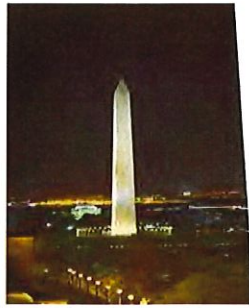


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The Perils of Serving as a Financial Caregiver

by Katherine C. Pearson

The facts set forth in a 2015 decision by the Arizona Court of Appeals¹ present a cautionary, modern tale on the perils of becoming not just a personal caregiver, but also a “financial caregiver” for an older person. The father, a widower, was 80 years old, and needed increasing assistance in his daily life, including help managing his finances. For ten years — from October 2001 until his death in January 2012 — his adult daughter and her husband provided that help. Caregiving relationships undoubtedly begin every day across the U.S., in much this fashion.

The couple assisted the father in moving into their home in New Jersey, and in moving a second time, with them, to Arizona in 2008. Throughout this time, they helped with his transportation to doctors’ appointments and assisted him with medications; they shopped for him and facilitated “all of his social and recreational activities,” including caring for his dog. Indeed, they lived together for 120 months, and only in his last two months did the father move

to a residential nursing or assisted care facility. It was undisputed that the daughter took good care of her father. At one point, the daughter left her job completely to be of more help, although she later returned to work.

From 2002 until he died, the daughter managed her father’s finances, which included savings, proceeds from sale of a house, and a monthly pension and Social Security; she used her authority as an agent, designated by her father’s signature on a Power of Attorney.

The father also had two adult sons. The appellate record is silent on their roles, at least until after their father’s death. After their father’s death, one of the two sons was appointed personal representative of his father’s estate.² In that capacity he filed a complaint against his sister and brother-in-law, alleging they violated Arizona’s Adult Protective Services law, breached their fiduciary duty, converted the father’s funds and enriched themselves with the father’s assets. After a one-day bench trial, the Arizona trial court ordered the daughter and son-in-law to reimburse the deceased father’s estate \$15,527, plus \$35,000 in attorney’s fees incurred by the estate.

1) *In the Matter of the Estate of Domingo A. Rodriguez*, Case No. 1 CA-CV 14-052, 2015 WL 6698535 (Ariz. Ct. App. Nov. 3, 2015). The author has also used Findings and Conclusions of fact and law from the trial court’s final order, dated April 10, 2014, a copy of which is in the possession of the author. Quotations used in this article when describing the history of this case are from the appellate decision. This appellate opinion is also available at <http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2015/1CA-CV14-0562.pdf>

2) The other son “did not believe [his sister] should have to reimburse the estate any funds,” according to the trial court’s Findings and Conclusions, filed as a final order on April 10, 2014.

The focus of the trial court's decision, affirmed on appeal in a non-precedential opinion, was on the couple's failure to "keep an accounting" of use of the father's funds. Several key events appear to be at the heart of the courts' rulings. The couple reportedly sold the father's house in 2002 and "used a portion of the proceeds to expand their home to accommodate" the father and "to make other improvements." They later sold their own home in New Jersey and purchased a new home in Arizona. Although at trial they provided "some evidence of the value of their services and the amounts they spent" for the father's benefit, the court found they had not shown that the father "received goods and services equal to the full value of the money they received from him."

The dollars involved in the various transactions handled by the daughter or her husband are not spelled out in the appellate decision. The trial court's order attempted to reconstruct the financial history over ten years, crediting the couple with the right to certain reimbursements for expenditures most clearly made to benefit the father. The trial court also assigned values for the costs of room, board and care provided by the couple, before awarding the estate less than \$16k. The award of \$35k in attorney's fees from the trial proceedings, and an unspecified additional amount of attorney's fees for the father's estate as the prevailing party on appeal, were the most significant consequence of the failure of the couple to have full and accurate financial records and to keep the father's money and bank accounts separate from their own.³

3) In 2001, the father signed a power of attorney (POA) that provided legal authority for the daughter to engage in transactions on her father's property in his name. The courts did not provide details about the scope of the POA in their opinions. It appears the Court of Appeals discounted the significance of the POA, because the daughter "selected" the attorney who drafted and witnessed the POA. The potential for unclear lines about whom an attorney represents – the daughter or the father or both — and the possibility of "conflict of interest" in such transactions can negate an argument about "independence" of legal advice, for either party. See e.g., Katherine C. Pearson, *The Lesson of the Irish Family Pub*, 40 STETSON L. REV. (No. 1), 237 (Fall 2010). Compare Maine's Improvident Transfer of Title Act, 33 M.R.S.A. §§ 1021 et seq., discussed by Sally Wagley, *Maine's Improvident Transfers Act: A Unique Approach to*

In 2009, Arizona adopted a strict standard of care for those assisting vulnerable adults.⁴ Prior to the change, Arizona's Adult Protective Services Act required a person in a position of "trust and confidence to a vulnerable person" to act for the adult's benefit to the same extent as a trustee, a reference to the "prudent person" standard of Arizona trusts and estates law.⁵ The 2009 change framed the mandatory command as a duty to use "the vulnerable adult's assets *solely* for the benefit of the vulnerable adult and not for the benefit of the person who is in the position of trust and confidence." The appellate court rejected the defense that the "sole benefit" standard was wrongly applied in a retroactive manner to financial decisions made before the statute's change. Instead, the appellate court focused on the "failure to keep clear and accurate records, commingling of funds and engaging in [self-benefiting] transactions," concluding that such actions violated even a "prudent person" standard.

At one time, courts were often loath to second-guess family caregivers' decisions.⁶ High profile modern cases of abundant greed — such as manipulation of

Protecting Exploited Elder, 36 BIFOCAL (ABA Commission on Law & Aging), Issue 1 (October 2014) (explaining that "knowledgeable attorneys now refer elders to outside counsel before assisting with a gift to family or others. . .").

4) Arizona Rev. Stat. Annot. § 46-456, "Duty to a Vulnerable Adult: financial exploitation; civil penalties; exceptions; definitions."

5) Compare language from the UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT (1997/1998), at Section 5-314 on "Duties of a Guardian" which provides, "A guardian at all times shall act in the ward's best interest and exercise reasonable care, diligence and prudence." See also UNIF. POWER OF ATTORNEY ACT (2006), Section 114(a), providing in part that "Notwithstanding provisions in the power of attorney, an agent . . . shall (1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest" and at (a)(6) "An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act. . . ."

6) *Russ ex rel Schwartz v. Russ*, 734 N.W.2d 874 (Wis. 2007) (discussing precedence from several states regarding commingling of funds, joint accounts, and powers of attorney in a family caregiving fact pattern that lasted 9 years, and asking "how is a well-intentioned agent supposed to behave?" but ultimately rejecting breach of fiduciary duty claims).

New York heiress Brooke Astor by her son Anthony to gain control over assets *before* her death⁷ — have sharpened scrutiny of financial transactions made in the name of older individuals, especially those deemed vulnerable because of disability, mental incapacity or mere age. Banks, financial management and service companies, law enforcement agencies and the courts are now more attuned to instances of financial abuse and exploitation, exhibiting greater willingness to examine the actions of family members, “befrienders,” or court-sanctioned fiduciaries.

On the one hand, much of this scrutiny is well deserved and overdue, as demonstrated in abundance by recent efforts in Nevada,⁸ Florida⁹ and New Mexico¹⁰ to curb abuses by personally-designated agents, as well as by court-appointed agents, such as guardians, conservators or other fiduciaries who are directly subject to some level of court-oversight.¹¹ In fact, the Arizona legislature adopted the “sole benefit” standard following an investigative series of detailed media reports on mismanagement of wards’ funds.¹²

7) Meryl Gordon, *Mrs. Astor Regrets: The Hidden Betrayals of a Family Beyond Reproach* (2008).

8) See Rachel Aviv, *How the Elderly Lose Their Rights*, THE NEW YORKER, October 9, 2017, at <https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights>

9) See Hung V. Nguyen & Stacy R. Rubel, *The Shifting Landscape of [Florida] Guardianship Law: Three Consecutive Years of Changes*, by Hung V. Nguyen & Stacy R. Rubel, FLP BLOG, September 9, 2016, at <http://www.businesslawyer-tampa.com/shifting-landscape-guardianship-law-three-consecutive-years-changes-hung-v-nguyen-stacy-b-rubel/>.

10) See Colleen Heild, *Who Guards the Guardians: [New Mexico] AG Sues Nonprofits, Wants Increased Oversight*, ALBUQUERQUE JOURNAL, October 18, 2017, at <https://www.abqjournal.com/1079858/who-guards-the-guardians-ag-sues-nonprofits-wants-increased-oversight-ex-any-money-collected-from-the-civil-actions-wont-likely-go-to-the-alleged-victims-harmed-by-the-firms.html>.

11) See also THE EXTENT OF ABUSE BY GUARDIANS IS UNKNOWN, BUT SOME MEASURES EXIST TO HELP PROTECT OLDER ADULTS, by the U.S. Government Accountability Office, GAO-17-33, released November 30, 2016, at <https://www.gao.gov/products/GAO-17-33>.

12) See Robert Anglen & Pat Kossan, *Maricopa County [Arizona] Probate Court – Life Savings, Freedom Taken Away: Professional Fees Can Empty a Life’s Savings in Months*, THE ARIZONA REPUBLIC, September 28, 2010, at <http://archive.azcentral.com/arizonarepublic/news/articles/2010/09/24/20100924maricopa-county-probate-court-main-0926.html>.

At the same time, the greater scrutiny raises the stakes for every well-meaning person serving as a caregiver. The modern trend heightens the importance of practical education for caregivers. In some jurisdictions, such as Colorado, state bar associations have crafted brief educational materials for current or prospective agents.¹³ Experienced attorneys can — and should — play important roles as counselors at law, by explaining, highlighting and reinforcing “financial caregiving” education. [Editor’s Note: See the CFPB series *Managing Someone Else’s Money* which sets the standard for such instructional guides, <https://www.consumerfinance.gov/consumer-tools/managing-someone-elses-money/>.]

At a minimum, the players, including principals (or the courts) who designate financial caregivers, and those assuming financial caregiving roles as agents, guardians or custodians, may be well-advised to consider the following questions:

1. What is the financial sophistication of the proposed agent? It is often worth a conversation with the individuals about their past experiences managing money, accounts, investments, and other assets.
2. What is the size of the estate in question? It helps to know this before someone agrees to serve as an agent. The unfortunate truth in life is the larger the estate, the greater the peril for financial caregivers.
3. What are the family dynamics? Will appointment of one individual create a trap whereby an overlooked or disgruntled offspring, sibling or spouse demands an accounting? Even successful defense against a weak claim will involve costs to the financial caregivers and to the principal’s estate. Family dynamics can also change over time, especially as feelings of resentment, guilt or denial begin to color relationships. Consider whether

13) See Colorado Bar Association, *So Now You Are An Agent Under Financial Power of Attorney*, a pamphlet published in 2002 as a “public service” and available at http://www.cobar.org/Portals/COBAR/Repository/publicDocs/So%20now%20you%20are%20an%20agent%20under%20financial%20poa_web.pdf?ver=2012-07-27-130158-320 or <http://www.usafa.af.mil/Portals/21/documents/Leadership/JudgeAdvocate/So%20Now%20You%20Are%20An%20Agent%20Under%20Financial%20Power%20of%20Attorney.pdf?ver=2015-10-30-115235-887>.

greater transparency within the family at all phases of the relationship involving handling of financial matters may deter later problems.

4. What advance planning documents are going to be used — and why are they necessary — to support the financial caregiver? Many “canned” powers of attorney or other estate planning documents, even those available from the most carefully designed “alt-lawyer” internet websites, involve nuanced decisions about whether to authorize “gifting” powers, fees for services provided, or unlimited authority to transact in the principal’s name. Here again is the important role for the experienced attorney, as counselor at law.
5. Is the proposed agent fully aware of what it means to:
 - a. Act as a fiduciary for the principal. A “best interest” standard can mean agents forego any advance of their expected inheritance. Even in states that use a “prudent person” or similar standard to evaluate the duties of a financial agent, transactions that have any odor of “self-dealing” can be scrutinized.
 - b. Keep the principal’s money separate from the agent’s money and to document any reimbursements carefully.
 - c. Keep detailed and accurate records of financial transactions, including cash or ATM transactions.
 - d. Deal with other family members in a way that reduces, rather than increases, the potential for a belated claim of breach of fiduciary duty.
 - e. Plan for the possibility that the vulnerable person may need third-party care, which may trigger demands for detailed accounting of the principal’s financial and medical history, especially if there will be a claim for benefits through insurance policies, Medicaid or the Veterans Administration.
 - f. Understand that financial caregiving roles may last indefinitely, even longer than the role of health-related

caregiver. Many individuals start the journey of caregiving assuming or hoping it is a temporary mission as a “Good Samaritan.” Opting out is not easy to do without consequences, including legal consequences.

6. And finally, if the financial caregiver will be paid for services as provided, or will pay others for services to the principal, what are the plans for the state and federal income tax consequences of such employment?

Thomas J. Murphy, an experienced Arizona attorney in Estates and Elder Law, explained his take-away message from cases such as the one described above. He cautioned that with the increasing importance of accountability for financial caregiving, “the caregiver child often has an even greater need for an attorney than the parent who is incapacitated or deemed vulnerable.”¹⁴

The final words of the Arizona trial court also serve as a warning: “Although [the daughter] was not a good accountant, bookkeeper, or records keeper, her actions do not rise to the level of warranting double damages, forfeiture or sanctions. She took care of her father for over 10 years and provided him with a home, care and companionship of the final years of his life.”¹⁵ As affirmed on appeal, sadly, that wasn’t quite enough.

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¹⁴ Interview with Thomas J. Murphy, Esq., December 28, 2017, Phoenix, Arizona (notes in possession of author).

¹⁵ *In the Matter of the Estate of Domingo A. Rodriguez*, Findings and Conclusion of Law No. 24, Ruling, April 14, 2014, in PB 2012-001760, Superior Court of Arizona, Maricopa County, Arizona.