

Financial Elder Abuse in Real Estate Transactions

By Robert E. Muir, Esq.

At a listing presentation with an elderly prospective client, you notice things that make you uncomfortable: The client's daughter, who is present, answers most of the questions. When the mother does answer, she looks anxiously towards her daughter, as if she needs her daughter's approval. The mother doesn't seem to have any idea about her financial situation, or future plans. The mother seems to be holding back information.

Your instincts tell you something is not right. Is this a potential financial elder abuse? Let's review this important issue.

California law says that an "elder" is anyone in the state, 65 years of age or older. (Welf. & Inst. Code § 15610.27). Financial abuse of an elder, or dependent adult, occurs when a person or entity, does or assists in the following: "takes, secretes, appropriates, obtains or retains, real or personal property of an elder or dependent adult, to a wrongful use, or with intent to defraud, or both." (Welf. & Inst. Code § 15610.30). The Code also says that a person or entity who knew or "should have known" that the elder person was being defrauded, and continues with the wrongful transaction, can be liable for elder abuse.

Financial elder abuse is becoming more common. The California Department of Justice estimates that 1 in 20 elders becomes a victim to neglect or physical, psychological, or financial abuse. For every reported case of elder abuse, there are five unreported cases. By 2020, those over 65 will account for about 15% of the population in the state. By 2020,

approximately one in eight over 65 years of age, and nearly half of those 85 and older, will have Alzheimer's disease.

Elders, and dependent adults, are vulnerable targets for the unscrupulous, particularly in real estate transactions. Californians over age 65 own about 25% of the total value of all owner-occupied housing in the state.

As the hypothetical suggests, many instances of elder abuse occur through actions of family members, trusted professionals, or caregivers. Real estate agents may encounter someone who is a victim of elder abuse, or an elderly client whose capacity to enter into a legal agreement is questionable. You should be able to recognize warning signs, and know how to respond.

REALTORS® have a legal and ethical obligation to protect the interests of their client. The National Association of REALTORS® Code of Ethics, Article 1, requires that REALTORS® "protect and promote the interests of their client." This means you must put the interests of your client ahead of your own.

Civil penalties for financial elder abuse require the wrongdoer to compensate the victim, pay punitive damages, and pay the victim's attorney fees and costs. (Welf. & Inst. C. § 15657). Lawsuits against agents increasingly include allegations of elder financial abuse to threaten agents with these civil penalties. Criminal penalties, when the government prosecutes for theft or embezzlement from an elder adult, can result in imprisonment. (Penal Code § 368.)

Financial elder abuse is also related to "legal capacity" which is required for a person to enter into a contract. Capacity

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to contract depends on whether the elder understands the “nature and extent” of the transaction. In general, a person does not have capacity to contract when he or she evidences a deficit that, “significantly impairs the person’s ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.” (Probate Code § 811). On the other hand, an individual is presumed to have capacity until proven otherwise. (Probate Code § 810).

Warning Signs

Signs that an elderly person may lack capacity to contract, or is a victim of elder abuse include: The person exhibits poor cognitive functioning, an inability to articulate the reasons behind their decisions, is severely disorganized thinking, shows obvious lack of medical care, is disorientated as to time, location, people and the situation. A client who lacks awareness of their own finances, who experiences an abrupt change to their financial status or financial planning may indicate a problem.

What You Can Do

If you suspect someone may not have the mental capacity to make an important decision, or is being inappropriately influenced, your goal should be to protect your client and yourself.

If you are concerned about the client’s capacity, it may be helpful to meet with the client a few times. An elderly person

who seems disoriented or has trouble processing information may simply be experiencing the effects of a new medication, or may be having trouble adjusting to some life event. It’s best to meet with the client at the time of day their energy is the highest. Meeting multiple times allows you to determine whether the worrisome behavior is consistent or just an isolated instance.

After meetings with the client, if you are still unsure about their capacity, it can be helpful to keep notes, documenting the time and place of the meeting, the client’s demeanor, the questions asked and answered, and have the presence of third-parties and their statements. If you have persistent concerns with the client’s capacity, you should obtain legal advice on appropriate action to take.

If you suspect that a client or any elder may be the victim of financial elder abuse, you should contact an attorney or Adult Protective Services.

Conclusion

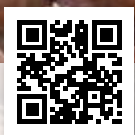
Real estate agents are increasingly likely to encounter situations where there could be financial elder abuse. Be sensitive to the warning signs and know how to respond to protect your client and yourself.

Robert Muir is a real estate attorney in San Diego, longtime member of SDAR’s Risk Management Committee, and represents agents, buyers and sellers in transactions and litigation. He can be reached at rm@muirlaw.com

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