

If My Father Planned So Well, What Happened to all the Money?

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If My Father Planned So Well, WHAT HAPPENED TO ALL THE MONEY?



An estate plan can implode in an instant when a vulnerable older adult changes beneficiaries late in life, shutting out family members.

BY MITCHELL I. KITROSER, ESQ.

Older adults often wind up especially vulnerable to fraud or other financial abuse. Cognitive impairment “can adversely affect judgement and decision-making abilities, which can negatively impact planning ability, financial decision making, and increase susceptibility to manipulation and fraud,” according to recent research (D’Ambrosio, 2018). While the majority of these plots are limited to false Medicare claims, counterfeit prescription drugs, and the like (National Council on Aging, n.d.b), others can wipe out entire fortunes. An exploiter can influence an older adult in order to gain control of brokerage accounts, a home, and other assets without the family knowing what is happening. In my practice, I see fact patterns like the following one all the time. The results can be life changing, particularly when funds are gone forever and the older adult needs care. Often, a lifetime of planning is destroyed.

Prologue (as told by Mark, a good client of ours)

Looking back on it all, the warning signs were there. I should have known what was happening, but I missed it. I was focused on my father and his need for care and I didn't want to see anything else. I certainly didn't want to cause any more stress than he was already under. But that turned out to be a big mistake.

Chapter One — January

The last I knew, my dad had \$5 million. He's 83 years old and living very comfortably in Boca Raton on his savings and investments. Mom died a few years ago. He was distraught for a while but has come through it and is doing much better. He's even had a few "lady friends" the past couple of years and now has a steady relationship with a widow named Sally. I know that Sally still has her own place, but she seems to be living with Dad now. Sally has three children of her own and they visit with her and Dad frequently. Her son, Mike, lives in Florida not far from Dad and Sally and he goes over to help out whenever they need him to. Mike is on disability, so he has a lot of free time to help out.

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I know Dad has a lawyer and when I asked Dad about his estate planning, he told me not to worry, the lawyer has taken care of it for him. He also told me that he put me in charge of everything and if something happens to him, I should get in touch with the lawyer immediately. I'm really not sure what that means, but for now, he seems to want to keep this part of his life private, so I am not going to push him on it. I tried calling the lawyer recently, but the lawyer said that she was unable to share the details of my father's plan with me unless Dad gave her permission to do so, or if there was an emergency.

My sister, Claire, lives in New York but she is visiting Dad more frequently now than she used to. I think that's good since Dad isn't getting any younger. Claire and her husband are planning on retiring soon and have talked about moving down to Florida. They said that if they move to Florida, they will look for a place near Dad so they can be there to help him if and when he needs it.

The last time I saw Dad was several months ago (I live in New York). He was fine, sharp as always, but during our last few phone calls, he sounded tired and a little unfocused. My sister is going down there in a couple of weeks to see him, so I am hoping to have a better idea of how he is doing once she gets the chance to evaluate the situation.

Chapter Two — February

I just got off the phone with my sister, who is back from visiting Dad. He is not doing well at all and may have had a stroke recently. His speech is a little slurred and he is having trouble moving his left arm. She reports that Dad is very sleepy and unable to focus. When Claire asked Sally for details about when this happened, Sally could not give a clear answer. We are so frustrated that no one called us to tell us that Dad was in crisis. I flew down the next day to see him and get a better idea of what was happening to him. We got him to his doctor, then to a neurologist. The consensus was that he had, indeed, had a stroke. He also has been suffering from the initial stages of dementia and we just hadn't noticed it. He would occasionally make jokes about "senior moments" or change the subject when he couldn't follow a conversation, but we really didn't pay that much attention to it up to now. We got Dad home and settled. Sally said not to worry, that she would stay with him and let us know if they needed anything. She reminded us that Mike was nearby and available to help them out if need be. Dad was well enough to let us know that he was going to be fine and he was still able to take care of things. We left and went back to our lives and families, a bit more worried but still comfortable with the thought that Dad could make his own decisions.

Chapter Three — April

Claire just called me with surprising news. Mike is now living with Dad and Sally. When she asked when that happened, all she could get from Sally was "a couple of weeks ago." I called Sally and she told me that taking care of Dad full time was really more than she could handle on her own and she had asked Mike to step up and help. This whole situation is making me a little uncomfortable at this point, but she and Mike are looking after Dad and Claire and I cannot do that for him. Additionally, when I asked him about it, he told me that it was fine, and he was happy for the company and the help. I don't want to seem untrusting, but I called Dad's lawyer again. She again told me that my father would need to give her authority to share his documents with me and that he had not done so. I really don't want to confront Dad about it

directly, because I don't want to cause any problems for him, but I am worried. I did ask him about powers of attorney and health care surrogate documents, and he said I was worrying too much and everything was fine, but he joked that if he died, I should call the lawyer. I need to get back down to see him, but work is intense right now and I cannot get away. I spoke with Claire about going down and she will try to make plans in a few weeks.

Chapter Four — July

Dad just had another stroke. He's in the hospital and the doctors expect that he will not make a full recovery from this one. They said at his age, recovery is difficult and takes time. My sister and I flew down to see him, of course — it's amazing how we make the time to do what we thought we didn't have the time to do when we have to. Dad's cognition is clearly diminished at this point and I don't know if he will ever be able to handle his finances again. I set up a meeting with Dad's lawyer and when Claire and I got there, we got some shocking news: All of the documents that Dad had prepared over the years were changed just two months ago. Apparently, Dad went with Sally to a different lawyer and signed new estate planning documents that made Sally his successor trustee, his attorney-in-fact under his durable power of attorney, and even his health care surrogate. Claire and I have no power to help our father under the current documents and we can't even get access to his accounts to see what Sally is doing. What's more, we looked online and discovered that the house is now in both Dad and Sally's names as "joint tenants with rights of survivorship."

When we confronted Sally about all of this, she just said, "That's what your father wanted. You know, I take care of him." We are stunned by all of this and really don't understand what happened. Dad is in no position to tell us anything at the moment and I don't know if he will ever be. Sally's son, Mike, lives with them now and is very confrontational with us. We did a little research on the Internet and found out that Sally was named as a joint tenant on the house she currently owns before her husband died and that it had been solely his house before they got married. We called Dad's investment advisor and were told that all of Dad's money had been transferred out to a different brokerage house about six weeks ago. We are heartsick for Dad and selfishly, for ourselves. We recognize that this is Dad's money, but he had always told us that Claire and I would share equally in whatever was left over and that there would be plenty for us and our children. Now, we don't know what is going to happen or if Sally stole all of Dad's money.

UNDUE INFLUENCE

People close to a vulnerable older adult may try and exert "undue influence" over that person by talking him or her into leaving assets to the manipulator and shutting out close family members. Relatives can take their suspicions to probate court, where a judge will rule if the decedent simply had a change of mind or was taken advantage of. Generally, the following four conditions must be proven (Randolph, n.d.):

- The will leaves property in a way that you wouldn't expect under the circumstances—close family members were left out in favor of others, without an obvious explanation.
- The will-maker was particularly dependent on, or trusted, the person who exerted influence. (This is sometimes called a "confidential relationship" between them.)
- Illness or frailty made the will-maker susceptible to undue influence.
- The influencer took advantage of the will-maker and benefited from the will by substituting his own will for that of the will-maker.

There is, however, a fine line between undue influence and simply stating one's mind. Cousin Bob who constantly tells your mother what a rotten kid you are and visits her weekly with his homemade banana bread is not exerting undue influence. Ultimately, proving undue influence can require jumping over a very high bar.

Chapter Five — November

My sister and I are four months into guardianship litigation now. We have spent over \$50,000 of our own money and may never see any of it returned, let alone get Dad's money transferred to our control. We found out that all of Dad's estate documents now have Sally as the beneficiary when he dies. What's more, Dad is now in a nursing home and Sally has total control over his house, with all of the family mementos, furniture, photos, and jewelry. We cannot get access for now. Our lawyer tells us that this case will be a battle and that Sally has already taken over \$1 million from Dad's account for herself (apparently, the power of

attorney that Dad signed gave her the authority to gift money to herself). Trial on the guardianship isn't for another month, but even after that and assuming that we win, getting the funds back from Sally is another matter entirely and disputing the validity of the post-death distribution plan is yet another matter. This will cost a fortune to fight.

The Frightening Facts

Although this article only discusses financial abuse, abuse of the elderly can also include sexual abuse, emotional abuse, and isolation, in addition to financial exploitation. Approximately one in ten Americans aged sixty or greater have experienced some form of elder abuse, yet only one in fourteen cases of abuse are reported to authorities (National Council on Aging, n.d.a). Abusers can be either men or women, and almost 60 percent of elder abuse and neglect incidents involve a family member; two-thirds of the perpetrators are adult children or spouses (National Council on Aging, n.d.a). Of additional concern, exploitation cases are among the most difficult cases to prosecute as they deal with issues of consent, which can be difficult for a jury to determine. As a result, prosecutors are often hesitant to file charges in close cases for fear of being unable to prove exploitation beyond a reasonable doubt. This is particularly true when the alleged exploiter is a family member who might be expected to receive gifts of property or transfers of assets from a parent or spouse.

Epilogue

The fact pattern presented and similar ones to it are all too familiar to elder law attorneys in South Florida. We see variations on this pattern all the time, including strangers as exploiters, children as exploiters, and second spouses or significant others as exploiters. The difficulty for lawyers and prosecutors is law enforcement's need to balance between an individual's right to make decisions for him- or herself regarding what they do with their property versus the knowledge that as a person ages, his or her capacity may diminish. That person may become susceptible to undue influence or exploitation. Even good estate planning plans and pre-nuptial agreements do not prevent a person from freely and voluntarily giving away their assets to a partner or second spouse. What's more, the children, who are often the beneficiaries of a parent's estate, often live far away and are involved in their own lives. Additionally, the parent is sometimes unwilling to turn over control of his or her assets too soon, reluctant to have to "go to the kids" for permission to spend the parent's own money, cautious about revealing too

much, or embarrassed over having already been taken advantage of. This can lead to the complete subversion of a well-crafted estate plan and sometimes the outright transfer of a family fortune to an exploiter, followed by expensive and time-consuming litigation.

There are solutions to some of these issues, particularly for persons with significant assets (who are often the target of exploitation). The key is to engage clients and hopefully, their loved ones, in a dialogue that ultimately allows clients to recognize that they are their own greatest risk factor in being taken advantage of, as long as they are in sole control of their assets. Introducing professional trustees into a plan, albeit at a fee to the client, is often a solution to a great many of the issues surrounding exploitation. Additionally, the use of fully funded, irrevocable life insurance trusts for the benefit of children can guarantee that a child's inheritance will not be lost due to exploitation or even long-term care expenses. A good beginning toward avoidance of these problems is a discussion with a financial professional who is familiar with strategies that are used to prevent exploitation. Each client will be different in the creation of a protection plan, depending upon the unique makeup of his or her family and the nature of the assets to be protected. •CSA



A 1982 graduate of St. John's University School of Law, **Mr. Kitroser** is the founder and managing attorney of Kitroser & Associates, a law firm focusing on guardianship, elder law, wills, trusts, probate, trust administration and litigation related to these areas of practice. The firm also assists with Medicaid planning, special needs planning and trusts, real estate transactions, small business matters, emergency planning and end of life planning. The practice also assists personal injury attorneys with wrongful death litigation and catastrophic injury litigation.

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