

Switzerland: fighting the scourge

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Abstract

This article addresses the problem of financial abuse of the elderly in Switzerland, which will get worse in the future as the older population grows steadily and the majority of the nation's wealth is controlled by the elder generation. The problem is exacerbated by the fact that financial abuse of the elderly is not specifically regulated in Switzerland. As a private client lawyer you must be aware of this problem in relation to the estate planning of elderly clients living in Switzerland or clients living abroad with Swiss assets, in particular how to prevent your client from being financially abused and which remedies you have at hand to protect your vulnerable clients.

In Switzerland, out of the 8.3 million population, 18 per cent are over 65 years old, almost as much as the group of the under 20-year-olds, which amounts to approximately 20 per cent

It is forecasted that the elder generation in Switzerland will increase by 50 per cent over the next 30 years

Best agers in Switzerland at risk?

Switzerland is a country with high prosperity and it is thus not surprising that the average life expectancy is 81 years for men and 85 years for women. In Switzerland, out of the 8.3 million population, 18 per cent are over 65 years old, almost as much as the group of the under 20-year-olds, which amounts to approximately 20 per cent. In some cantons in Switzerland, the proportion of elder people already exceeds the proportion of the younger population. This demographic ageing process is a result of the increasing life expectancy and particularly of the decreasing birth rate. It is forecasted that the elder generation in Switzerland will increase by 50 per cent over the next 30 years.¹

Studies from several countries in the USA, Europe, Asia, and Africa have observed that about 10 per cent of the older generation are nowadays subject to abuse and this rate even amounts to as high as 40–60 per cent among the older persons suffering from dementia.²

Elder abuse is a serious problem also in Swiss society and includes psychological, physical, financial and sexual abuse, and neglect. However, elder abuse in Switzerland remains a largely unreported problem. A recent study in the Canton of Zurich, Switzerland, showed that psychological abuse is the most frequent type of abuse (47 per cent), followed by financial exploitation (35 per cent) and physical abuse (30 per cent).³ Other important observations of the study were the relatively long time which passes (3 months in average) before these situations were reported and that elders with abuse were less likely to be a nursing home resident than living at home.

The problem of elder abuse will get worse in Switzerland in the future as the older population grows and elder persons control the majority of the

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1. Press release population development 2016: provisional results dated 6 April 2017 (<www.bfs.admin.ch/bfs/de/home/statistiken/bevoelkerung.assetdetail.2240354.html> accessed 12 September 2017).

2. Christophe J Büla, 'Abuse in Older Persons: Why Physicians Need to Be Aware' Swiss Med Wkly. 2016; 146:w14291.

3. Simone Lacher, Albert Wettstein, Oliver Senn, Thomas Rosemann, Susann Hasler, 'Types of Abuse And Risk Factors Associated with Elder Abuse' Swiss Med Wkly. 2016;146:w14273.

nation's wealth: the overall wealth of the 300 wealthiest private individuals only in Switzerland amounts per the end of 2016 to approximately USD613 billion and in Switzerland every eighth pensioner is a millionaire.⁴ It is forecasted that there will be three times as many persons suffering from dementia worldwide in the next 30 years, which will put such elderly persons even more at risk.

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Financial elder abuse in Switzerland

Lack of sufficient regulation

Financial elder abuse is the illegal or improper use of an elder's fund, property or assets. Detecting financial elder abuse is challenging because it remains a taboo and many cases remain unreported. This is not really surprising: especially financially or physically dependent older adults fear that if the perpetrator is arrested or removed from the household following disclosure, they may be institutionalized or lose other freedoms.

Financial elder abuse is as such not specifically regulated in Switzerland and case law is scarce. Elder financial abuse spans a broad spectrum of conduct. While there is no statutory definition of financial elder abuse under Swiss law, the following situations may qualify as financial elder abuse:

- Forging an elder persons' signature;
- Misuse of a (general) power of attorney issued by the elder adult in favour of the perpetrator;
- Getting the older person to sign a will or to make a donation through deception, coercion or undue influence;
- Third parties inducing elder people to enter into costly contractual arrangements, overcharging the elder person or using unfair business practices;
- Promising lifelong care in exchange of money or property and not following through on the promise; and
- Fraud resulting in financial gain for the perpetrator (eg the perpetrator wrongly purports to be a nephew or grandchild of the elder adult and—after receiving substantial funds from the elder person—disappears).

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Depending on the situation, such acts may give rise to civil remedies or even qualify as a criminal offence in Switzerland. This article does not deal with criminal offences committed against elder persons in Switzerland but instead focuses on potential civil measures to prevent and/or sanction financial elder abuse.

Legacy hunting—the estate planning nightmare

Typically, private client lawyers are mostly confronted with potential financial abuse in relation to the estate planning of an elderly client. A well-known case is playmate Anna Nicole Smith, who married at the age of 26 the 89-year-old billionaire Howard Marshall.⁵ Another example of financial elder abuse is the case about Liliane Henriette Charlotte Bettencourt, a French heiress, socialite, and a businesswoman. She is one of the principal shareholders of L'Oréal. Not only caretakers and 'friends' but also politicians were alleged of having received substantial gifts from Mrs Bettencourt who was eventually put under guardianship.

4. <<http://www.bilanz.ch/people/300-reichste/reichsten-updates/diese-deutschen-machen-die-schweiz-reich-782531>> accessed 20 September 2017.

5. The playmate Anna Nicole Smith married billionaire J Howard Marshall in 1994, but he died a year later. After his death, she began a legal battle over a share of his estate. Smith won the case about jurisdictional issues (*Marshall v Marshall*), but unsolved issues regarding her inheritance eventually led to another Supreme Court case (*Stern v Marshall*). She died long before that case was decided. The matter seems still to be ongoing after several decades.

Experience shows that in case of several marriages of a wealthy principal, the young widow is often benefitting the most from the estate, and the children of previous marriages are left out, challenging later on the last will by arguing that the widow estranged the children from their parent and that the principal was acting under duress/undue influence or lacked capacity when making the will. Another typical example of elder financial abuse is the situation where the children of an older person live abroad, have no contact to the testator and the caretaker, who looks for many years after the older person, is benefitting from the estate.

These cases (also sometimes referred to as legacy hunting or succession fraud) come in various forms and in various degrees and do not always give rise to a challenge of the last will or of potential lifetime donations.

Who are the perpetrators?

Swiss statistics show that the perpetrators of financial elder abuse were mainly caretakers or family members, with whom the victim was often cohabiting.⁶ Besides that, the perpetrators are also professionals or businesspersons who overcharge for their services or misuse their positions of trust or respect.

Caretakers/Doctors

Swiss succession law as embodied in the Swiss Civil Code (CC) does not prohibit that a nurse or doctor is benefitting under a last will of the patient. This is problematic as it could give rise to potential abuse of the trust relationship between the elder adult and the caretaker or doctor. It may, for example, be an incentive to nurses and doctors to treat wealthy elderly adults differently than other patients who do not

have the same financial means. The Swiss organization Spitex, who provides private caretaking services at home for elder people, prohibits, therefore, their employees to accept donations or testamentary dispositions from the patients.

Similarly, the Swiss Medical Association adopted professional rules of conduct, according to which it is forbidden for a medical practitioner to accept testamentary benefits unless the respective medical practitioner was not aware of such testamentary disposition prior to the death of the patient. Not surprisingly, the effectiveness of these professional guidelines (soft law) is limited.

Lawyers

Swiss law does not prohibit a lawyer to benefit under his/her client's will. However, the leading case in Switzerland as regards succession fraud involves a lawyer who was appointed as sole heir of the estate of his former client.⁷ In addition, the attorney accepted substantial gifts from the client during her lifetime but did not charge his client for his services until only after her death where he charged the estate for several hundred billable hours. The testator had no close relatives and considered her attorney to be her friend. The attorney did encourage her to designate him as his sole heir in her will and did not propose alternative beneficiaries. The Swiss Federal Supreme Court ruled that the attorney was considered unworthy to inherit in accordance with Article 540, paragraph 1, section 3 CC.⁸

The court held in particular that while 'legacy hunting' as such is not forbidden by Swiss law, a lawyer appointed by a testator in a last will, who knows that the testator is under a wrong impression and refrains from correcting such wrong impression, is acting against good morals and hence not worthy to inherit.

6. Lacher and others (n 3) 5.

7. Federal Court decision 5C.121/2005.

8. Art 540 CC (Free English Translation): 'A person is unworthy of inheriting or acquiring anything by a testamentary disposition if:

1. that person intentionally and unlawfully killed or tried to kill the testator;
2. that person intentionally and unlawfully caused the testator to be in a permanent state of testamentary incapacity;
3. by malice, coercion or threat he or she induced the person now deceased to make or revoke a testamentary disposition or prevented him or her from doing so;
4. that person intentionally and unlawfully destroyed or invalidated a last will under circumstances which do not allow the testator to make a new last will.'

Revision of Swiss Succession Law

There is currently a revision of the Swiss inheritance law under way. In that context, the federal council suggests to foresee a new provision, according to which only one-fourth of the overall estate may be appointed in favour of beneficiaries who are in a trust relationship to the testator whereby it has not yet been defined which professions would fall under such category.

Prevention of financial elder abuse

Vulnerable clients: also a topic for Swiss service providers

There are a large number of Swiss investors with substantial wealth who are approaching retirement. As they age, some begin to suffer from diminished capacity due to dementia or other health conditions. After having built up their fortune during their lifetime, they become vulnerable for financial abuse not only from criminals, but also from unethical caretakers, family members and financial service providers such as asset managers or banks. Some financial service providers have thus started to implement practices and measures to protect vulnerable clients.

Adult protection authority

As per 1 January 2013, the new Child and Adult Protection Law became effective in Switzerland. Each canton in Switzerland has its own adult protection authority (APA). The APA guarantees the protection and support of elder people who lack capacity (eg dementia) and who are thus no longer in a position to look after themselves.

Following a report with the APA, be it by a family member or by a third party (eg a neighbour, the police, etc), or upon its own initiative, the APA will implement the necessary measures. Because of its

extensive possibilities of intervention, the APA is somehow controversial in Switzerland.

There are different measures of elderly protection in Switzerland: (i) private measures like the Advance Care Directive (ACD) (similar to an enduring/lasting power of attorney as known in the UK/USA) and (ii) state measures which will be implemented by the APA in case there is no ACD in place.

Swiss ACD

An elder person, while still of sound mind, can issue an ACD and appoint a trusted person of his or her choice or an institution to represent him or her in case of an eventual incapacity both as regards (i) personal care (eg medical treatments, stay in elderly home, etc) and financial affairs (eg payment of taxes, bills, asset management, etc). The ACD can be comprehensive or limited to certain areas.⁹

Generally, it is debated in Swiss doctrine whether Swiss law allows general durable power of attorneys (which remain valid also in case of incapacity of the principal, Article 35 Swiss Code of Obligation (CO)). The Swiss Federal Supreme Court¹⁰ has considered such enduring power of attorneys as valid provided the principal can overlook the delegated business and monitor the principal accordingly. However, care must be taken with such instruments as their effectiveness is debated in Switzerland and in any event Swiss banks ask usually for specific power of attorneys limited to the respective bank accounts/securities deposits.

It is recommended that the elder person in any event issues a Swiss ACD, regardless as to whether he or she has already issued a Swiss general durable power of attorney. As the elder person must have capacity to do so, it is important to issue such document early enough and not when it becomes apparent that the elder person is already suffering from dementia. A Swiss ACD must be either in the form of a holographic will (eg to be written by hand, from the

9. Alexandra Rumo-Jungo, 'Commentary to Article 360 CC' in Heinrich Honsell, Vogt and Geiser (eds), *Basle Commentary CC I* (5th edn, 2014).

10. Federal Court decision 4C.263/2004.

beginning to the end, dated, and signed) or a public deed (notarization in front of a Swiss notary).

As the ACD is a so called 'absolute strictly personal right', substitution is not allowed. The APA is responsible to put the ACD into effect once the elder person becomes incapacitated. Thereby, the APA will have to verify whether: (i) the ACD has been validly executed, (ii) the requirements for its effectiveness are met, (iii) the appointee is fit for his/her duties, and whether (iv) further adult protection measures are required. With the death of the elder person, the ACD becomes ineffective.¹¹

Recognition of foreign enduring/lasting power of attorneys

As regards the recognition of foreign enduring (lasting) power of attorneys or similar instruments in Switzerland, according to Swiss conflict of law rules, the Hague Convention on the International Protection of Adults of 13 January 2000 (HCIPA) applies, also with regard to non-signatory states.

According to Article 5 HCIPA, the authorities at the habitual residence of the elder person are generally competent to issue protective measures. Likewise, based on Article 15 HCIPA, the powers granted by an ACD or similar instrument are governed by the law of the state of the elder person's habitual residence at the time the document was executed whereby the principal can opt for (i) the law of the state of his/her citizenship, (ii) the law of the state of his/her former habitual residence, or (iii) the law of the state in which property is located with respect to that property.

According to Article 22 HCIPA, foreign enduring power of attorneys are recognized in Switzerland if issued in a signatory state¹² or, alternatively, if issued at the habitual residence of the elder person or recognized in such state.

Despite this clear legal position, Swiss banks sometimes do not accept foreign enduring power of

attorneys. It is thus recommended to check with the respective Swiss financial institution beforehand and to execute a Swiss ACD (limited eg to the Swiss assets) as a backup solution.

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Statutory right of representation by spouse

Absent an ACD, the spouse or a registered partner (in case of a same-sex relationship) living in the same household are by law¹³ entitled to represent the other spouse in case of incapacity in relation to ordinary transactions eg for the payment of living expenses and asset management. For extraordinary transactions (eg real estate transactions), the consent of the APA is, however, necessary. In case the interests of the protected elder person are endangered, the APA limits the other spouses' authority or revokes the right of representation entirely and appoints a guardian.

Guardianship

Since the principle of subsidiarity applies, the APA only issues protective measures for an older person in need if the older person is incapacitated and neither an ACD is in place nor representation by the spouse/registered partner applies.¹⁴ Thereby different measures can be implemented, depending on the degree to which extent the older person is no longer in a position to take care for him or herself. Under Swiss law, testamentary capacity may still be given even in case of a general guardianship.

11. Alexandra Rumo-Jungo, 'Commentary to Article 363 CC' in Honsell, Vogt and Geiser (n 9).

12. Germany, Estland, Finland, France, Austria, Czech Republic, and UK.

13. Art 374 CC.

14. Art 389 CC.

Remedies

Challenge of contracts

Often, advantage is taken of elder vulnerable clients by firms, eg by inducing elder people to enter into costly contractual arrangements, by overcharging the elder person or using unfair business practices. Similarly, family members of elder persons may try to urge them to make substantial gifts because they fear that the older family member will get sick and use up their savings, depriving them of their future inheritance.

Under Swiss law, the conclusion of a contract requires the parties' express mutual consent with regard to all essential points of their contractual relationship. According to Article 16 CC and case law of the Swiss federal Supreme Court, there is a presumption that any person of age¹⁵ is capable of judgment provided such person does not lack the capacity to act because of mental disability. If either of the parties lack capacity, the respective contract is considered null and void. According to Article 8 CC, the person who claims a contract to be null and void because of lack of capacity has to prove the alleged absence of capacity.

If an elder person acts under a fundamental error at the time of the conclusion of a contract, the older person or their representative has to declare to the other contractual party that he/she is not bound by the contract, whereby such declaration must be made within one year after the discovery of the error, otherwise the contract is deemed to be ratified (Article 31 Swiss CO).

According to Article 469 CC, the same in principle applies with regard to testamentary dispositions made under error or under influence or malicious deception, threats or coercion. Such dispositions are deemed to be null and void if challenged within the one-year time period.

Challenge of testamentary dispositions

According to Article 467 and 468 CC, any person who has the capacity of judgment and is of age, has the testamentary capacity to make a last will or to enter into an inheritance agreement.

In case of incapacity, a respective last will is not deemed to be *per se* void (except in cases of severe deficiencies eg as to form). The same also applies with regard to other grounds for invalidity such as the lack of free will or testamentary dispositions being immoral or unlawful.

Any heir or other interested party may challenge a last will or inheritance contract according to Article 519 CC within one year after the discovery of the respective ground for invalidity. According to the principles mentioned above, the burden of proof lies with the person challenging the validity of the testamentary disposition.

The presumption of Article 16 CC generally also applies with regard to elder persons. However, in case of mental weakness due to old age (as with dementia), burden of proof is shifted: in cases of diagnosed dementia etc., it is presumed that the person suffering from dementia is incapable of judgment and the party relying on the validity of the testamentary disposition must prove that the testator was capable of judgment at the time of the disposition. This is, however, in practice, rather the exception.

Unworthiness to inherit

Unworthiness to inherit in the senses of Article 540 CC as mentioned above, is the legal consequence of an offence resulting in unworthiness to inherit specified by law and causes mandatory and comprehensive exclusion as an heir or legatee from participation in the estate.

Unworthiness to inherit must be distinguished from the concept of (punitive) disinheritance by the testator in the sense of Article 477 CC.¹⁶ While the

15. Eighteen years in Switzerland.

16. Art 477 CC (Disinheritance) (Free English Translation): '1. The testator is entitled by means of testamentary disposition to deprive an heir of his/her forced heirship right: if (1) the heir has committed a serious criminal offence against the testator or a person close to the testator, (2) if he/she has violated her family duties against the testator or with regard to a relative of the testator.'

two legal concepts arise out of similar offences, they are separate and independent concepts. Unlike (punitive) disinheritance by the testator, unworthiness to inherit is established by law and must be taken into account by public authorities and courts *ex officio*. Partial unworthiness to inherit is not possible, while by contrast partial disinheritance is possible. These cases are, however, in general difficult to prove.

Summary

Financial elder abuse is a serious issue also in Swiss society but there is lack of statutory provisions and case law is scarce. The problem will get worse in the future as the older population grows and elder persons control the majority of the nation's wealth. Depending on the situation at hand, acts of financial elder abuse may give rise to civil remedies (eg challenges of contracts, donations or of last wills etc.) or even qualify as a criminal offence in Switzerland. Thereby, the line between lawfully benefitting from

an elder adult and unjustified financial abuse is thin and the burden of proof is usually upon the victim or the victim's representative or the heirs.

Better than cure is prevention by having the elder person issue a Swiss ACD at a very early stage, eg before suffering from any signs of dementia. The involvement of the Adult Protection Authorities may in certain circumstances be justified even though this may entail the risk of estranging the family member who notified the Adult Protection Authorities from the older person if it turns out that the report was unjustified. Private client practitioners need to be aware of these issues and better protect vulnerable clients from being put under pressure by greedy family members in particular when assisting in their client's estate planning.

Better than cure is prevention by having the elder person issue a Swiss ACD at a very early stage

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