleadings ("Rule 1.2").¹⁵

The Illinois Appellate Court reversed the Circuit Court's decision and found that that Patterson's conduct was not sanctionable.¹⁶ Under Illinois law, provisions requiring a third party's consent to modify a trust are permissible.¹⁷ Thus, the Appellate Court held:

Provisions in estate planning documents, which limited elderly clients' power to amend or revoke documents by requiring consent of attorney, or alternatively, consent of court, were not void as against public policy or violative of rule of professional conduct requiring attorney to follow clients' instructions, notwithstanding that attorney drafted documents, where attorney did not mislead clients, clients were informed of provisions, attorney did not have financial stake in estate plan, and attorney, following his discharge by clients, sought to meet with them before agreeing to grant or refuse consent.¹⁸

The Appellate Court noted that the revocation provisions executed by the Dunns were not inconsistent with the duty of an attorney to follow his clients' instructions pursuant to Rule 1.2.¹⁹ Under the assumption that Patterson was terminated as the Dunns' attorney, Patterson was not acting as the Dunns' attorney when he declined to consent to the revocation of the trust and, therefore, did not violate his duty to follow his clients' wishes.²⁰ The Appellate Court stated that with respect to Patterson's actions in creating the documents and trying to meet with his former clients, "[w]e do not find Patterson's [conduct] sanctionable. Rather, we find it admirable and consistent with the highest ideals of the bar. In light of the obvious expense to Patterson, we will leave it to other estate planners whether they wish to use this particular method of estate planning."²¹

The Illinois Attorney Registration and Disciplinary Administration (the "ARDC") filed a disciplinary action against Patterson approximately 9 months after the Circuit Court determined the qualified amendment provisions drafted by Patterson to be contrary to public policy.²² While the disciplinary decision was pending, the Illinois Appellate Court

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reversed the Circuit Court's decision.²³ Although two separate counts (Count I and Count II) were brought against Patterson in the disciplinary action, this article addresses only Count II (for Patterson's actions related to the Dunns allegations of overreaching the attorney-client relationship and failure to abide by his clients' decisions concerning the objectives of representation in violation of Rule 1.2). Count I related to another client situation.

The majority of the Hearing Board of the ARDC (the "Hearing Board") found that, by refusing to meet with the Dunns when they obtained new counsel and continuing to bill legal fees to the Dunns after he no longer represented them, Patterson engaged in conduct involving dishonesty, fraud, deceit or misrepresentation; conduct that was prejudicial to the administration of justice; and conduct tending to defeat the administration of justice or to bring the courts or the legal profession into disrepute. The Hearing Board recommended that Patterson be suspended from the practice of law for three months and until he completed the ARDC Professional Seminar.²⁴ In reaching this conclusion, the Hearing Board noted that Patterson not only failed to meet with the Dunns concerning the proposed changes to the Estate Plan, but also placed numerous conditions on the scheduling of the meeting that effectively prevented the meeting from taking place, such as advising the Dunns' new attorney that he would charge \$225 per hour for the meeting and that he would not attend any meeting unless he met alone with the Dunns.²⁵ The Hearing Board found that, regardless of his trust protector role, Patterson had no basis to refuse to meet with the Dunns in the presence of their attorney and therefore acted unreasonably.²⁶ The Hearing Board found that, while Patterson might have been entitled to some fee for acting in his capacity as trust protector, he was not entitled to bill the Dunns for legal services after his services were terminated and that, by doing so, Patterson acted dishonestly and in a way that brings the legal profession into disrepute.²⁷

Decisions of the Hearing Board in Illinois are subject to appeal to the Review Board of the ARDC (the "Review Board"), so Patterson appealed. The Review Board examined the Hearing Board's holdings, which occurred after the Appeals Court reversed the Circuit Court in the civil case, and reversed the Hearing Board's decision.²⁸ The Review Board found that Patterson did not engage in misconduct by refusing to meet with the Dunns and their new counsel. Patterson received no response when he (1) wrote to the Dunns, asking them to sign and return an enclosed form stating that it was their intent to discharge him, and (2) advised the Dunns' new counsel that if the Dunns intended to terminate him and release him from liability, they needed to put it in writing. The fact that Patterson "wished to determine that the Dunns were not being taken advantage of without the presence of the person who intended

to 'dramatically change much of' what Respondent had put in place to protect them was not unreasonable."²⁹ The Review Board decision stated that, had Patterson agreed to make such changes without ascertaining that the Dunns were competent and not being unduly influenced, he "might very well have been called to answer" why he had done so.³⁰ The Review Board also found that the evidence was insufficient to support the Hearing Board's finding that Patterson acted dishonestly in billing the Dunns for the time he expended in his role as their trust protector. In the Review Board's view, "the mere fact that Respondent characterized his time as legal services is not sufficient proof of dishonest intent."³¹ Further, in his first communication with the Dunns' new counsel and several times thereafter, Patterson suggested the court approval alternative. Had the Dunns and their counsel taken the court approval route, such additional fees would have been avoided.³² Based on their findings, the Review Board concluded that Patterson's conduct did not violate Rule 1.2. The Review Board reversed the findings of the majority of the Hearing Board as to Count II, and recommended that Count II be dismissed.

Florida Law

Chapter 825 of the Florida Statutes is titled "Abuse, Neglect, and Exploitation of Elderly Persons and Disabled Adults." Section 825.103(1), Florida Statutes, entitled "Exploitation of an elderly person or disabled adult; penalties," sets forth the elements of the crime of exploitation of the elderly. Specifically, exploitation of the elderly is committed when anyone who stands in a position of trust and confidence, or has a business relationship, with the elderly person or disabled adult knowingly obtains or uses that person's property for the temporary or permanent use of the offending person or a third person. The crime of exploitation of the elderly can result in a first, second or third-degree felony depending on the value of the property involved.³³

Florida cases that have addressed section 825.103, Florida Statutes, have largely held the evidence was insufficient to support a conviction of exploitation of an elderly person or disabled adult.³⁴ In *Franke v. State*,³⁵ the Florida Supreme Court stated, "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence."

Possible Protections

A comprehensive summary of estate planning techniques to better protect elders is beyond the scope of this article. Some techniques that have been used include requiring the consent of family members before a revocable trust can be amended, use of irrevocable trusts, and/or using co-trustees, whether family members or corporate fiduciaries. Each alternative requires the elder to agree to give up a level of control that

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they may be unwilling to do. When estate planning attorneys discuss these issues with clients and suggest safeguards such as those previously noted, the client frequently questions from whom the drafting attorney is trying to protect the client. Our response is “caregivers and others who may develop relationships with them,” but we also tell them that we are trying to protect them from “themselves.” Most clients respond that they can “take care of that themselves.” Yet we find many clients that are in their eighties and succumbing to illness and reduced capacity have third parties taking advantage of them.

Dunn demonstrates how one attorney tried to be proactive and is a lesson of the potential consequences of providing legal advice especially where the lawyer is the one who serves as trust protector. For those who wish to avoid the potentially litigious effects of *Dunn*, other methods can be utilized to substantially reduce the risk of financial exploitation. At the first client-attorney meeting, most estate planning attorneys request that their potential new client complete a financial data sheet. In addition to this standard form, clients should be requested to identify family history of Alzheimer’s disease and dementia. The form should ask the client to state when his/her family member was diagnosed with the condition and how progressive the disease was. The estate planning attorney’s client software should identify clients with a family history of Alzheimer’s and dementia. Such clients should consider creating a panel of advisors and physicians to meet with periodically to evaluate them. The panel could consist of two or more of a psychiatrist or psychologist, a physician, the client’s attorney, one or more family members, an attorney who does not represent the client, and the client’s accountant (“the Panel”).

Annually, the Panel will assess the client’s mental capacity. If the client decides that he or she wishes to amend or re-write his or her estate planning documents, the client will have to appear before the Panel where the Panel will assess the client’s capacity and determine if the client should be permitted to make the requested change and/or bring an action to have a guardian appointed. We understand that this is just one of many potential alternatives but it appears that the use of a Panel, rather than an attorney or family member, may be a way to avoid litigation as described in *Dunn*. Of course each Panel member will want to be compensated, indemnified and held harmless for his or her actions.

Conclusion

Planning to avoid financial exploitation is difficult. Based upon *Dunn*, a lawyer who makes an effort to try to reduce the potential of financial exploitation may find himself or herself in a field of landmines. As medicine and technology increase the average life expectancy, the percentage and population of elderly individuals will continue to rise. As a result, the Florida Bar and other state bar associations should consider ways to create techniques and clarify ethical actions to combat

the threat of financial exploitation and alter the Rules of Professional Responsibility so that practicing lawyers can be proactive in their attempts to help their clients without risking disciplinary action. 



B. NELSON

Barry Nelson, a managing partner of *Nelson & Nelson, P.A.*, is a Florida Bar Board Certified Tax and Wills, Trusts & Estates Attorney with an emphasis of integrating Estate Planning and Asset Protection. Mr. Nelson has been named as a Band 1 Florida estate planning attorney in *Chambers USA: America’s Leading Lawyers for Business* since 2010 and has been included in *Best Lawyers in America* since 1995. He has been named as a Top 100 Miami Florida Attorney since 2012. Mr. Nelson is a

Fellow of the American College and Trust Counsel and served as its Asset Protection Committee Chair from 2009-2012. He served as an adjunct professor for the University of Miami School of Law LL.M. in Taxation program (1998-2009) and served 3 years as founding chairman of the Florida Bar’s Asset Preservation Committee.



C. NELSON

Cassandra S. Nelson, received her Bachelor of Arts, magna cum laude, from the University of Miami in 2013 and is a candidate to receive her Juris Doctor from Emory University School of Law in May 2017. Cassandra is taking the Florida Bar in July 2017 and will become an associate at *Nelson & Nelson, P.A.* upon admission to the Florida Bar.

Endnotes

- 1 395 Ill. App. 3d 914 (2009).
- 2 *Welcome to QuickFacts Florida*, United States Census Bureau, <http://www.census.gov/quickfacts/table/PST045216/12>.
- 3 *What is Adult Abuse?*, Florida Department of Children and Families, <http://www.myflfamilies.com/service-programs/adult-protective-services/what-is-adult-abuse>; see also Florida Statutes Section 825.103 (1).
- 4 *The Power to Prevent Elder Abuse Is in Your Hands*, Department of Elder Affairs, <http://elderaffairs.state.fl.us/doea/elderabuseprevention/Elder%20Abuse%20Brochure%20-%20English2015.pdf>; See also Florida Statutes Section 415.
- 5 Nicole Orr, *Investigating Elderly Exploitation*, Legal Advisor (2012), http://www.sao10.com/legal_advisor/redacted/2012/March2012.pdf.
- 6 R. Craig Harrison, *Protecting the Elderly From Financial Exploitation: The Dilemma and Solution, Part II*, 88-AUG Fla. B.J. 48 (2014), http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/c0d731e03de9828d852574580042ae7a/445ef3f18dbdb84e85257d01005009b0!OpenDocument&Highlight=0,disability*.
- 7 Patterson was in litigation, declaratory and disciplinary, from April 27, 2007 to May 7, 2013. See Exhibit 1 for a timeline of events.
- 8 *Dunn v. Patterson*, 395 Ill. App. 3d 914 (2009).
- 9 *Id.* at 915.
- 10 *Id.* at 916.
- 11 *In re: Lawrence Francis Patterson*, Attorney Number 2153718, Case Number 08PR0074 (Filed July 20, 2011), https://www.iardc.org/rd_database/rulesdecisions.html.
- 12 *Id.* at 9.
- 13 *Supra* note 8, at 916.
- 14 *Id.* at 917.
- 15 *Id.* at 919.

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and the defamation standard as applied to private figures early on in representation of the community. Far too many directors may be unaware that their service on the board may expose them to more than just the usual criticism.⁴¹



H. PERL

Howard J. Perl is a shareholder in the Becker & Poliakoff's Ft. Lauderdale office. Mr. Perl is involved in all aspects of community association law, including transactional, mediation, arbitration, construction defects, and litigation. Mr. Perl holds the AV Preeminent rating from Martindale-Hubbell. An active member of the Community Associations Institute (CAI), he has been designated a Professional Community

Association Manager (PCAM®) since 1995. Mr. Perl retired as a Major in the Army Reserves after 33 years of service, and was deployed to Iraq in support of Operation Iraqi Freedom from July 2005 to July 2006.

Endnotes

1 *Valencia v. Citibank International*, 728 So. 2d 330, 330 (Fla. 3d DCA 1999). See also *Miami Herald Publishing Company v. Ane*, 423 So.2d 376, 388 (Fla. 3d DCA 1982), affirmed, 458 So.2d 239 (Fla. 1984):

Without dispute, the plaintiff Ane was a private individual who was neither a public official nor a public figure. Under the First Amendment and applicable Florida law, he was entitled to recover in his libel action if he established at trial that the defendant Miami Herald published (1) false and defamatory statements of and concerning him, (2) without reasonable care as to whether those statements were true or false, (3) resulting in actual damage to himself.

2 See generally *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (U.S. 1974) (differentiating private individuals from public officials and public figures).

3 *Little v. Breland*, 93 F.3d 755 (11th Cir. 1996).

4 *Gertz*, 418 U.S. 323.

5 *Id.*

6 *Secord v. Cockburn*, 747 F.Supp. 779 (D.D.C. 1990).

7 *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

8 *Mile Marker, Inc. v. Petersen Publ'g, L.L.C.*, 811 So. 2d 841 (Fla. 4th DCA 2002).

9 *Id.*

10 *Verna v. The Links at Valleybrook Neighborhood Ass'n, Inc.*, 852 A.2d 202, 213, 371 N.J. Super. 77, 95-96 (N.J. App. 2004).

11 *Id.*

12 *Bossert v. Schamber*, 2001 Westlaw 1357018, *5 (Cal. App. 2d Nov. 06, 2001).

13 *Id.*

14 *Id.*

15 *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468 (Cal. App. 2000).

16 *Id.* at 479 (citations and internal quotation marks omitted).

17 *Gulrajany v. Petricha*, 885 A.2d 496, 381 N.J. Super. 241, 256-57 (N.J. App. 2005).

18 *Id.*

19 *Fla. Stat.* § 718.112 (2016).

20 *White Egret Condo., Inc. v. Franklin*, 379 So. 2d 346, 350 (Fla. 1979), quoting *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. 4th DCA 1975).

21 *Verna v. The Links at Valleybrook Neighborhood Ass'n, Inc.*, 852 A.2d 202, 214, 371 N.J. Super. 77, 98 (N.J. App. 2004).

22 *Silvester v. Am. Broad. Companies, Inc.*, 839 F.2d 1491, 1494 (11th Cir. 1988).

23 *Gill v. Eden Roc, et al*, Case No. 12-20653 CA02, 11th Judicial Circuit, Miami-Dade County, Florida.

24 *Friedgood v. Peters Pb. Co.*, 521 So. 2d 236, 239 (Fla. 4th DCA 1988).

25 *Gertz*, 418 U.S. at 345.

26 *Waldbaum v. Fairchild Pub'n, Inc.*, 627 F.2d 1287, 1297 (D.C. Cir. 1980); see *Silvester*, 839 F.2d at 1496.

27 *Silvester*, 839 F.2d at 1496.

28 *Gertz*, 418 U.S. at 345.

29 *Waldbaum*, 627 F.2d at 1298.

30 *Gertz*, 418 U.S. at 345; *Friedgood*, 521 So. 2d at 239; *Silvester*, 839 F.2d at 1497.

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16 *Id.* at 925.

17 *Supra* note 11, at 11.

18 *Supra* note 8, at 914.

19 *Id.* at 921.

20 *Id.*

21 *Id.*

22 *Supra* note 11.

23 The disciplinary action was filed on July 31, 2008. The declaratory action was ultimately resolved on November 18, 2009.

24 *Supra* note 11, at 1-2.

25 *Id.* at 34.

26 *Id.*

27 *Id.*

28 *In re: Lawrence Francis Patterson*, Attorney Number 2153718, Case Number 08PR0074 (Filed May 7, 2013), https://www.iardc.org/rd_database/rulesdecisions.html.

29 *Id.* at 15.

30 *Supra* note 8, at 923, 919.

31 *Supra* note 34, at 16.

32 *Id.*

33 *Id.*

34 See *Everett v. State*, 831 So. 2d 738 (2002); *Ellison v. State*, 983 So. 2d 1205 (2008).

35 188 So.3d 886 (2016).

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