

# THE RISLEY NEWSLETTER

## *RECENT DEVELOPMENTS AND HOW THE LAW MAY AFFECT YOU*

### **FINANCIAL ELDER AND DEPENDENT ADULT ABUSE**



Elder abuse has become an epidemic in the United States. While the name brings to mind physical acts of violence, what is transpiring is far more insidious. Elders in our society, instead of being venerated, are being preyed upon financially by unscrupulous individuals and institutions hoping to make a profit.

Thankfully, the California legislature has seen fit to pass laws protecting people over 65 years of age from these predators. At our offices, we pride ourselves on upholding California's laws and it has been a recent privilege to enforce the legislature's intent in ensuring that the elderly are protected.

The statistics show that over 200,000 people over the age of 65 are victims of financial elder abuse each year, regardless of their mental capacity. In fact, over 70 percent of people over the age of 50 have been approached fraudulently. Mr. John Doe Elderman' was just such a person, and our office defended his rights and got him a favorable settlement.

Mr. Elderman had been a successful, sophisticated businessman nearly all of his life, manufacturing, importing, and distributing products throughout the world. When he sold his real estate and business holdings, he wisely invested in various securities, including high-yield bonds which provided him with a handsome return on his investment until disaster struck, when financial investors took advantage of him.

In June of 2007, Mr. Elderman's liquid securities, held at two different brokerages, were valued at \$2.3 million. By March 9, 2009, all of his holdings were gone. He was 88 years of age and entitled to file a claim for Financial Elder Abuse because of what predatory

lenders had done to him. The ravages of time and illness had taken their toll on Mr. Elderman, as did the downturn in the economy, but neither of these factors was responsible for all of his losses. A financial institution, Big Bank<sup>2</sup>, had taken advantage of his poor health and advanced age, and enticed him into an adhesive loan which cost him everything. The loan provided for “kickbacks” to the financial advisors and gave the institution unfettered authority to liquidate and sell his holdings. In March 2009, Big Bank determined it was in their interest to do so and liquidated all of Mr. Elderman’s life savings, destroying his entire portfolio. This gave rise to a claim of Financial Elder Abuse and our offices fought to get the ailing Mr. Elderman his money back.

California law is tough on those who take advantage of the elderly, and our office is even tougher, and made sure Mr. Elderman received justice. Big Bank did not make it easy, successfully splitting the claim into three separate venues in two states, but we held off the attack in one state while pursuing his claims in the other two venues. Under California law if receiving or withholding the property of an elder or dependent adult is likely to be harmful to that elder or dependent adult, and a person or institution knows or should have known that it is likely to be harmful, then that action is deemed to be wrongful Financial Elder Abuse.

In Mr. Elderman’s case, he was protected because he was as an elder under *Welfare & Institutions Code* §15610.30 and also because he lacked capacity at the relevant times when the transactions took place. Big Bank was held to an even higher degree of care because they were considered a fiduciary, and therefore had an elevated level of responsibility to Mr. Elderman. Big Bank utterly failed Mr. Elderman and wrongfully took and retained Mr. Elderman’s property which was wrongful under California law because they knew it was going to be harmful to Mr. Elderman. Due to the zealous representation of the Risley Law Offices, Mr. Elderman was able to receive a handsome settlement and justice was done.

Elders hold the wealth in most families. Homes and investments have grown in value over the decades of their lives, while their children and grandchildren struggle financially. Tradesmen, salesmen, neighbors, and friends, as well as financial institutions, including some of the largest corporate enterprises in the country, target elders with financial “solutions” to problems that do not exist in order to earn a premium or a commission. Impaired judgment, fear, emotional liability, mental illness or the simple physiological and mental effects of aging, all predispose elders to vulnerability, even to the simplest and most transparent schemes. And, because some large, irresponsible corporations get away with such abuse, the laws of economics coerce other, more principled, enterprises to the same practices. This is why the California Legislature has enacted statutes to protect elders from abuse and why the Risley Law Offices are committed to enforcing these rights. Financial elder abuse is estimated to account for 40 percent of all forms of abuse against seniors, and studies show that only one out of 25 incidences of financial elder abuse is reported. If a member of your family has been a victim of financial elder abuse, we can help them exercise their rights.

<sup>1</sup> Fictitious name to protect our client's privacy.

<sup>2</sup> "Big Bank" is also a fictitious name.

## ESTATE AND END-OF-LIFE PLANNING

After a long life filled with family and friends, a sudden stroke took the patient unaware. Now, hooked up to life-support in a deep coma, catatonic, the healthcare providers struggle to keep him alive in a vegetative state. He will never regain consciousness, and what the healthcare providers don't know is he doesn't want this. He wanted to pass gracefully into the afterlife, but because he had left no instructions informing the doctors and nurses of his wishes, he is kept from a quick passing. Worse yet, it is costing him hundreds of thousands of dollars in medical bills, draining the estate he'd spent his whole life accumulating, and had planned on leaving to his children. Now his children will have no inheritance. And the reason why is poor planning. While planning for life's end is never pleasant, it is necessary to ensure that you live out your last days on your terms and that your loved ones can be provided for.



We can help ensure that your wishes will be followed. Whether young or old, it is important to have your intentions memorialized as unforeseen accidents or illness can leave you unable to decide essential matters for yourself.<sup>3</sup> You do not want to have these choices placed in the hands of others.

Care givers have innumerable decisions to make on the behalf an incapacitated patient and it is important to inform them of your intentions based upon your fundamental values and beliefs. The first step to effective end of life care planning is identifying those values and beliefs, even if you already have a will or trust. Start by completing a *Values Worksheet*, such as the one below. It will aid in preparing *Advance Directives*, which help guide family, friends and healthcare providers.

### Values Worksheet

You should consider your healthcare preferences based on this table and the questions which follow. Note your answers and discuss them with your loved ones and healthcare providers. To ensure your wishes are followed, an attorney should draft the proper documents.

Issue Relative Importance					
Letting nature take its course	4	3	2	1	0
Preserving quality of life	4	3	2	1	0
Staying true to my spiritual beliefs/traditions	4	3	2	1	0
Living as long as possible, regardless of quality of life	4	3	2	1	0
Being independent	4	3	2	1	0
Being comfortable, and as pain free as possible	4	3	2	1	0
Leaving good memories for my family and friends	4	3	2	1	0
Making a contribution to medical research or teaching	4	3	2	1	0
Being able to relate to family and friends	4	3	2	1	0
Being free of physical limitations	4	3	2	1	0
Being mentally alert and competent	4	3	2	1	0
Being able to leave money to family, friends, or charity	4	3	2	1	0
Dying in a short while rather than lingering	4	3	2	1	0
Avoiding expensive care	4	3	2	1	0

- What will be important to you when you are dying (physical comfort, no pain, family members present)?
- Do you want life-sustaining measures in the face of terminal illness? Permanent coma? Chronic illness?
- Do you have strong feelings about particular medical procedures (respirator, cardiopulmonary resuscitation (CPR), artificial nutrition and hydration, chemo or radiation therapy)?

- Do you want financial matters taken into account when treatment decisions are made?
- Would you prefer Hospice care, keeping you comfortable in your home during the final period of your life?
- Do you always want to know the truth about your condition and treatment options?

*<sup>3</sup> There are numerous legal devices for handling incapacity, including but not limited to conservatorships, revocable and irrevocable living trusts, joint tenancy, durable powers of attorney for financial management, and advance health care directives.*

### **Advance Health Care Directives**

One of the reasons why it is important to have an attorney memorialize your intentions is the California *Probate Code* §4270, et seq., (called Advance Health Care Directives or “AHCD”), provides a legal method for controlling end of life decisions and making your fundamental values and concerns known. These Advance Health Care Directives, which are also known as “Durable Powers of Attorney for Health Care” (“PAHC”), must be honored by all healthcare professionals, and under federal law must be kept with your hospital records. The Directive or Power of Attorney designates an “Agent,” or “Attorney-in-Fact,” or an alternate agent or attorney-in-fact, and names a “Conservator” or alternate conservator. This allows professional healthcare providers to be informed of your wishes if you are severely impaired, in a coma, or unable to make healthcare decisions yourself, whether temporarily or permanently. The directive should be prepared to reflect your values, religious preferences, and other life-long beliefs which affect your care at life’s end.

### **Estate Planning**

An equally important part of planning involves deciding what will happen to the money and property that you have accumulated during your lifetime. No matter whether the amount is large or small, thought has to go into the distribution of your estate in order to minimize taxes. It is also important to decide which family, friends, charities, or combination thereof will receive a portion of your estate.

Wills and trusts are the two basic instruments used in estate planning. Other documents include: 1) powers of attorney, 2) lifetime gifts, 3) living wills, 4) durable powers of attorney for health care, 5) guardianships and conservatorships, 6) Family Limited Partnerships, and 7) various forms of insurance.

First, let’s look at these different types of devices and what they are commonly used for:

Type:	Uses:
Simple Wills	Small estates with no minor children
Trust Wills (Testamentary Trust)	Small estates with children, large estates
Living Trusts (Inter Vivos)	Larger estates
Pourover Wills	Larger estates
Durable Powers of Attorney for Property Management	Size of estates is irrelevant
Durable Powers of Attorney for Health Care	Size of estates is irrelevant
Living Wills (not to be confused with Living Trusts)	All sizes of estates
AB Trusts	Middle-sized estates
ABC Trusts	Larger estates
Charitable Remainder Trusts	Larger estates
Assignment of non-recorded or registered assets	Middle-sized and larger estates

For medium to large estates, it is important to decide whether to utilize a living trust or a testamentary trust. These instruments contain the same basic estate tax planning provisions. However, a living trust requires that the assets be transferred into the trust. If the trust has separate income then it may be necessary to file a fiduciary tax return. In contrast, a testamentary trust does not require that anything be done until death. A living trust has the advantage of avoiding probate, whereas a testamentary trust requires some probate. The probate of a testamentary trust occurs upon the death of the first spouse, though there is usually no probate on the death of the second spouse, depending upon the survivor's elections at the time. Because of the multitude options available for estate planning, it is highly recommended to speak with an attorney so that you can select the instrument that works best with your plans and wishes.

### **Estate Taxes**

While the "Estate Tax" was actually repealed on January 1, 2010, it will be re-instated on January 1, 2011, unless Congress takes affirmative steps to prevent it. Since this is unlikely, most estate planning is based upon 2011 tax projections. In 2011, there will be a \$1 million exemption, which, when adjusted for inflation, will be \$1.34 million. There are currently two bills pending in Congress which would increase this exemption and lower the tax rate. However, for now, the best way to plan is to use existing tax law and exemptions until action is taken in Washington. The tax rates are found in Internal Revenue Code Section 2001(c) and begin at 18%, with the highest rate reaching 50% for

estates valued above \$2,500,000. Since there are so many choices, depending on planning needs, a few of the most common and useful estate planning instruments are outlined below.

### **AB Trusts**

When a married couple has a combined community property estate of more than \$1,340,000, an AB Trust is usually established to avoid estate tax on the first part of the \$2,680,000 combined estate. An AB Trust saves substantial estate tax, estimated as follows:

<b>Net Estate Size (\$)</b>	<b>Tax Savings (\$)</b>
\$2,000,000	\$215,000
\$3,000,000	\$505,000
\$5,000,000	\$668,200

The amount of the estate which will be exempt from tax under an AB Trust, will be \$2,680,000 in 2011. While the couple is married, all of the community property remains in one combined AB Trust. Upon the death of the first spouse, the survivor, as the sole trustee, divides the estate in two subtrusts, designated A and B. As trustee of both subtrusts, the surviving spouse can purchase and sell assets in either subtrust at any time. However, no assets have to be sold in order to divide the estate into the subtrusts.

#### Trust A

Trust A consists of the survivor's half of the property, and also the decedent's half in excess of \$1,340,000. The surviving spouse has the right to all of the income and the assets. Moreover, the survivor can change the heirs or cancel the trust. If not canceled, upon the survivor's death, the trust is distributed to the survivor's heirs. Upon the survivor's death, the trust is tax exempt on the first \$1,340,000 and the balance of the trust is subject to federal and estate taxes.

#### Trust B

Trust B consists of the decedent's half share up to \$1,340,000. The surviving spouse has the use of the income for normal living expenses, and the survivor can draw on the principal of the trust after exhausting Trust A. The survivor cannot change the heirs or cancel the trust, and upon the survivor's death, the trust is distributed to the decedent's heirs. Upon the survivor's death, the trust is completely tax-exempt even if with appreciation, it exceeds \$1,340,000 at the time of distribution to the heirs.

### **ABC Trusts**

If a married couple has a combined community property estate of over \$2,680,000, an ABC Trust is generally created for additional assurance that the estate will remain intact for later distribution to the heirs. An ABC Trust functions in all respects as an AB Trust, with the exception that, upon the death of the deceased spouse, the survivor divides the estate into three subtrusts as follows:

#### Trust A

Trust A consists of the survivor's half of the community property. The surviving spouse has the right to all of the income and assets. The survivor can change the heirs or cancel the Trust; otherwise, upon the survivor's death, the Trust is distributed to the survivor's heirs. Upon the survivor's death, the Trust is tax exempt on the first \$1,340,000, and the balance of the Trust is subject to estate taxes when the survivor dies.

#### Trust B

Trust B consists of the decedent's half of the community property, up to \$1,340,000. The surviving spouse has the use of the income for normal living expenses, and the survivor can draw on the principal of the Trust, but only after having first exhausted Trust A and also Trust C. The survivor cannot change the heirs or cancel the Trust, and upon the survivor's death, the Trust is distributed to the decedent's heirs. Upon the survivor's death, the Trust is completely tax exempt, even if, with appreciation, it exceeds \$1,340,000 at the time of distribution to the heirs.

#### Trust C

Trust C consists of the decedent's half of the community property over \$1,340,000. The surviving spouse has all of the income for support, and can draw on the principal of the Trust after having first exhausted Trust A. The survivor cannot change the heirs or change the Trust, and upon the survivor's death, the Trust is distributed to the decedent's heirs. Upon the survivor's death, the Trust is part of the survivor's taxable estate to be subject to estate tax if the survivor's estate exceeds \$1,340,000.

#### **Pour-Over Will**

Cash or stocks in the decedent's individual name which are not included in the Living Trust can be added without probate via a pour-over will if the amount is less than \$100,000. If it is more than \$100,000, then those items must be probated.

#### **Powers of Attorney for Property Management**

A Durable Power of Attorney for Property Management permits the decedent's agent to act in his or her behalf, often without the need for probate. However, there are a number of risks and liabilities for the agent in acting under a Power of Attorney. Accordingly, these instruments should be used with caution.

#### **Plan Your Estate Today**

The minimization of taxes is an important part of estate planning, however, the most important aspect is ensuring your property is disposed of in the manner you would like and your intentions are carried out. It is necessary to ask yourself: Who will get what? Who will take care of you affairs – your children, your spouse, and/or a third party? How will they manage your things? Recognize your immortality? Where will you be buried or cremated? What will happen if you cannot make decisions in last few years of your life? It is important to talk to an attorney, discuss and answer these questions, and then memorialize these considerations. Even if you cannot arrange everything at the present time, it is always possible to amend the documents later and it is better to be prepared..

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