

# Financial Exploitation

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## Module Overview

Responding to crimes of exploitation is a complicated task because of the multiple levels of investigation that are required. One must have the knowledge and skills to interview victims and alleged perpetrators about financial transactions. One must also know how to gather and review various kinds of financial statements. This module provides a basic knowledge overview needed for a protective services worker to investigate a report of exploitation.

## Learning Objectives

By the end of the module, you will:

- Know the Older Adult Protective Services Act definition of exploitation.
- Know the resources available in the Commonwealth to provide support to a victim of exploitation.
- Know the questions to ask when interviewing a victim of financial exploitation.
- Understand the dynamics that may result in the exploitation of an older adult.

## Study Steps

1. Prior to reading this module it would be beneficial to:
  - a. Shadow an experienced worker on an interview regarding a report of exploitation.
  - b. Read a completed case record that documents a report of exploitation from the Report of Need (RON) to a completed investigation.
2. Review the content of this section.
3. Review referenced Sections of Pa Code, Title 6, Chapter 15. Protective Services for Older Adults, Aging Program Directives (APD) and Aging Technical Assistance Bulletins (ATAB).
4. Complete the self-evaluation quiz and use the answer key to review your answers.
5. Review the content of any of the questions you answered incorrectly.
6. Plan with your supervisor to complete transfer of learning activities.

## Content

Read the module, Financial Exploitation.

## Investigating Reports of Financial Exploitation

### A. Exploitation Defined:

*Exploitation*—An act or course of conduct by a caretaker or other person against an older adult or an older adult's resources, without the informed consent of the older adult or with consent obtained through misrepresentation, coercion or threats of force, that results in monetary, personal or other benefit, gain or profit for the perpetrator or monetary or personal loss to the older adult. (6 Pa. Code § 15.2. Definitions)

### B. Types of Financial Exploitation

- a. Unexplained disappearance of funds from the elder's bank accounts
- b. Unexplained disappearance of valuables from the elder's home
- c. Transfer of real property and/or other assets
- d. Inappropriate use of the elder's home and other resources

### C. Risk Factors Associated with Elder Financial Exploitation

- a. A combination of personality and environmental characteristics [are] believed to increase an elder's vulnerability to abuse:
  - i. Old age
  - ii. Social isolation
  - iii. Extreme dependence and frailty
  - iv. Severe mental and/or physical illness
  - v. Female gender
  - vi. Low to modest financial resources
- b. Those who were owner-occupants were three times more likely to be exploited, in that they had significantly more housing-related problems than did renters or those residing in congregate settings (Choi, Kulick and Mayer).

### D. Perpetrators' Characteristics

- a. Studies identify that perpetrators tend to fall in the following categories (Choi, Kulick and Mayer):
  - i. The majority of the perpetrators were the victim's children (40%)
  - ii. The next largest category was other relatives (20%), including a few spouses and children's spouses
  - iii. The remaining group of exploiters (40%) was non-relatives
  - iv. In one-fourth of the cases, more than one perpetrator was involved, with some cases reflecting a group of perpetrators working as a team to exploit the victim.
  - v. Exploitation often was accompanied by other forms of abuse and neglect
    1. History of psychopathology
    2. Pathological family dynamics and interpersonal relationships

3. Caregiver stress
4. Alcohol and other chemical dependency
5. Transgenerational violence as a learned behavior
6. Economic dependency on the elder

### **E. Investigations of Alleged Financial Exploitation**

Observing that the financial exploitation victim profiles do not differ significantly from those experiencing other forms of abuse, it has been suggested that the financially exploited may be more likely to have mental health or cognitive problems, which appear to have affected their financial management abilities, than do the victims of other forms of abuse (Choi, Kulick and Mayer).

- a. It is advisable that if the financial standing of an older adult is extremely complicated, the protective service worker should attempt to use the agency or county accountant (who must first sign a confidentiality agreement) to assist in the protective service worker's evaluation. The INSTITUTE on Protective Services also provides expert consultation – 717-221-1689.
- b. The investigation must include the accumulation of information on the older adult's financial status. In all cases, the protective service worker must review bank records or whatever else may be available that would indicate or support mismanagement or actual exploitation. Additional items to review:
  - i. Deed(s)
  - ii. Mortgage(s)
  - iii. Certificates of deposit
  - iv. Stocks, bonds and mutual funds
  - v. Power of attorney, Guardianship records for review
  - vi. Insurance policies
  - vii. Loan documents

### **F. Recommended Responses**

- a. Case management for frail, cognitively impaired elders
- b. Preventive educational programs
- c. Ongoing collaboration among adult protective services, financial institutions, and law enforcement agencies.

### **G. How Elders Get Exploited:**

- a. Access point of many exploiters is through the provision of housing repair, or maintenance. Assistance to elders in securing trustworthy, reasonably priced and high quality housing repair and maintenance would appear to offer some protection against this form of financial exploitation.
- b. Other researchers have uncovered similar patterns of financial exploitation.
  - i. Coker and Little, writing in the *FBI Enforcement Bulletin*, December, 1997, pgs. 1-5, report that a 1994 survey of banks in New York City

revealed that the most common forms of financial abuse are forgery, misappropriation of funds, abuse of joint accounts, and abuse of powers of attorney documents.

- ii. The National Elder Abuse Incidence Study collected data from reports from local adult protective services agencies, serving 20 counties in 15 states. These data indicated that 92% of the financial abuse victims were women and that African American elderly, while 8% of the population, represented 15% of the financially abused victims.
- c. Finally, it should be no surprise that the elderly are targeted for this form of familial and criminal exploitation as data reported by O'Neill and Flanagan reveal that the elderly hold almost \$7 of every \$10 that is in a savings deposit or commercial bank. Of all of the money in savings institutions, 80% of it is controlled by the elderly. The use of savings institutions for savings, as opposed to the equities markets, may be a function of age. One of the consequences of this choice by elders is that their money is more quickly and easily accessible than if it were invested in equities, or was accessible only through brokers, or other intermediaries.
- d. All of this information confirms what the protective services community knows: the elderly are easy targets for family, and others, to financially exploit and criminally victimize. Our task is to develop effective strategies for investigating and resolving this form of exploitation. Ideally, prevention is the best mechanism for ending this form of victimization, but it is also one of the most difficult services to implement.

#### **H. Financial Exploitation Investigative Training--Basic Issues**

- a. Financial exploitation investigations conducted by area agencies on aging occur within the context of the legislative policy of the Pennsylvania Older Adult Protective Services Act, 35 P.S. § 10225.101, *et. seq* ("The Act"). That policy is "that older adults who lack the capacity to protect themselves and are at imminent risk of abuse, neglect, exploitation or abandonment shall have access to and be provided with services necessary to protect their health, safety and welfare." 35 P.S. § 10225.102. This policy is implemented by area agencies on aging which investigate reports of need for protective services (See 35 P.S. § 10225.303). The investigative process is essential to the work of the agencies, as the reports of need are the foundations upon which the agencies develop and implement service plans designed to protect older adults.
- b. The Act defines "exploitation" as: "An act or course of conduct by a caretaker or other person against an older adult or an older adult's resources, without the informed consent of the older adult or with consent obtained through misrepresentation, coercion or threats of force, that results in monetary, personal or other benefit, gain or profit for the perpetrator or monetary or personal loss to the older adult."

- c. Based on this definition, investigations to determine that an older adult has been exploited must establish the following:
    - i. An act or course of conduct by a person, other than the older adult (a caretaker or other person) against the older adult or the older adult's resources;
    - ii. Without the informed consent of the older adult or with consent obtained through misrepresentation, coercion or threats of force;
    - iii. Which results in monetary, personal, or other benefit, gain or profit for the perpetrator; or monetary or personal loss to the older adult.
- I. Core Information Needed For All Financial Victimization Investigations**
- a. All investigations of financial victimization seek to answer who, what, when, why, where and how questions. These questions are formulated as follows:
    - i. Who is the alleged victim, e.g., is there a victim?
    - ii. Who is the alleged perpetrator, e.g., is there a perpetrator?
    - iii. What is alleged to have been perpetrated against the victim, e.g., has anything been done which lawfully can be characterized as exploitation?
    - iv. How did the alleged exploitation occur, e.g., what happened --- was there a single act, or a course of conduct?
    - v. What, if anything, is the role of the alleged victim in the perpetration of the alleged exploitation?
    - vi. How, or does, the victim characterize the transaction(s) which have occurred and is she capable and willing to assist in the investigation?
    - vii. Why did the transactions occur? (Include the perspectives of the victim, the perpetrator [if known and available for interview] and others with information regarding the transaction.)
    - viii. When did the alleged victimization occur, e.g., can a time line be established which will guide the investigator in searching for evidence during a particular period? Is there a beginning and end to the exploitation, or is it on-going?
    - ix. Where did the alleged victimization occur, e.g., through what institutions or structures were the victim's resources exploited?
    - x. How is the alleged exploitation to be documented and proven, e.g., can sufficient evidence be accumulated and in what form can the evidence be found and preserved? This presumes that the investigator has developed a theory of the case, which can be implemented.
    - xi. Are there witnesses with first hand knowledge of the acts complained of who can confirm the allegations of exploitation, e.g., can individuals be identified whose credible observations can be utilized to document the occurrence of victimization? Or are there

- witnesses who can corroborate the occurrence of events indicative of exploitation, but who do not have first hand knowledge?
- xii. Are there trustworthy documents which can be identified and acquired which will confirm the alleged wrongful act(s) toward the victim? If yes, what are these documents, where are these documents located and how can they be obtained?
  - xiii. Are there other investigative resources which can be called upon by the agency's workers to assist in the investigation of the allegations, e.g., expert witnesses in a variety of fields including finance, medicine and psychology; or law enforcement personnel who have jurisdiction to investigate the allegations, and who may have statutory tools to acquire evidence which agency personnel do not possess; are there regulatory or recording offices which may possess information and documentation on the registration and movement of property, or funds?
  - xiv. Are there disinterested individuals who can be identified and who can testify to the overall health and cognitive status of the alleged victim during the period when the exploitation is alleged to have occurred? Particular reference should be given to those who would have no vested interest in the outcome of the investigation, e.g., bank tellers; delivery people; postal carriers; individual's providing services within the home, e.g., meter reader, washer repair person, yard worker, etc.
  - xv. Is there a person--friend or family member--who is not involved in the exploitation, who can specify the financial assets, property, goods, real estate and other resources which the older adult possessed and may appear to have been misappropriated by another?
  - xvi. Is there an assertion by the suspect that the older adult gave consent to the utilization of her resources by the suspected exploiter?
- b. "Informed consent" has been defined as, "A person's agreement to allow something to happen (such as surgery) that is based on a full disclosure of facts needed to make the decision intelligently, i.e., knowledge of risks involved, alternatives, etc.," *Blacks Law Dictionary, Fifth Edition, 1979*.
  - c. The law provides that **consent is not effective** when:
    - i. Another acts in excess of the given consent, e.g., "It's OK to sign a check for the prescription medicine I need." But if the perpetrator also signs a check for a new car, there is no consent.
    - ii. Perpetrator obtains the consent through fraud, e.g., "It's OK to take money from the dresser drawer to pay for repairing the leak in the roof you showed me." But if the perpetrator has created a false perception of a leak, and none exists, there is no consent.
    - iii. Perpetrator obtains consent through duress, (physical force or threats thereof) directed at the party giving consent, or her family,

there is no consent, e.g., “You have permission to use my credit card to buy a new motor cycle, just don’t lock me out of my home any more,” there is no consent.

- iv. Perpetrator obtains consent when the elder is led to do so through mistake, either created by the perpetrator, or where the perpetrator knows that the elder giving consent is doing so based on a mistake. “O.K., I’ll sign the house over to you, because if I don’t, I’ll never be able to get into a nursing home, because one must have nothing in order to get into one of those places.” This consent would be ineffective if the party to whom the house is deeded created the mistaken belief, or knows that the victim is mistaken in her understanding.
- v. Perpetrator obtains consent from an individual who is clearly cognitively impaired to the point that she is not able to give consent. The person giving consent believes that she is the Princess of Wales, and she is not, and that she has unlimited resources, and she does not, from which she is making a donation to the British Children’s Relief Fund, and she is not. In fact she may be demented, delirious or in a state of intoxication and the person receiving, or securing the consent, knows that she is cognitively impaired. There is no consent.

## **J. Specific Investigative Steps To Be Taken**

- a. Given the need to establish the elements of exploitation, the worker must organize the investigation and move quickly to obtain evidence. It is axiomatic that once it is known that an investigation is underway, evidence begins to disappear. Thus, speed is essential to obtain evidence that may substantiate a finding of exploitation. This requires that the investigator identify evidence (documents and witnesses) that can establish the elements of the case.
- b. Not only should speed be used, secrecy should also be employed. The more people who know that an investigation is in progress, the more likely it is that information will be shaped to suit various perspectives, both those supporting a finding of exploitation, and those supporting a finding of no exploitation. Evidence also has a way of disappearing, or being fabricated, when this information comes to be available to the exploiter.
- c. When conducting interviews, the investigator should attempt to gain the witnesses’ promise that they will not reveal that they have been contacted or that they have provided evidence. Likewise, the investigator should, to the extent possible, assure the witnesses that their cooperation will be kept confidential. Of course, at some later date this may not be possible, as legal proceedings, either civil or criminal, may require that the witnesses testify.
- d. First, the complainant should be interviewed, probing to acquire as much information as possible, as well as pressing to have this individual identify

other sources of evidence, e.g., other witnesses and documents. A detailed report of interview should be made which may serve as a map of the investigation to be implemented. This interview should be done in person, at a location where the complainant will have access to records and documents needed for the investigation.

- e. Next, the person alleged to be exploited should be interviewed. That interview should be done as quickly as possible, following the investigator coming to have enough information to know what questions to ask. This presumes that the older adult has the capacity to possess, recall and report information, and that she is willing to be part of the investigation. It is not unusual for older adults who have been exploited not to be willing to cooperate, particularly where the perpetrator is a family member, especially a child. Embarrassment is one factor, as is the fear that some action taken against the family member may result in the older person not receiving the support from this family member, which has been provided and that this will lead to the elder's institutionalization. Many older individuals would rather suffer the exploitation (and sometimes abuse) of a family member, than be placed in a nursing home.
- f. During the interview with the alleged victim it will be essential to gain her trust and secure her written permission to examine relevant health, social services, financial and other records regarding the individual and her financial affairs. This should be obtained early in the interviewing process, prior to the senior coming under the influence of the exploiter who may sway the victim not to cooperate, once the investigation is known to others.
- g. This interview should occur, if possible, without others knowing that it is taking place, particularly if they may be involved in the exploitation. If possible, the interview should be done in the victim's home, or where she has access to records and documents that are needed for the investigation. And, if the interview must take place in a location where others may be present, it should be done with as much privacy as possible. If the suspect is a household member at the victim's residence, it may be beneficial to conduct the interview away from the residence, or at a time when the suspect will not be present.
- h. In some cases the victim, in addition to having been financially exploited, has been socially and psychologically berated and controlled by the perpetrator. Frequently this mistreatment has been so pervasive, and across so long a period of time, the victim believes that she deserves any mistreatment she has received. Her self-esteem and personal confidence may be very low. Or, she is so dependent upon the perpetrator, that any effort to discuss the victimization will be rejected.
- i. In those circumstances it may be better to interview the victim after substantial evidence of the financial exploitation has been developed, and documentary evidence collected, which can be shown to the victim. This is done so that when the victim is interviewed, the investigator is able to

demonstrate for the victim the nature and extent of the exploitation. This documentation, along with psychological support and understanding on the part of the investigator, may be sufficient to enable the victim to understand that the perpetrator has victimized her and to move her to cooperate with the investigation.

- j. Whether you will confront this in a particular case may best be gauged by the information provided by the initial complainant and other collateral witnesses the complainant identifies. In gathering information from the initial complainant data should be sought as to the psychological status of the victim so that the investigator can determine whether the victim may be psychologically under the control of the perpetrator or whether the victim has capacity and is able to participate in the investigation. This information will aid the investigator in determining whether to next interview the victim, or to develop additional evidence before undertaking that task. If the victim is not believed to be under the control of the perpetrator, best practice would be to interview her following the complainant and to gain the victim's cooperation and permission to review documents and records pertaining to the allegations of exploitation.
- k. Next, all relevant records should be obtained and analyzed. When analyzing financial documents you will want to be alert to determining what other records might provide additional information. In reviewing bank statements, the investigator may find that there are a series of \$500 checks written every month. The bank statement does not identify the recipient of the checks, nor the reason for the check's issuance. Obtaining canceled checks will be important in determining to whom they were paid and where they were deposited or cashed. If the reason for the issuance of the check is unclear on its face, further interview with the victim, or with the issuer of the check, if other than the victim, will be needed to clarify the rationale for the disbursement of funds.
- l. If it is apparent that the perpetrator is going to allege that the transactions were performed by the older adult out of friendship, or because the recipient has provided services, it will be important to establish the cognitive status of the victim at the time of the transaction, as well as currently. This will also be an issue if the perpetrator is utilizing a power of attorney to exploit the principal's resources. Interview of the victim's primary health care provider, and review of medical records, will be essential to establish whether the victim was cognitively intact at the establishment of the power of attorney and at the time of the exploitation. Competency to sign a power of attorney as measured by capacity to receive and evaluate information effectively and communicate decisions in any way will bear on whether the power of attorney is valid, and whether the victim will be able to testify in any proceeding growing out of the investigation.
- m. The investigator will also need to identify and interview witnesses who can provide information about the circumstances that the victim confronted

during the time of the alleged exploitation. What was her cognitive, emotional and health status? What was her financial status? The investigator will need to determine if the victim was paying her bills and maintaining her appearance and hygiene. Did she make any statements to others about her money disappearing?

- n. Here it will be important to inquire about any new people coming into the life of the victim, particularly if the perpetrator is unknown. While the majority of perpetrators are family members, there are cases where the perpetrator is unknown. Here neighbors, friends, associates at the senior center, and non-suspect family members, can provide crucial information about the victim stating that someone has offered to help her, or someone has been particularly kind. Bank tellers sometimes can identify people accompanying the victim to the bank to withdraw cash, particularly when this has not been a usual practice, and when the amount withdrawn is large.
- o. It will be beneficial to review the victim's papers maintained in her home, or in a safety deposit box. This requires some sensitivity as most people do not want a stranger rummaging through their papers; that is, if the individual has maintained any papers. In reviewing the victim's papers, the investigator may find names, telephone numbers, contracts for repairs or services, insurance policies, deeds, tax bills and other leads which may identify the means of exploitation and the perpetrator(s).
- p. If the investigation reveals that there is financial exploitation, within the meaning of the Act, and a particular suspect, the investigator should consider if it would be beneficial to involve law enforcement in the investigation. First, the investigator should consider if police, or district attorney resources could advance the investigation. This hinges on whether the exploitation involves a crime and how the law enforcement authorities may be able to assist.
- q. Police have access to the state's criminal record history information system and if the evidence collected by the investigator indicates that the exploitation involves criminal conduct, referral of the case to the police may result in the police doing a criminal background check to determine if the individual has been engaged in similar conduct that has resulted in a conviction. As well, if the investigator has not been able to obtain needed documents and information from a suspected perpetrator, such as his or her bank records, and it is believed that those accounts will contain evidence of criminal victimization, the police may be able to obtain those records through a search warrant. That is, if the investigation has revealed evidence that a crime has been committed and that evidence of that crime exists within the suspect's bank, or other, records.
- r. Additionally, many counties have investigating grand juries which the district attorneys utilize to investigate white collar and other types of crime. Grand juries have the capacity to issue subpoenas to obtain records where it is thought that crimes may have been committed, or are in the

process of being committed, and that the subpoenaed records may reveal evidence of the crime. Typically grand juries are very busy and do not investigate every crime which may be aided by its resources. But, if the investigation is revealing substantial theft of resources, the district attorney may be willing to submit the case to the grand jury for assistance.

- s. The State Attorney General's Office also maintains an investigating grand jury. Those counties which do not have investigating grand juries can sometimes submit investigations to the Attorney General's grand jury, in appropriate circumstances. This requires that the district attorney seek those resources and that the Attorney General's Office agree to assist in the investigation. Where the investigation has revealed that the exploitation may involve insurance fraud, money laundering and other white collar crimes, for which the Attorney General has jurisdiction, it may be possible to have the Attorney General's Office assume investigative responsibility for the case under its authority, independent of the district attorney.
- t. Pennsylvania criminal law prohibits a number of transactions based upon deceit and fraud, and makes these actions unlawful. Among these unlawful transactions are the following crimes, and others.
  - i. Theft by deception, 18 Pa. C. S. A. § 3922;
  - ii. Theft by unlawful taking, 18 Pa. C. S. A. § 3921;
  - iii. Theft by failure to make required disposition of funds received, 18 Pa. C. S. A. § 3927;
  - iv. Receiving stolen property, 18 Pa. C.S.A. § 3925;
  - v. Forgery, 18 Pa. C. S. A. § 4101;
  - vi. Fraudulent destruction, removal or concealment of recordable instruments, 18 Pa. C. S. A. § 4103;
  - vii. Securing execution of documents by deception, 18 Pa. C. S. A. § 4114;
  - viii. Identity theft, 18 Pa. C.S.A. § 4120.
- u. All of the above listed theft crimes involve the acquisition of the assets of another through some form of unlawful taking, usually involving deception. The forgery, fraudulent destruction and securing execution of documents by deception charges, also involve the obtaining of another's assets through fraud, but in a more indirect route than theft.
  - i. For example, if a son were to trick his aging mother into signing a deed transferring land or a home to the child, but representing the document to mother as a "tax paper," or something other than what it is, the child may be subject to prosecution under 18 Pa. C. S. A. Section 4114, Securing execution of documents by deception. As well, any other of a series of schemes to take resources from an aged individual may constitute theft as defined in Chapter 39, Theft and Related Offenses, of the Crimes Code.

## K. Legal Issues Confronted in Financial Exploitation Investigations.

- a. Older Adults Protective Services Act, 35 P.S. § 10225.101, *et. seq.*
  - i. During the course of a financial exploitation investigation a number of legal issues will emerge. Two relevant issues growing out of the Older Adults Protective Services Act, 35 P. S. § 10225.101, *et. seq.*, are:
    1. Obtaining access to the older adult's records pursuant to 35 P. S. § 10225.304(h) (access to records and persons); and
    2. The level of intent to exploit which must be documented by an investigation in order to substantiate a finding of financial exploitation by the agency.
  - ii. A recent Commonwealth Court case has clarified the issue of what an area agency on aging must demonstrate, prior to obtaining an order of court, to secure access to the records of an older adult.
    1. In the case of *In the Interest of M.B., an Older Adult*, 686 A.2d 877 (Pa.Cmwlt. 1996), the Commonwealth Court reviewed the action of the York County Court of Common Pleas in denying the York County Area Agency on Aging access to M.B.'s records pursuant to 35 P. S. § 10225.304(h)(2), which reads, "The agency can demonstrate that the older adult is denying access to records because of incompetence, coercion, extortion or justifiable fear of future abuse, neglect, exploitation or abandonment."
    2. The Agency had initially been granted an *ex parte* order (e.g., an order issued without the opponent being notified or present) giving it access to M.B.'s records. In its petition, the agency alleged, among other things, that M.B. had refused access to her records and due to her refusal, it was unable to complete its investigation into the allegations or its assessment of M.B.'s needs for protective services. The agency further alleged that based on two conversations a caseworker had with a physician, it believed that M.B. had refused access to her records due to incompetence. The Court of Common Pleas granted the agency's request without a hearing or argument, but appointed counsel for M.B. and directed that the order be served upon M.B.
    3. M.B.'s counsel then filed a motion to vacate the order contending that Section 10225.304(h)(2) of the Older Adults Protective Services Act requires notice and a hearing on the issue of, among other things, incompetence, prior to ordering the production of records. Following argument on this motion, the Court of Common Pleas vacated its order holding that the agency's allegation that M.B. may be vulnerable to financial exploitation was insufficient under the law.

4. The Agency appealed the decision to Commonwealth Court, which affirmed the York County Court of Common Pleas and ruled that Courts of Common Pleas have considerable latitude in determining that the Agency has “demonstrated that an older adult is denying access to records because of incompetence, coercion, extortion or, etc....” and that the Court may on its own motion order a hearing to determine whether the agency has demonstrated the need for court ordered access to records of an older adult.
  5. Further, Commonwealth Court ruled that the older adult is entitled to notice of a petition being filed seeking access to the adult’s records, and that the Courts of Common Pleas may order discovery regarding disputed issues of fact, evidentiary hearings and arguments by parties. This does not mean that in every case these procedures will be followed, but the Courts of Common Pleas have wide latitude in determining how to resolve the Agency’s petition for access.
  6. The bottom line in this case is that the Agency’s petition did not aver sufficient facts to show M.B. was incompetent, or denying access to records due to one of the stated reasons in Section 10225.304(h)(2). Agency employees can avoid this by specifically averring sufficient information to make it clear to the judge reviewing the application for a court order, that the agency has demonstrated that an older adult is denying access due to one of the issues listed in the Act.
- iii. Another issue which has arisen in relation to the Act is the role of perpetrator’s “intent” on the agency’s substantiation of financial exploitation. Regulatory Reference Section 15.2, issued by the Department of Aging and dealing with the question of exploitation states, “Prior to 1993, PDA had held the position that showing that an alleged perpetrator intended to exploit the victim was not required for substantiation of financial exploitation. It was necessary to show only that a loss occurred without the victim’s consent.”
1. This changed, however, as the result of Case No. 92-1 (S v. Perry Co. AAA), which was appealed to Secretary of Aging Linda Rhodes. She concluded that “. . . exploitation under the Act required a showing of intent by the perpetrator.” The Department’s Regulatory Reference states, “To substantiate an allegation of financial exploitation, it is necessary to show that the perpetrator acted knowingly or willfully against an older adult or her resources or without proper informed consent. Simply showing an error in judgment by the

perpetrator is not sufficient to support substantiation of financial exploitation.”

2. The Regulatory Reference continues, “It is important to remember that, with regard to the substantiation decision, it is not necessary to ‘prove’ intent beyond a ‘shadow of doubt.’ It is required only that you show it to be ‘more likely than not’ that there was intent to exploit. More often, the intent becomes apparent when the use of the money, property, etc. is discovered. It’s difficult for an alleged perpetrator to convince anyone that he intended to help his mother by selling her house and buying himself drugs, alcohol or a new car.”

- b. Powers of Attorney, 20 PA.C.S.A. § 5601, *et. seq.*
  - i. Many investigations involve examining how an agent has used a power of attorney to conduct the affairs of his principal. An agent is one who acts on behalf of another pursuant to a power of attorney, i.e., a document that specifies what the agent may do, and what an agent may not do, in handling a principal’s affairs. The principal, in this context, is the older adult who has appointed someone to act on his behalf.
  - ii. Any person who has capacity, e.g., has not been declared to be incapacitated by a court of competent jurisdiction, or who is not so obviously impaired as to not be able to receive and evaluate information effectively and communicate decisions in any way, can draft a power of attorney. For example, if an individual is going to be out of the country for an extended period of time, the power of attorney is a mechanism that could be utilized to authorize someone to transact one’s business affairs, while one is out of town. The written power of attorney document controls what the agent may do.
  - iii. As an agent of a principal, the agent stands in a “fiduciary capacity” to the principal. *Black’s Law Dictionary* defines fiduciary capacity as, “One is said to act in a ‘fiduciary capacity’ or to receive money or contract a debt in a ‘fiduciary capacity,’ when the business which he transacts, or the money or property which he handles, is not his own or for his own benefit, but for the benefit of another person, as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part.”
    1. *Black’s* also defines fiduciary, as “a person having duty, created by his undertaking, to act primarily for another’s benefit in matters connected with such undertaking.”
    2. The bottom line as to agents is that their duty is to act on behalf of another and the resources which they control and

- manage are not to be utilized for their well-being, but for the well-being of the principal.
- iv. This principle is recognized in recent legislation which amends Chapter 56 of Title 20 of the Pennsylvania Consolidated Statutes. This is the section which deals with Powers of Attorney. Act 39 of 1999, which went into effect on April 12, 2000, requires that every power of attorney drafted after that date contain a notice that the document which the principal is about to sign gives wide ranging power to another person to dispose of the principal's property. As well, the notice is to be signed by the principal, and it spells out the principal's rights, as well as the agent's duties.
  - v. The agent has to sign an agreement in which he/she agrees that as agent:
    1. "I shall exercise the power for the benefit of the principal."
    2. "I shall keep the assets of the principal separate from my assets."
    3. "I shall exercise reasonable caution and prudence."
    4. "I shall keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal."
  - vi. Additionally, the law spells out that the agent has a fiduciary relationship to the principal (20 Pa. C. S. § 5601(e)) which includes: exercising the agency powers for the benefit of the principal; keeping the principal's assets separate from the agent's; exercising reasonable caution and prudence; and keeping a full and accurate record of all actions, receipts and disbursements on behalf of the principal.
  - vii. As before, the law allows for the agent to make gifts on behalf of the principal to others, but limits those gifts to the specifics of the law, unless the document specifies otherwise. Finally, section (e) has been added in the section dealing with special rules for gifts. That section is entitled "Equity" and specifies, "An agent and the donee of a gift shall be liable as equity and justice may require to the extent that, as determined by the court, a gift made by the agent is inconsistent with prudent estate planning or financial management for the principal or with the known or probable intent of the principal with respect to disposition of the estate."
  - viii. This newly added equity section will make it possible for agents, and recipients of gifts, to be challenged, and to be held liable for giving and receiving a gift that is not in the best interest of the principal, or which is not consistent with the known or probable intent of the principal. What this translates to is that the agent, and recipients of gifts, can be sued to prevent the wasting of the principal's estate.
  - ix. Overall, the new changes should bring greater capacity on the part of area agencies on aging, and other interested parties, to require

that agents act in the interest of the principal, and if they do not, be held accountable. The case law will need to be developed in this area before it is clear what actual impact these amendments will have, but they look to be promising.

- c. Guardianship, 20 P.S. § 5501, *et. seq.*
  - i. Another legal mechanism for protecting incapacitated persons, which is utilized in exploiting the elderly, is the role of the guardian. Appointment of guardians of the person and/or the estate of incapacitated persons is controlled by 20 P. S. § 5501, *et. seq.*
    - 1. An “incapacitated person” is defined by Section 5501 as “an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.”
  - ii. In order for an individual to be declared an incapacitated person, the Court of Common Pleas, for the county where the individual resides, or where the court has jurisdiction of the individual’s estate, or of a trust in which the individual has an interest, must upon a petition filed by an interested party, and following a hearing, find by clear and convincing evidence that the individual is an incapacitated person. In making this determination the court must make specific findings as to the existence of incapacity and of its extent.
  - iii. In appointing a guardian, the court must determine the degree of control which the guardian shall have over the affairs of the individual, based on the evidence which has been offered documenting the extent of incapacity. The law requires the court to “prefer limited guardianship,” of either the person or estate of the individual, giving the guardian control in only specifically-defined areas of the incapacitated individual’s life. However, if the incapacity is pervasive, the court may appoint a plenary guardian of the person and/or the estate, giving the guardian control in all areas, with the exception of decisions that can only be made with the permission of the court.
  - iv. Section 5521 of Title 20 spells out the duties and liabilities of the guardian, and subsection (f) provides that “The court may not grant to a guardian powers controlled by other statute, including, but not limited to, the power (1) to admit the incapacitated person to an inpatient psychiatric facility or State center for the mentally retarded; and (2) to consent on behalf of the incapacitated person, to the relinquishment of the person’s parental rights.”
  - v. Subsection (d) of Section 5521 also specifies that unless the original guardianship order provides for the following, only the court can grant permission to:

1. Consent on behalf of the incapacitated person to an abortion, sterilization, psycho-surgery, electroconvulsive therapy or removal of a healthy body organ.
  2. Prohibit the marriage or consent to the divorce of the incapacitated person.
  3. Consent on behalf of the incapacitated person to the performance of any experimental biomedical or behavioral medical procedure or participation in any biomedical or behavioral experiment.
- vi. Subsection (a) of Section 5521 specifies the duty of the guardian of the person and subsection (b) specifies the duty of the guardian of the estate. The duties of the guardian of the estate are extensive, and if the guardianship is plenary (unqualified), the guardian has control over every aspect of the incapacitated person's financial affairs. It is this grant of power which makes it possible for the guardianship to be used as a mechanism of exploitation.
  - vii. Subsection (c) of Section 5521 provides for guardians to make reports to the court on at least an annual basis. The guardian of the estate must report: current principal and how it is invested; current income; expenditures of principal and income since the last report; and needs of the incapacitated person for which the guardian has provided since the last report. This report must be filed with the Clerk of Orphan's Court and becomes part of the court's record in the matter. In many counties, the courts require that the reports be reviewed to determine that the estate is being administered for the benefit of the incapacitated person.
  - viii. Subsection (g) grants criminal and civil immunity to guardians which are "a unit of local government, nonprofit corporation or guardianship support agency," in the absence of gross negligence, recklessness or intentional misconduct. There is no such grant of immunity to other guardians, who may be found to be civilly and criminally liable for misconduct in office.
  - ix. Section 5531 provides that a guardian "shall file an account of his administration whenever directed to do so by the court or may file an account at the termination of the guardianship, or at any other time or times authorized by the court." This provision of the law allows for an interested party to petition the court under Section 5512.2, for a review hearing. That section specifies a number of reasons why a court may conduct a rehearing on some aspect of the guardianship, including, "...the guardian's failure to perform his duties in accordance with the law or to act in the best interest of the incapacitated person." This provision gives the area agency on aging, and other interested parties, the capacity to petition for a hearing into a guardian's discharge of his or her duties.

- x. Section 5515 gives the court exclusive power to remove a guardian when:
    - 1. He is wasting or mismanaging the estate, is likely to become insolvent, or has failed to perform duties imposed by law.
    - 2. He has become incapacitated to discharge his duties and his incapacity is likely to continue to the injury of the estate.
    - 3. He has left the state or has ceased to have a known place of residence therein, without furnishing such additional security as the court may direct.
    - 4. For any reason by which the interest of the estate is likely to be jeopardized by his continuance in office.
  - xi. Under this section an area agency on aging may petition the court for a rehearing to remove an exploiting guardian through proof of one of the above areas. This may also give the area agency, or another interested party acting on behalf of the incapacitated individual, the capacity to both stop the exploitation, and to recover lost assets. Recovery of lost assets presumes, of course, that sufficient admissible evidence has been accumulated which will demonstrate to the court that the resources of the estate have been unlawfully utilized by the guardian. Recovery also presumes the capacity of the petitioner to identify resources of the guardian which can be attached. This can be a major obstacle for guardians who have used the resource for gambling or drugs, or for the designing guardian who has situated the assets outside of the reach of the court.
  - xii. This is not the only remedy available where the guardian has exploited the estate. Guardians who are not specifically exempted under the Act, may also be found to be criminally liable for theft of the estate's resources, or using the assets for their own benefit. This presumes that an investigation is able to clearly demonstrate the allegation of criminal conduct and that local law enforcement is willing to move forward with a prosecution.
- d. Joint Ownership
- i. Often when older adults become concerned that they may need assistance in managing their affairs, they will turn to a family member, or friend, and ask if the individual will assist them by allowing that person's name to be placed upon a checking account or other property owned by the older adult. Generally, the rationale for this is that the senior may need access to the resource in question, but will be prevented from obtaining access to it, because of illness or incapacity. Usually, this takes the form of the addition of the name of another owner of an asset such as a checking account, savings account, certificates of deposit, stocks, bonds and other such resources, which may need to be used to purchase

- goods or services which the older adult needs. This type of ownership is generally referred to as “joint tenancy.”
- ii. Joint tenancy has been defined as “a type of ownership of real or personal property by two or more persons in which each owns an undivided interest in the whole and attached to which is the right of survivorship.” *Blacks Law Dictionary, 5<sup>th</sup> Edition*. What this typically means is that each named party on the ownership document for the resource in question has total control of the asset. An elderly mother who places her son’s name on her checking account as an additional signer, that is owner, gives to that son the capacity to dispose of the resources in the account by his signature alone. This is done with the intent that the son pay mother’s expenses when she is unable to do so, but an unrestricted transfer of interest to him in the account allows him to utilize the funds in any fashion he may choose. These types of accounts are sometimes colloquially referred to as “OR” accounts, e.g., Mary Smith OR Thomas Smith; both have equal ownership of the entire resource, whether it is a checking account, or title to a home or other property. If one of the co-owners dies, the other comes into possession of the total value of the resource.
  - iii. While this mechanism is often seen as a quick and easy way of managing the problem of a senior’s failing capacity to perform routine business transactions, or means for transferring assets outside of a will and probate, these transfers of ownership frequently result in the elder’s resources being plundered by the co-owner. If the transfer is done by the elder when she/he has capacity and there is no showing of duress, coercion or fraud, there is little which can be done to recover assets taken by the co-owner, as the transfer gives that party ownership of the entire asset.
  - iv. 20 Pa. C.S.A. § 6303 (a), Joint Account, provides that the ownership of a joint account during lifetime is determined as follows: “A joint account belongs, during the lifetime of all partners, to the partner in proportion to the net contributions by each to the sum on deposit, unless there is clear and convincing evidence of a different intent.”
  - v. The provisions of the Estate Code makes it possible for criminal prosecution, or civil recoveries to occur where elders are able to testify, or where other evidence can be adduced, that the elder did not give, nor intent, for the joint owner to use the asset for the benefit of the joint owner. Most often joint accounts are established as convenience for elders to insure that their bills are paid when they are unable to do so, rather than to gift the joint owner with the elder’s assets.
  - vi. This potential form of exploitation can be protected against by transferring the ownership such that both parties are named as joint

owners of the resource, e.g., Mary Smith AND Thomas Smith. In this circumstance, if it is a checking account, in order for the asset to be expended, both parties must sign. This does not address the problem of the inability of the senior to act, as her/his signature is still required, along with that of the other owning party. For this reason, families frequently choose the route of giving complete access to the total asset by either named party.

- e. Medicaid eligibility implications with transferred assets
  - i. Federal and state law provide for medicaid funds to be made available to older adults who require nursing home services, but who do not have sufficient resources to pay for the needed care. In determining the eligibility of an individual to receive medical assistance funds, the Department of Public Welfare looks at the assets which an individual possesses and those which they have disposed of within the 36 months prior to application for assistance. If property is found which the applicant has “gifted away” or disposed of without receiving consideration (e.g., a benefit), the applicant may be ineligible for medical assistance for a period of time, equal to the amount of care for which the gifted property would have paid. The maximum period of ineligibility is 36 months, and this period is determined by dividing the fair marked value of the gifted asset by the state-wide average monthly cost of nursing care for the year in question.
    - 1. As an example, if Mrs. Smith gave her son \$100,000 in 1999, which was the core of her assets, and she needed nursing home care in 2000, in determining her eligibility for medical assistance payments, the \$100,000 would be divided by the state-wide average monthly nursing home cost, which was \$4,386.60, as of January 1, 1997 (it is higher now) and the resulting quotient 22.79, would be the number of months which she would be ineligible to receive medical assistance funding for nursing home care. The law does provide for special needs circumstances which the state may recognize, but it does not compel the state to recognize these special needs.
    - 2. In circumstances where the older adult has made a poor decision in transferring her assets to another, or where she has been exploited, there is a very real possibility that, should she need nursing home care funded by medical assistance, she would be denied that care due to the poor decision, or exploitation. This is the real “double whammy” of losing one’s assets to exploitation.
  - ii. In Sections 4,5,6 and 7 of this study guide, you will find a number of resources which will assist you in conducting your investigations. Among them is an overview of techniques for interviewing victims;

suspects and hearing impaired individuals as well as an investigative protocol. Component 2 of the training module contains information specific to financial transactions which also will assist in investigations.

<b>Self-Evaluation Quiz</b>
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Answer the following questions.

1. List three risk factors associated with financial exploitation of elders.  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
2. The majority of perpetrators who financially exploit elders are the victim's relatives, specifically their children.  
 T F
3. List three instances where the law does not deem consent of the elder to be effective.  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
4. The investigative interview with the victim in financial exploitation cases should take place, if possible, without others knowing about it.  
 T F
5. The Department's Regulatory Reference states, "To substantiate an allegation of financial exploitation, it is not necessary to show that the perpetrator acted knowingly or willfully against an older adult or her resources or without proper informed consent."  
 T F
6. When guardianship is sought, the court's preference is to limit guardianship and only give the guardian control in specifically-defined areas of the incapacitated individual's life.  
 T F
7. List two of the four reasons a guardian may be discharged from his role as guardian.  
 \_\_\_\_\_  
 \_\_\_\_\_
8. Adding an individual's name to an elder's bank account is the best way to protect him/her from financial exploitation.  
 T F

Review your answers with the answer key at the end of this section.

### Transfer of Learning Activities

1. Review a completed case record for a financial exploitation investigation:
2. As assigned by your supervisor; Shadow an experienced PS worker throughout an entire financial exploitation protective services investigation.
3. As assigned by your supervisor; request an experienced PS worker or your supervisor observe you conducting an entire financial exploitation protective services investigation.

### References

Choi, N.G., Kulick, D.B. & Mayer, J. (1999). Financial exploitation in elders: Analysis of risk factors based on county adult protective services data. *Journal of Elder Abuse and Neglect* 10 (3/4), 39-60.

Pennsylvania Code, Title 6, Chapter 15. *Protective Services for Older Adults*.

<b>ANSWER KEY</b> <b>Financial Exploitation</b>
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1. List three risk factors associated with financial exploitation of elders. *Any of the following are potential risk factors: Old age, social isolation, extreme dependence and frailty, severe mental and/or physical illness, female gender, low to modest financial resources, being an owner-occupant of a residence.*
2. The majority of perpetrators who financially exploit elders are the victim's relatives, specifically their children. **True.** Studies show that 40% of perpetrators are the victim's children and 20% are other relatives.
3. List three instances where the law does not deem consent of the elder to be effective. *Any of the following responses would apply: Another acts in excess of the given consent; Consent is obtained through fraud; Consent is obtained through duress; Consent is based on a mistake; Consent is obtained from an individual who is clearly cognitively impaired.*
4. The investigative interview with the victim in financial exploitation cases should take place, if possible, without others knowing about it. **True.** *The more people who know that an investigation is in progress, the more likely it is that information will be shaped to suit various perspectives or that evidence will begin to disappear or be fabricated.*
5. The Department's Regulatory Reference states, "To substantiate an allegation of financial exploitation, it is not necessary to show that the perpetrator acted knowingly or willfully against an older adult or her resources or without proper informed consent." **False.** *Intent must be shown. Prior to 1993, demonstrating intent was not necessary, but following the decision in Case No. 92-1 (S v. Perry Co. AAA), exploitation under the Act required a showing of intent by the perpetrator.*
6. When guardianship is sought, the court's preference is to limit guardianship and only give the guardian control in specifically-defined areas of the incapacitated individual's life. **True.**
7. List two of the four reasons a guardian may be discharged from his role as guardian. *Any of the following is correct: Wasting or mismanaging the estate; He has become incapacitated; He has left the state or has ceased to have a known place of residence; For any other reason his continuing jeopardizes the interest of the estate.*
8. Adding an individual's name to an elder's bank account is the best way to protect him/her from financial exploitation. **False.** *This may be the easiest way to help manage assets, but it is also the easiest way for the account to be plundered. Joint ownership should be established so that the account is in the name of "individual" AND "elder," not "individual" OR "elder."*