

CHECKLIST

TACKLING FINANCIAL ABUSE OF ELDERS

Kimberly Whaley and Clare Burns

Issues Related to Power of Attorney Misuses and Abuses

- The attorney fails to understand their various duties
- The grantor fails to understand the scope of the power that they grant to their attorney[s], or whether their attorney[s] can be trusted
- A POA is purportedly granted by a grantor who is incapable
- The date of which a POA became effective, the timing of the grantor's incapacity, or the extent of the attorney's involvement is disputed
- A POA is forged or otherwise fraudulent
- The attorney makes unwise, questionable, or speculative investment decisions with the grantor's assets
- The attorney fails to consider the tax implications of their decisions
- The attorney inappropriately deals with jointly held assets or accounts
- The attorney fails to seek professional advice where necessary or appropriate
- A POA is procured for the attorney's personal gain, through fraud or undue influence, especially from a vulnerable or dependant grantor
 - Undue influence: A situation in which a person compels another to make decisions that are not truly their own, often through coercion or manipulation
 - Presumed in certain relationships, such as solicitor and client, parent and child, and guardian and ward
- The attorney uses the POA in their sole self-interest, or for their sole personal gain, in breach of their fiduciary duty
- The attorney misappropriates the grantor's assets

- The attorney makes hidden or unexplained dispositions of assets, or improperly transfers assets into joint tenancy
- The attorney pressures the grantor to make or change a will
- The attorney commits certain criminal offences, such as theft, fraud, forgery, or extortion
- The attorney for personal care fails to provide the necessities of life for the grantor
- If there are multiple attorneys, one attorney acts without the knowledge, approval, or acquiescence of the other[s]
- If there are multiple attorneys, the attorneys are unable to cooperate with each other
- The grantor is unwilling or unable to report financial abuse
 - Common reasons include: Shame, embarrassment, fear, dependence, coping mechanisms, incapacity, failure to understand the situation, and desire to protect either the perpetrator or the relationship

Issues Related to Transfers of Assets into Joint Accounts or Real Property into Joint Names

- Common reasons for an older adult to make these transfers: to avoid probate, or to assist with their banking needs
- Capacity
 - With real estate, capacity to contract: ability to understand both the nature of the contract and the contract's specific effect in the specific circumstances
 - With real estate that represents a significant portion of the donor's estate, testamentary capacity: The ability to understand the nature and effect of making a will or undertaking the transaction in question, the extent of the property in question, and the claims of persons who would normally expect to benefit under the donor's will
- Issues of intention: a gift or not a gift?
 - Presumption of resulting trust: Applies to a gratuitous transfer between a parent and an independent adult child; onus on the child to prove a gift, and that the asset is not simply held in trust for the parent

- Right of survivorship: When one joint tenant dies, their interest in the asset is extinguished, and the other joint tenant becomes the sole owner
- Assets are sometimes depleted by being moved from the joint account to a separate one
- Fraud: Vulnerable adult tricked

Issues Related to Purported Gifting

- Capacity to make a gift: Must be able to understand both the nature of the gift and the specific effect of the gift in the circumstances
 - The size of the gift is a relevant consideration
- Intention
 - Presumption of resulting trust
- Undue influence
- Unconscionable bargain: The maker suffers from a disadvantage or disability that renders the maker unable to enter the transaction while effectively protecting the maker's own interests, and the transaction affects a substantial unfairness or disadvantage on the maker

Issues Related to Predatory Marriages

- Capacity to marry: Ability to understand the nature of the contract and the duties and responsibilities it creates
 - Includes an understanding of the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected by the marriage
- Unscrupulous people manipulate vulnerable seniors into marriage for their own financial gain
- Some predators provide temporary care or companionship, or purport to do this, to establish the relationship
- Predators often try to isolate their victims from other support networks, including family and friends

Issues Related to Dependents Living in Older Adults' Homes without Paying their Fair Share

- This can be a type of POA abuse
- Sometimes these people were not actively involved in the senior's life before the senior became vulnerable

Red Flags – General

- Physical or mental disability on the part of the grantor/donor
- Confusion or contradictory information from the grantor/donor
- Established doubts about capacity, but no capacity assessment
- Language barrier when preparing legal documents, and no independent interpreter
 - Attorney/recipient interprets for grantor/donor
- Recent medical issues or other major life changes
- Recent bereavement
- Relationship of control or dependence, including before the attorney acts under the POA
- Grantor/donor seemingly afraid of attorney/recipient, or reluctant to be around them
- Pre-existing family disputes
 - Recent family conflict
- Social isolation of grantor/donor, including from family, friends, and other support networks
- Departure from grantor's/donor's usual behaviour
- Lack of control of, or drastic changes in, grantor's/donor's personal affairs

- Grantor/donor does not receive independent legal advice
 - Attorney/recipient participates in meetings with grantor/donor's lawyer
 - Attorney/recipient giving instructions to the lawyer
 - Attorney/recipient choosing the lawyer
 - Lawyer unable to meet client alone
- Involvement from professionals that surpasses reasonable expectations, or from professionals who seem overly or personally involved in the matter

Red Flags – POA Misuse/Abuse

- Suspicious transactions or accounting by attorney
- Sudden decline in grantor's quality of life
- Unexplained or sudden inability to pay bills
- Unexplained or sudden withdrawal of money from accounts
- Changes in banking patterns due to pressure
- Attorney controlling grantor's spending
- Denial of grantor's right to make independent financial decisions
- Confusion or lack of knowledge about financial situation and signing of legal documents
- Grantor coerced into a situation where grantor is being overworked and underpaid
- Grantor overcharged for services or products by salespeople or providers
- In attorney's accounts
 - Vague entries
 - Unexplained changes in assets
 - Suspicious transactions
 - Pre-taking compensation
- Unclean or disorganized living environment
- Changes in the grantor's appearance

- Changes in living arrangements, such as previously uninvolved relatives or new friends moving in
- Unexplained disappearance of possessions (e.g. lost jewellery or silverware)
- Grantor becomes socially isolated, or behaves less socially than before
- Poor living conditions in comparison with the grantor's assets
- Necessities of life denied or not provided by the attorney (shelter, food, medication, assistive devices, etc.)
- Multiple POAs, with a noticeable change in their provisions
- Grantor forced to sign multiple documents at once
- Secrecy in the planning process
- Drastic departure from previous plans
- Irrational planning
- Attorney has a history of acting contrary to grantor's interests
- A history of non-cooperation between multiple attorneys
- Attorney treating grantor's assets as their own

Red Flags – Purported Transfers/Gifts

- Departure from previous history of gifting
- Transfers/gifts inconsistent with the provisions of planning documents
- Purported donor continues to exercise control over an asset, pay taxes, etc.
- Other evidence that a gift or transfer was not intended, such as the purported donor's conduct or the knowledge of third parties

Red Flags – Predatory Marriage

- Relationship of vulnerability or power imbalance
- Personal history of predator
- Misleading or inconsistent descriptions of the relationship to others
- Controlling relationship
- Victim appearing to be strongly influenced by someone else
- Some common characteristics
 - One spouse significantly advanced in age and older than the predator spouse
 - Susceptible to exploitation/influence because of loneliness loss of spouse, illness, physical disability, incapacity etc.
 - No children of the union
 - One spouse finances the relationship
 - Alienation, secrecy, sequestering etc. from family/friends