Financial Abuse and Exploitation of Elders and Dependent Adults

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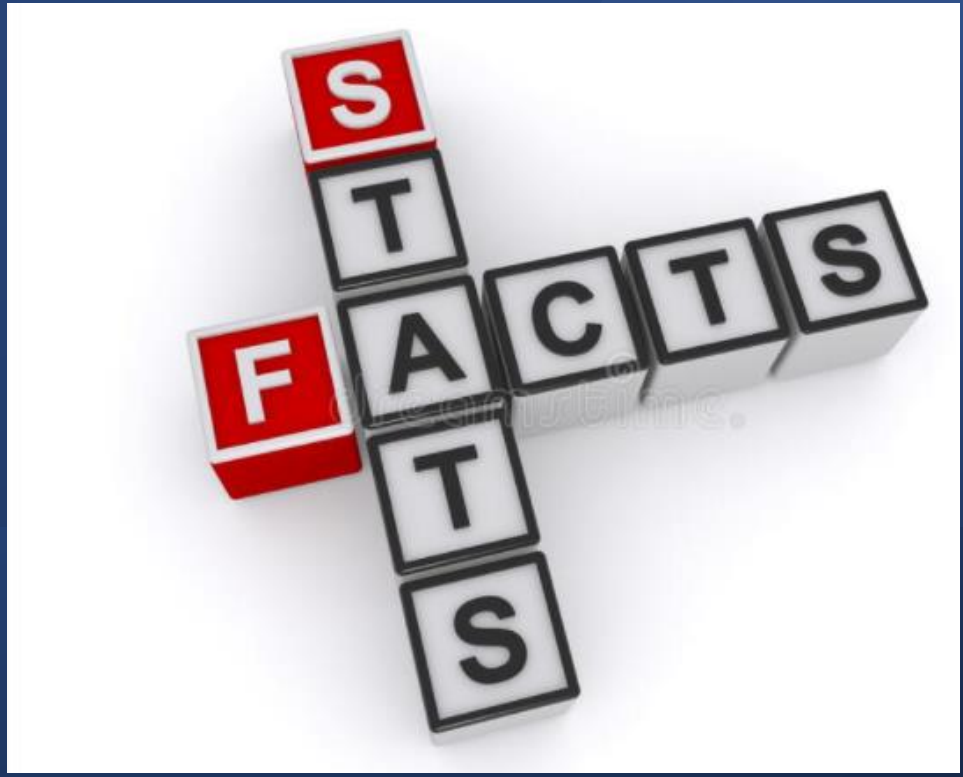
Let’s Start With Some Facts and Statistics



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Who is considered an older adult or “elderly”?

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- Older Americans Act – 60 years
- CDC – 60 years

By 2030, the U.S. Census Bureau estimates that 20% or 1/5th of the U.S population will be over 65

The prevalence of cognitive impairment in 85-year-olds is as high as 50%

According to ALTA, 53% of agents have experienced an instance of elder abuse

The National Center of Elder Abuse estimates that elder financial abuse costs older adults $2.9 billion annually

Elder abuse title claims, on average, are more expensive than other categories of claims

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Why???

A real estate transaction or mortgage that involves undue influence, duress, incompetency, incapacity, or lack of authority can be rescinded

Who are the “Perps”???

According to the National Adult Protective Services 90% of elder financial abuse takes place in domestic settings instead of long-term care facilities

The second most common group of abusers consists of professional criminals such as repair scammers and telemarketers

The third most common group consists of friends or others in a position of trust

So what is elder abuse?

Elder Abuse – Defined

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- Elder abuse is defined as an intentional act or omission by a person in a relationship of trust with the older adult that causes a risk of harm to that older adult

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- Elder abuse is defined as an intentional act or omission by a person in a relationship of trust with the older adult that causes a risk of harm to that older adult

- Financial abuse of an elder 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 adult, to a wrongful use, or with the intent to defraud, or both”

1 in 20 elders become a victim of neglect or physical, psychological, or financial abuse in their lifetime

For every reported case of elder abuse there are five unreported cases

Types of Elder Abuse

There are different varieties of elder abuse:

There are different varieties of elder abuse:

- Physical

There are different varieties of elder abuse:

- Physical
- Sexual/Abusive Sexual Contact

There are different varieties of elder abuse:

- Physical
- Sexual/Abusive Sexual Contact
- Emotional or Psychological

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- Emotional or Psychological
- Neglect; and

There are different varieties of elder abuse:

- Physical
- Sexual/Abusive Sexual Contact
- Emotional or Psychological
- Neglect
- Financial or Exploitation

In our industry, we are concerned with financial abuse or exploitation. It is the fasted growing form of abuse of seniors and adults with disabilities.

What is the “big ticket item” in elder abuse?

Legal Capacity

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- Legal capacity for a person to enter into a contract depends on whether the individual understands the “nature and extent” of the transaction

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- Legal capacity for a person to enter into a contract depends on whether the individual understands the “nature and extent” of the transaction

- In general, a person does not have the 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

Perpetrators – Three Types of Abusers:

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Family:

Adult Children and Grandchildren (24% sons; 20% daughters; 15% other relatives)

Family:

This is the most common scenario. Statistics show that it is usually committed against the elder by a low functioning 40 to 60 year old son or daughter, often with a history of drug or alcohol dependence, who lives with one of the surviving elderly parents. As the parent's cognition declines, the child has the parent sign a quitclaim deed or forges the parent's signature on the document. The abuser often promises to provide care until end of life or makes some other promise to induce the gift. This type of financial abuse is usually discovered by a normal functioning brother or sister who is busy with their own life.

Professional Criminals Who Target Elderly

(Examples: home repair scams and telemarketers)

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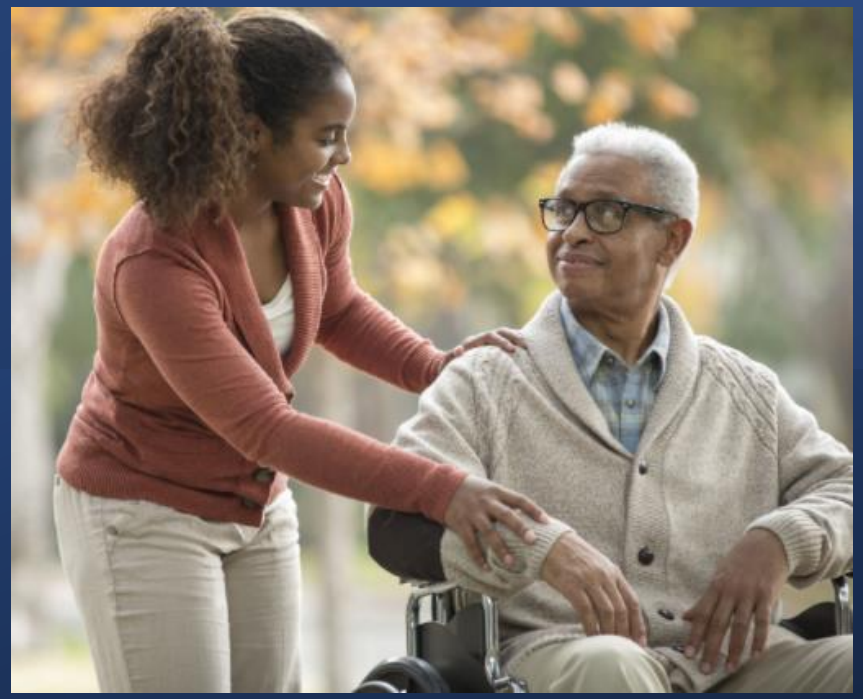
Friends, Caregivers or Others in Position of Trust

(Examples: home caregivers, neighbors, attorneys, bank employees, clergy, doctors or nurses and friends)



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Friends, Caregivers or Others in Position of Trust

Example #1

Why is elder abuse so critically important in our industry?

Liability of Title Agent and Real Estate Agent

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Why would we have liability?

Could we be considered “negligent”?

What is “negligence”?

Negligence as a Tort Cause of Action

Negligence as a Tort Cause of Action

1. Duty

Negligence as a Tort Cause of Action

1. Duty
2. Breach

Negligence as a Tort Cause of Action

1. Duty
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3. Causation

Negligence as a Tort Cause of Action

1. Duty
2. Breach
3. Causation
4. Damages

Liability of Title Agent and Real Estate Agent

- Duty to Inquire

Liability of Title Agent and Real Estate Agent

- **Duty to Inquire**

Van Heyde v. Miller (799 S.E.2d 133 (W. Va April 20, 2017)

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How far does the liability extend?

Liability of Title Agent and Real Estate Agent

- Vicarious Liability

Liability of Title Agent and Real Estate Agent

- Vicarious Liability
  - Agency and Scope

Liability of Title Agent and Real Estate Agent

- **Vicarious Liability**

Trevarthen v. Wilson (No. 4D16-2032, 2017 WL 1718814 (Fla Dist. Ct. App. May 3, 2017)

How Does Elder Abuse Manifest Itself?

Forms of Abuse

Forms of Abuse

- Stolen cash or valuables

Forms of Abuse

- Stolen cash or valuables
- Access to the home

Forms of Abuse

- Stolen cash or valuables

- Access to the home
- Bank account withdrawals

Forms of Abuse

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- Access to the home
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- Sudden increase of credit card use

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- Selling investments; and

Forms of Abuse

- Stolen cash or valuables

- Access to the home
- Bank account withdrawals
- Sudden increase of credit card use
- Selling investments; and
- Purchasing home improvements financial services or products

Forms of Abuse

- Identity Theft – Friend or Foe

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  - Unauthorized access to mail

Forms of Abuse

- Identity Theft – Friend or Foe

- Unauthorized access to mail
- Returns credit card or mortgage loan application; &

Forms of Abuse

- Identity Theft – Friend or Foe

  - Unauthorized access to mail
  - Returns credit card or mortgage loan application; &
  - Intercepts funds that arrive

Forms of Abuse

- Banking Relationships

Forms of Abuse

- Banking Relationships

- Password used to manage funds; and

Forms of Abuse

- Banking Relationships

- Password used to manage funds; and
- Banking trips replaced with online transactions

Forms of Abuse

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Forms of Abuse

- Abuse of Legal Authority
  (A person with the legal authority to act on behalf of another that misuses that power)

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- Power of Attorney
  (limitations within the grant of power); and

Forms of Abuse

- Abuse of Legal Authority
  (A person with the legal authority to act on behalf of another that misuses that power)
- Power of Attorney
  (limitations within the grant of power); and
- Appointment of Guardian
  (Unauthorized transfer of assets)

What is the biggest area of elder abuse in our industry?

Or course, it is…

The transfer of real property

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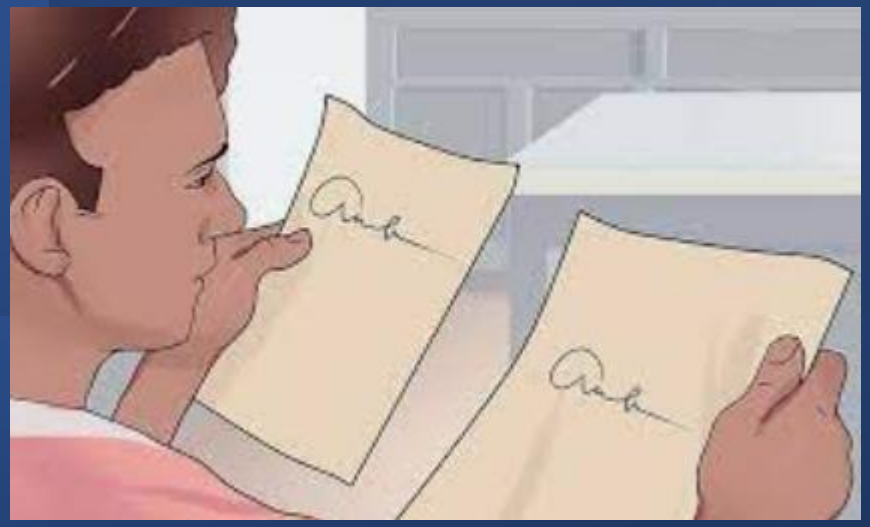
Transfer of Real Property

- Inheritance – terms of will change; and

Transfer of Real Property

- Inheritance – terms of will change; and
- Sale or Mortgage – forged signature



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Transfer of Real Property

- Example #2

Let's Pause for a Public Service Announcement

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Important Programming Announcement

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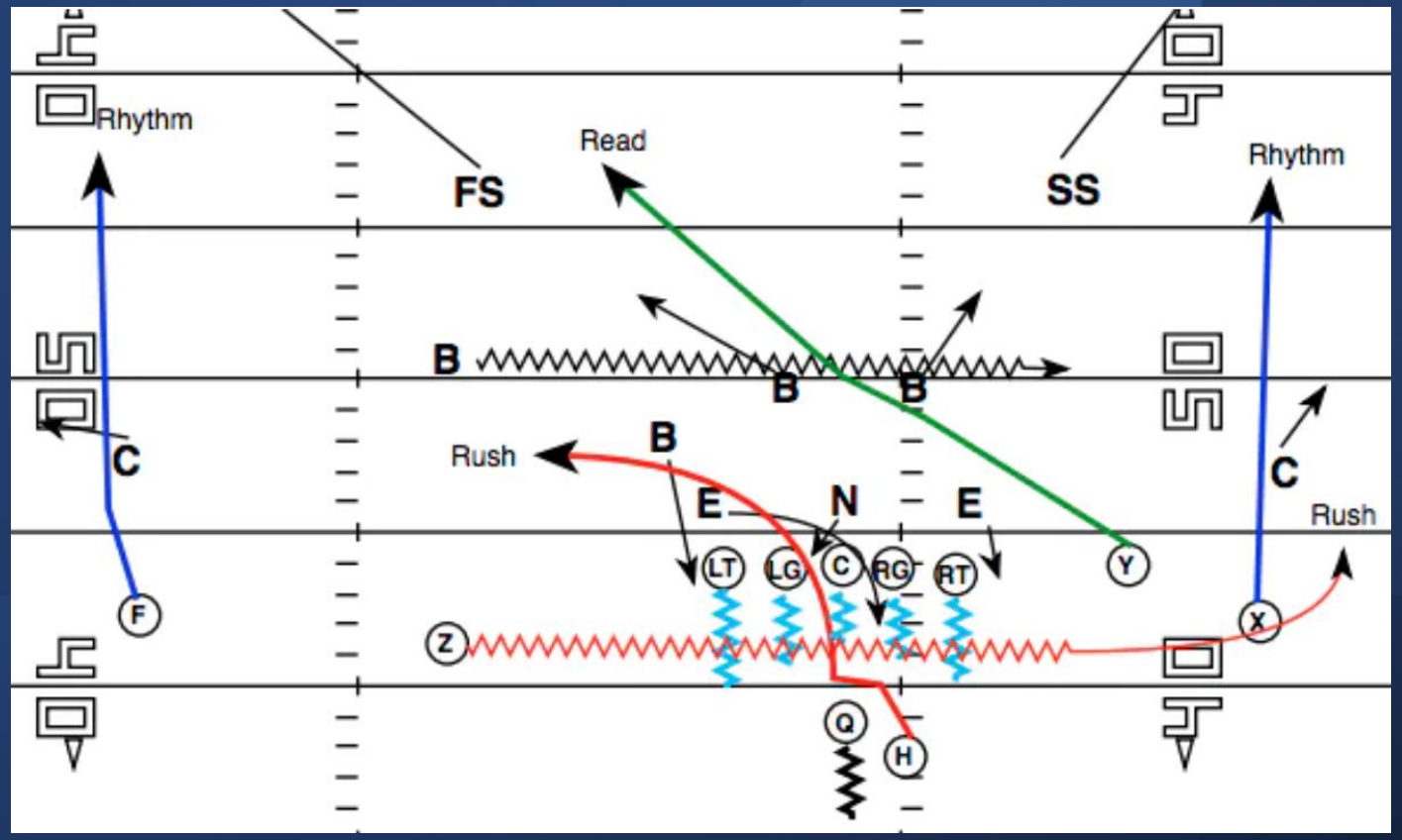
Monday, September 13 – 8:15 P.M.

Y-Off Trio Weak Play-Action Post Dig



Legal Instruments

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Legitimate legal instruments that…

are often used to commit elder financial abuse

Reverse Mortgages

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Reverse Mortgages

- Type of loan for qualifying homeowners

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- Type of loan for qualifying homeowners
- Converts the home equity to cash
- Lump sum, line of credit or monthly payments; and
- Repayment deferred until the owner no longer occupies home

Types of Reverse Mortgages

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Types of Reverse Mortgages

- Single-purpose – available from certain state and local government agencies or non-profit organizations, usually meant to be used for a specific approved purpose such as home repairs and property taxes

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- Federally-insured – HECMs – which are the more common federally insured or home equity conversation mortgages. These are backed by the U.S. Department of HUD and FHA. There is a lot of information on their respective websites.

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- Proprietary – private loans backed by companies or banks that develop the loans

Reverse Mortgages - Qualifications

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- Must be borrower's primary residence

Reverse Mortgages - Qualifications

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- 62 years of age or older; and

Reverse Mortgages - Qualifications

- Must be borrower's primary residence
- 62 years of age or older; and
- Traditional mortgage must be paid off

Example #3

Another legitimate legal instrument that…

is often used to commit elder financial abuse

Powers of Attorney

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Powers of Attorney

- What is the intent of the POA? Look for red flags and start dialog

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    - A specific POA provides the agent the power over specific situations (such, the power to sell specific real estate)

Powers of Attorney

- What is the intent of the POA? Look for red flags and start dialog
- Is it a specific/limited POA or a general POA?
  - A specific POA provides the agent the power over specific situations (such, the power to sell specific real estate)
  - A general POA is much broader (such as the power to engage in real property transactions)

Powers of Attorney

- Other considerations:

Powers of Attorney

- Other considerations:
    - Does it have a termination date?

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    - Does it have a termination date?
    - Has it been revoked by the principal?

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- Other considerations:
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  - How long ago was the POA given?

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- Other considerations:
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  - How long ago was the POA given?
  - Principal's death?

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  - Principal's disability or incapacity?

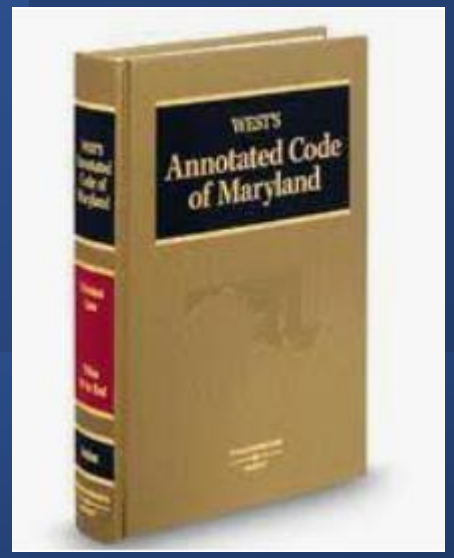
Powers of Attorney

- Other considerations:
  - Does it have a termination date?
  - Has it been revoked by the principal?
  - How long ago was the POA given?
  - Principal's death?
  - Principal's disability or incapacity?
  - Divorce of principal?

Powers of Attorney

Md. ESTATES AND TRUSTS Code Ann. § 17-112

(b) Termination of agent's authority. An agent's authority terminates when:



(3) An action is filed for the dissolution or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides

Powers of Attorney

- Signs of abuse:

Powers of Attorney

- Signs of abuse:
    - Dated months or even years earlier

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    - POA agent is evasive regarding finances

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Powers of Attorney

- Signs of abuse:
  - Dated months or even years earlier
  - POA agent is evasive regarding finances
  - Purchases not on behalf of principal; and
  - Decisions made are not in the best interest of the principal

Another legitimate legal instrument that…

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Guardianships

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Appointing a Guardian

- When an individual does not have legal capacity (as determined by a court); and

Appointing a Guardian

- When an individual does not have legal capacity (as determined by a court); and
- Supersedes prior POA

Appointing a Guardian

Significant Power and Fiduciary Duty

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What can be done when there is not a valid POA, but a full-blown guardianship is too onerous?

Appointing a Guardian

- Transaction Specific Guardianship under Md. ESTATES AND TRUSTS Code Ann. § 17-112

Another legitimate legal instrument that…

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Trusts

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Trusts

- Property owner transfers legal ownership

Trusts

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- Person or institutions known as trustee; and

Trusts

- Property owner transfers legal ownership
- Person or institutions known as trustee; and
- Trustee as a fiduciary – must act in the best interest of the beneficiary

Trusts

- Types of Trust

Trusts

- Types of Trust
    - Testamentary; and

Trusts

- Types of Trust
  - Testamentary; and
  - Living Trust / Intervivos Trust
    (may be revocable or irrevocable)

Trusts

- Trustee's Powers

Trusts

- Trustee's Powers
    - Sell, acquire or lease real estate; and

Trusts

- Trustee's Powers
  - Sell, acquire or lease real estate; and
  - Borrow funds or mortgage property

Trusts

- Trustee Delegation via Power of Attorney

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    - The trust must specially allow for this

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What are the best ways to detect elder financial abuse?

Red Flags

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- Recent uninsured deeds in the chain of title

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- Use of powers of attorney

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- Large cash-out refinances
- Wiring to another's account; and
- Foreclosure rescue scams
  (see Md Real Property Code Ann. § 7-302, et. seq.)

Some final thoughts…

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It’s Lunchtime!