

# Financial Abuse Cases In Which a Professional Commits Undue Influence

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## Acknowledgements

- ▶ Some of this presentation's content was prepared for the online curriculum "Handling Financial Elder Abuse Cases When a Professional Uses the Tactics of Undue Influence." Heisler drafted the curriculum, which is being developed by San Diego State University Project Master and is due to be released by early 2015. It is funded through a generous grant from the Huguette Clark Family Fund for Prevention of Financial Abuse.
- ▶ The Undue Influence tactics wheel was developed by Brandl, Heisler, and Stiegel for the YWCA of Omaha curriculum, Undue Influence: The Criminal Justice Response (2006).
- ▶ We acknowledge and thank Project Master and the YWCA of Omaha for allowing us to use some of the content here.

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## Why This Workshop

- ▶ More cases of undue influence (UI) by professionals
- ▶ Cases differ from UI by family & friends
  - Different sources of information may exist
  - Some elements may be easier to prove
  - Burden of proof may diminish or shift
  - Professional standards of practice and ethical codes may exist and have an impact
  - May be additional or different obstacles

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## Workshop Objectives

- ▶ Define UI
- ▶ Identify professionals' opportunities & tactics
- ▶ Identify potential obstacles to investigating alleged UI by professionals
- ▶ Identify resources for investigating UI by professionals

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## Key Definitions

- ▶ Professional: training and education in specialized field; often licensed by a professional entity
  - Examples: attorney, accountant, clergy, physician
- ▶ Fiduciary
  - Depends on law and circumstances
  - Generally, must act in a totally trustworthy manner and make decisions that are consistent with a person's expressed wishes or in the person's best interest
- ▶ A person can be in one or both categories

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## Key Definitions: Undue Influence

- ▶ "The substitution of one person's will for the true desires of another."
- ▶ Fraud, duress, threats or other types of pressure often accompany it.
- ▶ It occurs when "one person uses his or her role and power to exploit the trust, dependency, and fear of another."
  - Quinn, 1998

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### Key Definitions: Undue Influence

- ▶ Other psychological definitions and models exist
- ▶ Legal definitions exist and vary from state to state
- ▶ Pattern of tactics - process not an event
- ▶ Method to commit a crime

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### Dynamics of Undue Influence



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### Case Example:

- ▶ Pearl:
  - legally blind
  - has dementia
  - no children
  - widowed at age 90
- ▶ James:
  - Pearl's lawyer
  - from a distinguished family
  - a Shriner with Pearl's late husband
  - former special justice for mental health issues, court commissioner, town attorney
  - named by Pearl as her agent under a POA and as executor of her will

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### Case Example (cont.):

- ▶ James began acting as agent after Pearl was widowed. According to her family James then:
  - Cut off her phone
  - Changed her doctors
  - Wouldn't let relatives visit unsupervised
  - Obtained Pearl's checkbook and signature stamp
  - Obtained from relatives their keys to Pearl's home
  - Hired his then-girlfriend (who he subsequently married) to serve as Pearl's personal assistant
  - Paid his son to do work for Pearl
  - Entered into an agreement with Pearl whereby she paid him \$9,750/mo. (3x her monthly income) to manage her assets and affairs
  - Told hospital staff that Pearl had no family when she was hospitalized

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### Undue Influence: Common Tactics



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### Discussion

- ▶ What tactics were used in the case example?

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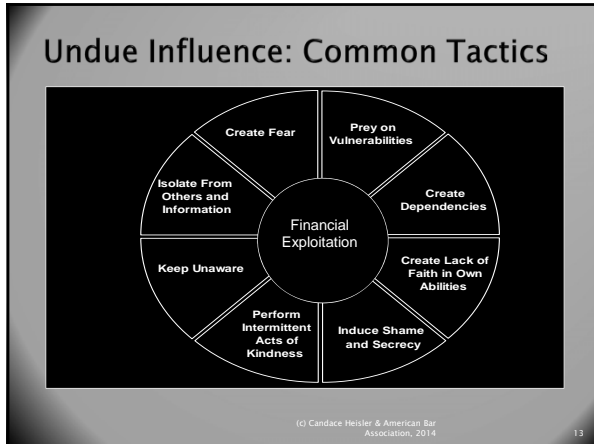
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- ### Victim Susceptibility
- ▶ ANYONE is susceptible to UI
    - Ill or cognitively impaired
    - Adverse life conditions
    - Exhausted, distracted
    - Lonely
    - Frightened
    - Dependent
    - Naïve, uninformed, lack of expertise
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### What About Capacity?

"Soundness of mind and body does not imply immunity from undue influence. It may require greater ingenuity to unduly influence a person of sound mind and body, and more evidence may be required to show that such a person was overcome than in the case of one weak of body and mind. But history and experience teach that minds of strong men and women have been overborne, and they have been by a master mind persuaded to consent to what in their sober and normal moments, and free from undue influence, they would not have done."

*Estate of Olson*, 19 Cal.App. 379, 386 (1912)

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## Relationship of Capacity to Susceptibility

- Diminished capacity increases susceptibility to UI
  - Increases dependence
  - Makes person less risk-averse
  - Reduces the ability to understand complex transactions or evaluate professional advice
  - Decreases the ability to make good decisions and resist tactics of UI

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## Discussion

- ▶ Are victims more susceptible to UI when it is committed by a professional or fiduciary?

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## Professionals

- ▶ "Status"
  - By virtue of their role or position
  - Societal disbelief that such a person would misuse their position
- ▶ "Trust"
  - Professional may have a relationship of trust with the victim and will likely actually be trusted by the victim
- ▶ "Power Imbalance"
  - Inherent power imbalance between the parties due to the role (e.g., clergy, doctor) or the professional's specialized knowledge (e.g. investments, business ventures, tax preparation).

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## Perpetrators

### Opportunists

- ▶ Existing relationship
- ▶ Take advantage of situation
- ▶ Family & trusted friends
- ▶ Others (non-professionals)
- ▶ Professionals

### Predators

- ▶ No existing relationship
- ▶ Target and groom
- ▶ Family & trusted friends
- ▶ Others (non-professionals)
- ▶ Professionals

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## Legal Elements of Undue Influence



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## Typical Legal Elements

- ▶ Susceptibility to influence (including age, infirmity, isolation, and dependence on others),
- ▶ A confidential or fiduciary relationship between influencer and victim,
- ▶ The opportunity to exert UI and use of the relationship by the influencer in an attempt to control the weaker parties affairs, and
- ▶ A change of disposition that is unconscionable, unnatural, and unduly benefitting the influencer which may be counter to longstanding patterns of behavior.

– Quinn, et. al., 2010 at 9, 56-57

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## Confidential Relationship

- ▶ Persons in positions of trust and confidence have an unfair advantage over those whose trust and confidence they hold.
- ▶ This confidential relationship imposes a duty to act in the other's best interest.
- ▶ Confidential relationships can be fiduciary, reliant, or dominant-subservient.

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## Confidential Relationship

- ▶ A "fiduciary relationship" -- a relationship in which there is a legal duty of fair dealing and acting in the best interest of the other party, e.g., agent under a power of attorney, trustee, guardian or conservator
- ▶ A "reliant relationship" -- a special relationship of confidence or trust, where there is reliance on the alleged influencer for judgment or advice, such as a doctor-patient
- ▶ A "dominant-subservient," -- one party is subservient to the influencer, e.g., a person who is incapacitated and their caregiver

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## Legal Significance of a Confidential Relationship

- ▶ Second of four elements of UI
- ▶ May create a presumption that the professional committed UI
- ▶ May affect burden of proof
  - Reduce level of required proof
  - Shift burden of proof to alleged exploiter

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### Example: Reduced Burden of Proof

- ▶ “A person who challenges a donation because of fraud, duress, or **undue influence**, must prove it by clear and convincing evidence. However, if, at the time the donation was made or a testament executed, a relationship of confidence existed between the donor and the wrongdoer and the wrongdoer was not then related to the donor by affinity, consanguinity, or adoption, the person who challenges the donation need only prove the fraud, duress, or undue influence by a preponderance of the evidence.”
  - Louisiana Civil Code 1483

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### Investigating Undue Influence



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### Discussion

What are the challenges when investigating allegations of undue influence committed by a professional?

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### Investigating Undue Influence

- ▶ Challenges
  - Your work will be carefully scrutinized as the professional may face loss of professional license, livelihood, and community status
  - You may not understand the intricacies of the work of the professional and may lack access to experts who can help you understand what the suspect did or whether it was proper practice
  - Professional protection
  - Biases (e.g., prior good deeds, good family, political status)
    - Character witnesses to attest to professional's good character

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### Investigating Undue Influence

- ▶ Capacity assessment
  - Now and when critical events occurred
- ▶ Explore relationship between victim and influencer
  - When did it begin? How did it progress?
  - What did the suspect do to isolate the victim from family, friends, trusted advisors, activities, and information?
  - Did the suspect lie to or mislead the victim?
  - How did the deceit affect the victim's decisions?

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### Investigating Undue Influence

- ▶ Explore before and after questioned events
  - Victim routine spending habits
  - Victim gifting and estate planning
  - Victim patterns of obtaining financial or legal advice
    - Professionals
    - Family and friends
    - Other

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### Investigating Undue Influence

- ▶ Develop a timeline of events
- ▶ Collect relevant documents
  - Consider value of coordinated investigation (e.g., MDT)
- ▶ Consider how to protect remaining assets and recover what has been taken

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### Investigating Undue Influence

- ▶ Contact the professional licensing board or agency
  - There may be professional rules of conduct, ethical rules, or standards that are relevant to your case.
  - For example, there may be requirements that were ignored or violated such as that potential conflicts of interest must be disclosed; prohibitions on continuing relationships where a conflict of interest exists; and the mandatory use of hiring, retainer, or other agreements specifically describing the duties and relationships between the professional and victim.

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### Investigating Undue Influence

- ▶ Explore with the licensing board or agency:
  - Professional's History:
    - Is there a current disciplinary investigation?
    - Have there been prior disciplinary actions or other allegations of similar conduct?
  - Locating experts
    - Can it assist with locating experts on standard of practice?
  - Restitution
    - Are there restitution funds for losses due to misconduct?
- ▶ Regardless of what you learn from the licensing board or agency, your independent investigation is necessary.

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## Investigating Undue Influence

- ▶ Understand the elements of UI in your state
- ▶ Do not make assumptions about the nature of the relationship between a victim and a professional
- ▶ No short cuts—anticipate that every step will be challenged by counsel
  - Careful and complete documentation is critical

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## Resources

- ▶ Quinn, M.J., Goldman, E., Nerenberg, L., and Piazza, D. (March 2010) "Undue Influence: Definitions and Applications, Final Report to the Borchard Foundation Center on Law and Aging, available at [www.courts.ca.gov/documents/UndueInfluence.pdf](http://www.courts.ca.gov/documents/UndueInfluence.pdf)
- ▶ Brandl, B., Heisler, C.J., and Stiegel, L.A. (2006) Undue Influence: The Criminal Justice Response, YWCA of Omaha, available at [www.ncall.us](http://www.ncall.us). See:
  - Trainer Guide: <http://ncall.us/content/undue-influence-teaching-plan>
  - Participant Guide: <http://ncall.us/content/undue-influence-participant-materials>
  - PowerPoint Slides: <http://ncall.us/content/undue-influence-powerpoint-slides>

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## Resources

- ▶ American Bar Association & American Psychological Association Capacity Assessment Guides:
  - ABA Commission on L. & Aging & Am. Psychological Assn., Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005)
  - ABA Commission on L. & Aging, Am. Psychological Assn., & Nat'l College of Probate Judges, Assessment of Older Adults with Diminished Capacity: A Handbook for Judges (2006)
  - ABA Commission on L. & Aging & Am. Psychological Assn., Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists (2008) [this guide contains the most information on UI of the three]
- ▶ All three guides can be accessed at [www.americanbar.org/groups/law\\_aging/resources/capacity\\_assessment.html](http://www.americanbar.org/groups/law_aging/resources/capacity_assessment.html)

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Questions?

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Crime

# Elderly woman in Va. cheated out of savings by lawyer she trusted, family alleges



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**Correction:** Based on an error in a lawsuit, an earlier version of this article reported that a nephew of Heidi Pender had allegedly received stolen funds. The nephew did not receive any money. The lawsuit misidentified the relationship between Pender and the person who received the money.

Edward and Pearl Buckley at a Shriners event. (Family photo)

By [Justin Jouvenal](#) August 4

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Pearl Buckley was like an “old Southern grandmother,” always welcoming family into her Fairfax County home, her grandniece Catherine Bray said. Buckley had no children of her own, but she and her husband, Edward, would shuttle Bray to school, help with homework and offer dinner.

When Edward died and Pearl was legally blind and suffering from dementia, the family was there to help. Relatives organized in-home care for the 90-year-old and took her to doctor’s appointments.

But with a single phone call in 2008, family members said they were cut out of her care — and then her life. Buckley’s lawyer told them that he had power of attorney, or broad legal authority to manage her affairs and finances under an agreement she signed years earlier. He was also the executor of the couple’s wills.

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James Kincheloe slowly took over every aspect of Buckley’s life over the next 18 months, exercising a control so complete that one relative described her as a “prisoner in her own home.” The family alleges in a lawsuit and interviews that he drained more than \$850,000 from her life savings, changed her doctors, cut off her phone and wouldn’t let relatives visit unsupervised.

Most galling of all to her family, the woman who loved having relatives around spent her final moments alone in a hospital. Family members said Kincheloe never informed them that Buckley was dying in 2009.

Pearl Buckley (Family photo)

An attorney for some of Buckley’s family members said it

is one of the worst cases of elder financial abuse he has seen in Virginia and all the more troubling because Kincheloe was able to legally circumvent portions of a state law intended to protect the elderly from just such a theft. He fears it may happen again if the law is not changed.

Authorities worry there could be a wave of similar cases as 10,000 baby boomers reach 65 each day between now and 2030, according to a federal estimate.

Kincheloe, 66, entered an Alford plea to a charge of embezzlement in the case in Fairfax County last month. In an Alford plea, a defendant does not admit guilt but acknowledges there is enough evidence for a conviction. Prosecutors say he stole at least \$460,000, and he faces up to 20 years in prison when he is sentenced this month.

James Love IV, Kincheloe’s attorney, said his client was wrongfully prosecuted and performed the work he was hired to do.

“I think [the case is] more an example of poor record-keeping than anything else,” Love said. “The money was paid out to caregivers. . . . [Buckley] asked Mr. Kincheloe to get her away from her beneficiaries.”

But Buckley’s family is still reeling.

“To have everything they worked so hard for disappear is heartbreaking,” said Joan Brown, wife of one of Buckley’s nephews.

Edward Buckley (Family photo)

‘I will be there for you’

Edward and Pearl Buckley lived on Blake Lane in Fairfax for more than 60 years, family members said. He was a World War II veteran and a supervisor at Washington Gas. She worked in accounting at the federal printing office. Family members said they dedicated themselves to youth causes such as the Shriners Hospitals for Children in Philadelphia.

The Buckleys met Kincheloe through the Kena Shriners temple in Fairfax, where Edward was a potentate and considered him a friend, family members said. Kincheloe drafted the couple's wills and an agreement with Pearl, giving him power of attorney if she became incapacitated.

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When Edward died in 2007, Kincheloe was appointed as executor of his estate. And when Pearl's health and mental faculties began to decline in 2008, he invoked the power of attorney.

Kincheloe had been a town attorney in Clifton, was a special justice for mental health issues and commissioner for the Fairfax courts. His family was well known in the county.

Some of Pearl Buckley's family members said that pedigree gave them a false sense of security when he called her nephew Leon Fox and his wife, Sandra, in March 2008. They said Kincheloe told them that he would be managing Buckley's affairs and asked for her checkbook, their keys to her home and a stamp she used to sign her name.

Prosecutors said Kincheloe then entered into an agreement with Pearl, saying she would pay him \$9,750 a month to manage her home and affairs — three times her monthly income.

"I assure you that I will be there for you in the manner you have asked me to be, and that you are assured of my commitment to your well being," it read.

At the time, prosecutors said, Buckley was unable to read and often asked her caregivers to speak to her dead husband. Prosecutors said in court that they think Buckley never signed the agreement — that Kincheloe instead used her signature stamp to endorse it.

Four days later, prosecutors said, Kincheloe's girlfriend and later wife, Heidi Pender, entered into a separate agreement with Buckley to serve as



her personal assistant for a fee of \$35 an hour. The agreement was also endorsed with the stamp.

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Over the coming months, relatives said, Kincheloe increasingly isolated Buckley from her family.

No one answered Buckley's phone, and Kincheloe didn't return calls. Relatives noticed strange people had moved onto Buckley's property. They said Buckley seemed afraid to talk in the presence of Kincheloe or her caregivers.

"We would go to visits on Sundays, and when she wasn't there, we would call all the hospitals," said Sandra Fox. "One day, we did find her at the hospital. We had no idea why she was there. The nurse said we were under the impression she had no family."

'It's a powerful thing'

The treatment raised the suspicions of Buckley's relatives, but it was what they couldn't see at the time that was truly devastating.

In a civil lawsuit, the family alleges that Kincheloe or Pender engaged in more than 700 transactions on a bank account in Buckley's name, which continued even after her death. Prosecutors said Pender was paid more than \$165,000 for 16 months as a personal assistant but performed only a small fraction of the work she claimed.

Pender is facing six counts of receiving stolen property in connection with the case.

Buckley's nest egg also was used to enrich a web of Kincheloe and Pender's friends and family members, relatives allege in the lawsuit. It says that one of Kincheloe's sons was paid nearly \$36,000, and other associates got more than \$50,000 for work on Buckley's property.

When Buckley died in September 2009, relatives said, they were crushed that they were not notified until the day after her passing. Things grew worse at the funeral: They said the rings Buckley had said she wanted to be buried with had disappeared.

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“None of it was done the way Mrs. Buckley wanted,” Sandra Fox said.

In November 2010, Buckley’s relatives hired a lawyer to begin investigating Kincheloe’s handling of the Buckleys’ estates. Kincheloe had not distributed any proceeds and had failed to complete filings with a court overseer who monitors executors of estates, relatives said.

When the relatives’ attorney asked for information about the estates, Pender wrote a letter to the court overseer, which was obtained by the family’s attorney, alleging that some of Buckley’s beneficiaries might have stolen money, jewelry and coins from her. Pender also alleged that the family neglected Buckley and that the neglect played a role in Buckley’s death.

She reiterated those claims in an e-mailed statement.

“That any governmental official would show support for any individual who terrified and held a senior woman hostage, then second guess that senior woman’s decisions on the pretext of protecting her, is to reward elder abusers under cover of law,” Pender wrote.

Family members said the claims were baseless and a smoke screen to cover Kincheloe and Pender’s alleged thefts. After a legal battle, relatives succeeded in having Kincheloe removed as executor of the Buckleys’ estates.

Love, Kincheloe’s attorney, denies that his client tried to isolate Buckley from the family. He said Kincheloe was trying to protect Buckley, who he said was mistreated while in the family’s care.

Joseph Stuart, one of the family’s attorneys, said the case points to a hole in Virginia law. In drafting Edward and Pearl Buckley’s wills, Kincheloe and the Buckleys waived an option requiring the executor to get insurance in the event the estates were misappropriated.

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Stuart said the insurance, or surety bond, would have allowed Buckley’s beneficiaries to be reimbursed for Kincheloe’s misdeeds and possibly have prevented the entire mess. Stuart said Kincheloe, who filed for bankruptcy shortly after he was removed as executor, may not have been able to get the necessary insurance if insurers discovered he was in financial distress.

He says Virginia should require attorneys qualifying as executors for non-relatives to get the surety bond.

There are no statistics on the prevalence of abuse by the executors of estates or those with power of attorney, but the National Center on Elder Abuse said 41 out of 1,000 elderly people in one survey said they had suffered major financial exploitation.

Stuart said power of attorney can be an effective tool for managing the affairs of the incapacitated, but it can just as easily be abused.

“It’s like a gun in your home,” he said. “You can use it to defend yourself, or it can be used for bad things. It’s a powerful thing.”

In all, family members allege that \$876,000 was stolen from the Buckleys, but that paled in comparison with what else was lost.

“I felt like I was robbed of the last couple years of my aunt’s life,” her grandniece Bray said.

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Crime

# Attorney James Kincheloe Jr. gets six years for embezzling from elderly woman



By [Justin Jouvenal](#) August 14

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A Fairfax County attorney was sentenced to six years in prison Thursday for [embezzling nearly \\$500,000](#) while he was entrusted to care for an elderly woman and her estate, according to the Virginia attorney general's office.

James G. Kincheloe, Jr., 67, who lives in Fauquier County, was convicted of a single count of embezzlement in the case in Fairfax County Circuit court in July. Kincheloe entered an Alford plea, meaning he did not admit guilt but acknowledged that prosecutors had enough evidence for a conviction.

Fairfax County Judge Jane M. Roush ruled that Kincheloe will have to repay more than \$483,000 to the estate of Pearl Buckley, a Fairfax City resident who died in 2009 at the age of 90. A separate civil suit by the family claimed almost \$900,000 was taken from Buckley.

Kincheloe served as the executor of Buckley's will and that of her deceased husband, Edward. He also had power of attorney over her. At the time of her death, Buckley was suffering from dementia and was legally blind.

Before she died, prosecutors said Kincheloe entered into an agreement with her to manage her personal affairs at a rate of more than \$9,700 a month — three times Buckley's income. They also said his now-wife,

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Heidi Pender Kincheloe, entered a separate agreement to serve as Buckley's personal assistant for \$35 an hour.

Prosecutors say Pender Kincheloe only worked a fraction of the hours she billed for and she has been charged with six counts of receiving stolen property in Prince William County. She denies the charges.

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