ASPATORE

Inside the Minds: Elder Law Client Strategies in California

Published by Aspatore Books, a Thomson Reuters business

Fighting Financial Elder Abuse In California

By Niall P. McCarthy and Eric J. Buescher
COTCHETT, PITRE & McCARTHY, LLP

Introduction

Financial elder abuse cases are on the rise in California. The breadth of predatory practices is staggering.
Victims come from all socioeconomic backgrounds. Perpetrators can be family members, trusted professionals, or large financial institutions. California seniors are in need of help. Understanding the history and breadth of California elder abuse law is a vital first step for anyone looking to practice in this field.

The Elder Abuse And Dependent Adult Civil Protection Act (EADACPA)

The Purpose, Intent, And History Of Elder Abuse Statutes

As reflected in the legislative intent of California's elder abuse statutes, the definition of abuse is broad and is designed to encapsulate a wide variety of conduct that is harmful to senior citizens or dependent adults. See generally Cal. Welf. & Inst. Code § 15600.[1] The elder abuse statutes exist to protect an especially vulnerable portion of the population that is "subject to abuse, neglect, or abandonment." See § 15600(a). A significant number of those persons have "disabilities" and "mental and verbal limitations" that leave them "vulnerable to abuse and incapable of asking for help and protection." See § 15600(c). The Legislature further recognized that "most elders and dependent adults who are at the greatest risk of abuse, neglect or abandonment by their families or caretakers suffer physical impairments and other poor health that place them in a dependent and vulnerable position." See § 15600(d). As a result of these facts, the Legislature declared that "infirm elderly persons and dependent adults are a disadvantaged class," and that "cases of abuse of these persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse." See § 15600(h). In order to attempt to remedy this problem, the Legislatures specifically crafted the elder abuse statutes to "enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults." See § 15600(j).

[1] All statutory citations are to the California Welfare and Institutions Code, unless otherwise noted.

The Legislative History of the EADACPA

In 1982, the "Older Californians Act" was passed to protect elders in California. The Older Californians Act provided reporting requirements to encourage health care providers to report suspected abuse and to collect information about abuse and protect individuals who reported it. In 1985, those provisions were replaced with a more detailed and broader definition of abuse. The new definition included not only physical abuse, but also "fiduciary abuse or other treatment with resulting harm or pain or mental suffering, or the deprivation by a care custodian of goods or services which are necessary to avoid physical harm or mental suffering." (Stats. 1985 Ch. 1164.) The including of "fiduciary abuse" was the first instance of protection specifically for elders from financial abuse, but was limited in its application to those who owed a fiduciary obligation to the elder.

In 1991, the protections were amended and retitled the "Elder Abuse and Dependent Adult Civil Protection Act" (EADACPA). In 1994, the legislature instituted more stringent reporting requirements and created criminal penalties for "causing or permitting" elders to suffer abuse, physical pain, mental suffering, or placing them in danger.

In 2004, the legislature redefined "fiduciary abuse" as "financial abuse." The legislature found that "fiduciary abuse" was too restrictive and that the language had failed to protect elders from unfair losses of their financial assets. The Legislature also allowed for the recovery of attorneys' fees from the abuser.

Finally, in 2008, the legislature rewrote the definition of financial abuse, to add "obtains" the property of an elder to the prior list of "secretes, appropriates, or retains"; clarified that liability existed if such an action was done "for a wrongful use"; and removed the prior requirement that the defendant's conduct be taken in "bad faith," replacing it with a requirement that the defendant "knew or should have known" that the conduct was "likely to be harmful to the elder or dependent adult." "This amendment constitute[d] a material change in the statutory definition of financial abuse. As the 2008 amendments to the statutory scheme were substantive, rather than procedural, and the Legislature did not state that the amendments were retroactive in effect, they are [not]." *Das v. Bank of America*, 186 Cal.App.4th 727, 736-37 (citations omitted).

Financial Elder Abuse Defined

Financial abuse occurs when any person or entity (1) takes, secretes, appropriates, obtains, or retains property, (2) for a wrongful use, with the intent to defraud, or by undue influence, or (3) assists in doing the prohibited acts. The breadth of this definition now exists directly in the statute as a result of the 2008 amendments. After the passage of those amendments, financial abuse of an elder[2] or a dependent adult[3] is statutorily defined at § 15610.30 as follows:

a. "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:

1. Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

---

[2] An elder is defined by statute as "any person residing in this state, 65 years of age or older." § 15610.27.

[3] A "dependent adult" is "any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age." § 15610.23.

2. Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
3. Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70.

b. A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.

c. For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult.

d. For purposes of this section, "representative" means a person or entity that is either of the following:

1. A conservator, trustee, or other representative of the estate of an elder or dependent adult.
2. An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.

The Evolution of Financial Elder Abuse Claims

What started in 1985 as "fiduciary abuse" is now a much broader and more powerful tool to protect California elders who are ripped off. Because the statute's definition of "financial elder abuse" is written largely in the disjunctive, a financial elder abuse claim can be proven in numerous ways. Financial elder abuse occurs when a person does any of the following:

- takes, secretes, appropriates, obtains **or** retains any interest in the person property of an elder or dependent adult; AND does so for a wrongful use, with the intent to defraud, **or** both; OR
- Assists in doing any of those acts; OR
- Does any of those acts "by undue influence."[4]

The statue also provides a conclusive presumption of financial abuse where the defendant "knew or should have known" that its conduct "is likely harmful to the elder or dependent adult." § 15610.30(b). This creates both a subjective and objective test to determine whether the presumption applies. First, the presumption can be proven if the defendant "subjectively" "knew" his or her conduct would be harmful to the elder. This requires testimony or evidence related to the actual state of mind of the defendant. However, the presumption can also be found where a plaintiff presents evidence that "objectively" the defendant "should have known" that the conduct would be harmful, which does not require evidence about the specific intention of the wrongdoer. See *Wood v. Jamison* (2008) 167 Cal.App.4th 156 (discussed later in this chapter).

[4] Undue influence is defined as "excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity." §15610.70. According to the statute, this requires consideration of (1) the vulnerability of the victim, (2) the influencer's apparent authority, (3) the actions or tactics used by the influencer, and, (4) the equity of the result. *Id.* An inequitable result alone is insufficient to prove undue influence. *Id.*

Proving Financial Elder Abuse Liability

The CACI Jury Instructions reflect the broad nature of the claims and the numerous ways they can be proven. CACI 3100 provides:

> Plaintiff claims that defendant(s) violated the Elder Abuse and Dependent Adult Civil Protection Act by taking financial advantage of Plaintiff/Decedent. To establish this claim, Plaintiff must prove that <u>all of the following are more likely to be true than not true</u>:
>
> 1. The Plaintiff/Decedent was 65 years of age or older or was a dependent adult at the time of the conduct;
> 2. Defendant(s) did one of the following:
>   a. took/hid/appropriated/obtained/retained the Plaintiff's/Decedent's property;
>
> **OR**
>
>   b. assisted in taking/hiding/appropriating/obtaining/retaining the Plaintiff's/Decedent's property;
> 3. Defendant(s) took/hid/appropriated/obtained/retained OR assisted in taking/hiding/appropriating/obtaining/retaining the property
>   a. for a wrongful use OR
>   b. with the intent to defraud OR
>   c. by undue influence;
> 4. Plaintiff/Decedent was harmed; and
> 5. Defendant(s)' conduct was a substantial factor in causing Plaintiff's harm.
>
> One way Plaintiff can prove that Defendant(s) took/hid/appropriated/obtained/retained the property for a wrongful use is by proving that Defendant(s) knew or should have known that his/her conduct was likely to be harmful to Plaintiff Decedent.
> Defendant(s) took/hid/appropriated/obtained/retained the property if Plaintiff/Decedent was deprived of the property by an agreement, gift, will, trust or other testamentary instrument regardless of whether the property was held by Plaintiff/Decedent or by his/her representative.
>
> CACI 3100 (formatting edited, bolding added).

A plaintiff must prove those five elements by a <u>preponderance of the evidence</u> in order to prove liability. [is this part of the quoted material?- No it is not.]

Additional Remedies

Attorneys' Fees

The legislature acted with a stated desire to encourage private attorneys to investigate and prosecute civil elder abuse claims. Moreover, the wrongdoer, not the elder, should pay the elder's attorneys' fees in meritorious cases. In order to recover attorneys' fees in a financial elder abuse case, the plaintiff must only prove liability for financial elder abuse by a preponderance of the evidence. See § 15657.5. There is no requirement that the higher clear and convincing threshold used to award attorneys' fees in physical elder abuse cases be met. See § 15657.

Punitive Damages
Elder abuse cases (financial and physical) are about deceit and mistreatment of seniors. They are not typical contract or tort claims. Elder abuse cases are largely driven by a basic human instinct: greed. As such, the prevalence of punitive damages in such cases is much higher than typical litigation. While punitive damages are unrealistic in many types of disputes, just the opposite is true in elder abuse litigation. Practitioners should pursue discovery (including the net worth of defendants) to address punitive damages arguments during trial. While punitive damages is an afterthought in most discovery plans, punitive damage discovery should be at the forefront of elder abuse cases.

Significant Financial Elder Abuse Case Law
Given the relative newness of the statute, there is not a substantial amount of appellate case law in California related to financial elder abuse cases. However, the cases involving financial elder abuse demonstrate both the breadth and effectiveness of the statute, and certain limitations on pleading and proving liability against parties who are ancillary to the abuse.

In 2010, the Second Appellate District considered the case of *Das v. Bank of America*.[5] In that case, the plaintiff sued Bank of America on behalf of her deceased father. The trial court sustained demurrers from Bank of America to the claim that it was liable for financial elder abuse by third parties, and the appellate court affirmed the dismissal.

The facts alleged in the complaint, as described by the appellate court, "vividly depict[ed] the reprehensible victimization of [plaintiff's father] by third parties," and were described by the court as follows:

> Appellant's father was born in 1933. In August 2004, [Decedent] experienced a stroke or strokes. He was found to have brain tumors, and developed ischemic vascular dementia. His ability to move and speak was impaired; he experienced deficits in language, communication, reasoning, personality, and judgment; and he experienced mood swings. As a result, his ability to assess the consequences of his actions and the motivations of other people was "severely compromised," as was his capacity to manage his finances. In addition, [Decedent] experienced problems with drooling, acted in a confused and disorganized manner, and used a wheelchair. Some or all of his deficiencies were "readily apparent to the eyes of even casual observers."
>
> In late 2006 or early 2007, [Decedent] committed himself to a series of real estate transactions. In the course of these transactions, he obtained a "suspicious" $105,000 mortgage loan from [Bank of America] regarding a parcel of property in Georgia. Within a short period of time, he became delinquent on the loan payments, and [Bank of America] foreclosed on the property.

[5] (2010) 186 Cal.App.4th 727.

> As a result of the loss of the property, [Decedent] became despondent, and his condition deteriorated. In attempting to achieve a financial recovery, he fell prey to a series of illegal lottery scams. The perpetrators of these scams lured their victims with promises of lottery winnings, and instructed the victims to pay taxes by wire in order to claim their prizes. In connection with the scams, [Decedent] liquidated his assets, placed the funds in his accounts held by [Bank of America], and repeatedly instructed [Bank of America] to transfer sums to bank accounts in other countries. [Bank of America] complied with his instructions. The transferred sums exceeded $300,000.

Das, 186 Cal.App.4th at 732-733.

The plaintiff sued, alleging that Bank of America's failure to report the suspicious conduct regarding her father to the authorities constituted financial elder abuse relying principally on "the Financial Elder Abuse Reporting Act of 2005 . . . [that] declares banks and other financial institutions to be 'mandated reporter[s] of suspected financial abuse of an elder,' in cases of 'financial abuse' as defined in accordance with § 15630. As mandated reporters, banks are obliged to report 'suspected financial abuse' they encounter 'in connection with providing financial services with respect to an elder' to local law enforcement or adult protective services agencies." *Id.* at 735-736 (citations omitted).

The court first rejected the contention that violation of the reporting requirements constituted "negligence *per se*" sufficient to state a cause of action under some other theory. *Id.* The court reached this conclusion because the reporting requirements of § 15630.1 explicitly contain a statement that the reporting statute "does not 'limit, expand, or otherwise modify any civil liability or remedy that may exist under this or any other law.' The provision thus expressly negates any inference of legislative intent to enlarge the legal bases for a private civil action predicated on a bank's failure to report suspected financial abuse." *Id.* at 737 (quoting § 15630.1(g)).[6]

The court then analyzed whether the plaintiff had asserted a financial elder abuse claim.[7] At the outset, the court reviewed the statutory language providing for liability for elder abuse and concluded the allegations, even if true, did not demonstrate that Bank of America had "directly engaged in financial abuse." *Id.* at 744. As the court noted, "nothing in appellant's complaints suggests that [Bank of America], in issuing a loan to [Decedent] and transferring his funds at his request, obtained his property for an improper use, or acted in bad faith or with a fraudulent intent." *Id.*

The court then analyzed whether Bank of America could be held liable for "assisting" the third parties in engaging in financial elder abuse. "The elder abuse statutes do not define the term 'assists,' and no court has addressed the meaning of the term." *Id.* In interpreting the term "assists" in the context of the elder abuse statutes, the court explained:

> In our view, the provision cannot be understood to impose strict liability for assistance in an act of financial abuse. Generally, California has adopted the common law rule for subjecting a defendant to liability for aiding and abetting a tort. Liability

---

[6] While a violation of the reporting requirements found in § 15630.1 can give rise to civil penalties, those penalties "shall be recovered only in a civil action brought against the financial institution by the Attorney General, district attorney, or county counsel. No action shall be brought under this section by any person other than the Attorney General, district attorney, or county counsel [and] nothing in the Financial Elder Abuse Reporting Act of 2005 shall be construed to limit, expand, or otherwise modify any civil liability or remedy that may exist under this or any other law." *Das*, 186 Cal.App.4th at 736 (quoting § 15630.1(g)).

[7] Because the decedent had passed away in 2008, the amendments in 2008 to change presumption of the existence of abuse from "bad faith" to "knew or should have known" did not apply to plaintiff's claims. It is not clear whether the amendments to the statute would have changed the outcome of the case.

> may … be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. The adoption of this rule predates the elder abuse statutes.
>
> The Legislature is presumed to be aware of existing judicial decisions when it enacts or amends statutes, the term "assists," as found in former section 15610.30, subdivision (a)(2), is properly interpreted in light of the rule. Under that rule, a bank may be liable as an aider and abettor of a tort if the bank, in providing ordinary services, actually knew those transactions were assisting the customer in committing a specific tort. We thus conclude that when, as here, a bank provides ordinary services that effectuate financial abuse by a third party, the bank may be found to have "assisted" the financial abuse only if it knew of the third party's wrongful conduct.
>
> *Id.* at 744-745.

A financial elder abuse plaintiff can prevail by showing that a third party was aware of the wrongdoing of the direct abuser. However, proving "knowing assistance" does not always require direct knowledge or participation, but can also be proven by inferences from the circumstances. See *Wood v. Jamison* (2008) 167 Cal.App.4th 156.

In Wood, a jury found an attorney (Jamison) who represented an elderly client (Peterson)[8] to have assisted in the financial abuse of an elder by a third party (McComb), who was also represented by Jamison. The appellate court described the conduct of Jamison and McComb as follows:

> Donald and Merle Peterson had been married for 55 years. A few months prior to the incidents leading to this lawsuit, the Petersons' only child died and Donald Peterson moved into an Alzheimer's facility.
>
> Shortly after her son's death and her husband's move to the Alzheimer's facility, Merle Peterson (Peterson), then 78 years old, met Patrick McComb. McComb told Peterson he was her nephew. In fact, he was not related to her. Over the next few weeks, McComb convinced Peterson to transfer approximately $174,000 to him in a series of transactions. McComb also convinced Peterson, in her capacity as trustee of the Peterson trust, to obtain a $250,000 loan secured by her primary residence. McComb told Peterson that the money would be invested in a nightclub joint venture.
>
> Jamison was representing McComb in the joint venture. He also performed legal services for Peterson. The services included meeting with Peterson and McComb in his office to discuss financing of the nightclub; locating the lender for Peterson's loan; advising Peterson about various lenders; selecting the lender; gathering documents necessary to close the loan; completing the loan application; transmitting documents under cover of his letterhead; communicating with the lender and title company; reviewing loan documents; and attending the loan escrow closing with Peterson.

[8] The trustee of Peterson's trust who prosecuted the appeal was Craig Wood.

Jamison, 167 Cal.App.4th at 158.

The appellate court's rejection of Jamison's attempt to avoid attorneys' fees and liability under the EADACPA demonstrates the power of the "assists" prong of the statute:

> The trial court found Jamison committed financial elder abuse when he took [an] undisclosed finder's fee; McComb committed financial elder abuse when he took the $174,000 from the Petersons' bank account and the $250,000 loan proceeds; and Jamison knowingly aided and abetted McComb's abusive scheme to take the $250,000.
>
> Jamison argues there is no evidence that he knowingly assisted McComb in taking the $250,000 loan proceeds. <u>But Jamison knew what the loan proceeds would be used for. Any attorney would know it was an inappropriate use of Peterson's funds.</u>
>
> *Id.* at 164-165 (emphasis added).

Jamison shows that proof of knowing assistance can be made by implication from the likely outcome of the conduct, but does not require actual knowledge. The *Jamison* court did not rely on the attorneys' direct knowledge of *how* McComb convinced Ms. Peterson it would be a good idea to invest several hundred thousand dollars in a nightclub, but determined that it was sufficient for the attorney to know that the proceeds of a loan against Peterson's residence were going to be used by McComb for the nightclub, and that "any attorney *would know* it was an inappropriate use of Peterson's funds." *Id.* at 165 (emphasis added).

More recently, the appellate courts have considered the question of undue influence in the context of financial elder abuse and a probate challenge to an estate plan. In *Lintz v. Lintz*[9], the Superior Court entered a "judgment of financial elder abuse, undue influence, breach of fiduciary duty, conversion of separate property, and constructive trust." *Id.* at 1349. The defendant in the case was the decedent's third wife and "the couple married in 1999, divorced approximately six months later, and remarried in February 2005. Their second marriage ended when decedent died in October 2009 at age 81." *Id.* at 1350. The decedent had a "complicated estate plan," which the court described as follows:

> Decedent's northern California estate plan was contained in the Robert Lintz Trust (the trust) and a series of amendments to the trust, prepared over the years by decedent's estate lawyers. The ninth amendment to the trust, in effect when decedent and defendant remarried, provided for decedent's children, grandchildren, and former son-in-law upon decedent's death.
>
> In May 2005 decedent executed a 10th amendment to the trust. The 10th amendment provided defendant with 50 percent of decedent's assets upon his death, with the remaining 50 percent to be distributed among decedent's children and grandchildren. Between May 2005 and 2008 decedent executed several additional trust amendments, increasingly providing defendant with more of decedent's assets upon his death and disinheriting his two eldest children. Ultimately, in June 2008 defendant and decedent, as joint settlors and trustees, executed the Lintz Family Revocable Trust. The trust, prepared by defendant's

[9] (2014) 222 Cal.App.4th 1346

> attorney at defendant's direction, purportedly designated all of decedent's property as community property, gave defendant an exclusive life interest in decedent's estate, and gave defendant the right to disinherit decedent's youngest child and leave any unspent residue to defendant's two children.
>
> *Id.*

The decedent's children sued, and a fifteen-day bench trial was held, resulting in judgment against the defendant. *Id.* Defendant appealed, challenging the undue influence findings and the invalidation of each amendment to the trust after the tenth amendment. The appellate court analyzed the undue influence presumptions and standards contained in the various probate code, family code, civil code, and welfare and institutions code statutes.
First, the Court made clear that a finding of undue influence can be made upon circumstantial evidence:

> [Defendant argues there was] no evidence established that decedent's free will was overborne at the time the testamentary documents were executed. Given the extensive circumstantial evidence supporting the probate court's undue influence finding, we can only understand defendant to be arguing that plaintiffs failed to produce any direct evidence of undue influence at the time decedent signed the testamentary documents. <u>But plaintiffs are not required to prove their case by direct evidence.</u>
> "Direct evidence as to undue influence is rarely obtainable and hence a court or jury must determine the issue of undue influence by inferences drawn from all the facts and circumstances." (*Estate of Hannam* (1951) 106 Cal.App.2d 782, 786; see *David v. Hermann* (2005) 129 Cal.App.4th 672, 684 [proof of undue influence in the execution of a testamentary instrument by circumstantial evidence usually requires a number of factors]; *In re Estate of Easton* (1934) 140 Cal.App. 367, 371 [requiring direct or circumstantial evidence of "pressure which overpowers the volition of the testator and operates directly on the testamentary act"].) <u>Thus, while pressure must be brought to bear directly on the testamentary act, the pressure, or undue influence, may be established by circumstantial evidence.</u> (*In re Estate of McDevitt* (1892) 95 Cal. 17, 33.) As a matter of law, the probate court's undue influence finding need not be supported by direct evidence of undue influence at the moment decedent signed the trust instruments.
>
> *Id.* at 1354-1355.

As the court's analysis continued, it determined that the various definitions of "undue influence" and the standards associated with them in the probate code, the civil code and the welfare and institutions code were the same. As explained by the court: "We reject defendant's assertion that the probate court's undue influence finding was made under Welfare and Institutions Code section 15610.30. . . . Some courts have required the same undue influence showing under Civil Code section 1575 as is required to void a testamentary document under the Probate Code." At the time the case was in effect, § 15610.30 provided that definition of undue influence was provided by Civil Code § 1575. However, the change in 2014 to refer to § 15610.70 instead of Civil Code § 1575, only served to confirm the Superior Court's determination that the various standards were the same:

> During the pendency of this appeal, the Legislature amended Welfare and Institutions Code section 15610.30, subdivision (a)(3) replacing "by undue influence, as defined in Section 1575 of the Civil Code" with "by undue influence, as defined in Section 15610.70." The Legislature added a new section 15610.70 to the Welfare and Institutions Code, defining undue influence. . . . The Legislature also added section 86 to the Probate Code, providing that undue influence under the Probate Code has the same meaning as it does under Welfare and Institutions Code section 15610.70. While this legislation, effective January 1, 2014, does not affect our analysis, it eliminates any doubt that the two standards are now the same.
>
> *Id.* at 1356, fn. 3.

The *Lintz* court also held an additional presumption of undue influence should have been applied by the Superior Court. *See id.* at *1353*; see also Family Code § 721. While not at issue in *Lintz*, testamentary gifts from senior citizens to their caregivers are presumed to be the product of undue influence, and therefore, invalid. See Probate Code § 21380; *see also Shook v. LaFarre* discussed later in this chapter.

Lintz and its logic can be used to expand the ways in which plaintiffs can go about proving financial elder abuse claims. A plaintiff can rely on presumptions of undue influence by proving facts to invoke them.[10] In doing so, the plaintiff must be prepared to argue that the definitions of and standards for proving undue influence under the family code, probate code, or civil code are the same as found in the welfare and institutions code—an argument directly supported by *Lintz*.

The appellate court flatly rejected the defendant's contention seeking to have the estate-planning documents approved as a result of her status as the decedent's wife, explaining that "while the right to marry is protected by the California Constitution, the Constitution does not diminish defendant's fiduciary obligations to her husband, nor shield her from liability for unlawful conduct." *Id.* at 1358.

Case Studies: Effective Civil Prosecution of Financial Elder Abuse Claims

Financial Elder Abuse against an Individual Defendant: Josephine Shook v. Cyrus LaFarre

The case of Josephine Shook and her deceased brother Rudolph Cook provides a demonstration of one way to utilize the interconnected code provisions related to undue influence against a single defendant. Rudolph Cook was a longtime San Francisco resident, who had resided in the City with a partner for more than forty-five years. In 2003, the defendant, Cyrus LaFarre, moved in across the street from Cook, and neighbors who testified at trial described their interaction as generally friendly. In 2012, Cook's partner passed away. Cook was 89 at that point, could not drive, and his mind and body were failing him.He needed assistance going to the doctor, the grocery store, and church as well as assistance in bathing and doing other household and daily tasks. LaFarre provided that assistance, and Cook paid him cash to do so.

As far back as 1991, Cook had established an estate plan that provided for his estate to be shared equally among his brothers and sisters or their children. In 2001, Cook created a trust that provided the same thing. Just weeks after Cook's partner passed away, changes were made to his estate plan to

[10] See e.g. Family Code § 721; Probate Code § 21380 (providing a presumption of undue influence where a donative transfer is made to (1) a person who drafted the instrument, (2) a person in a fiduciary relationship with the transferor, (3) a care custodian, (4) a relative of any of those individuals, (5) a cohabitant or employee of those individuals, or (6) a partner or shareholder in a law firm of the drafter or fiduciary of the transferor).

provide for minimal bequests to seemingly random family members (four of them received gifts under the amended document, out of a family of nearly twenty brothers, sisters, nieces, and nephews), and to leave the majority of the estate to LaFarre and appoint LaFarre as trustee.

Also around this time, both LaFarre and his girlfriend (who later became his second wife) "borrowed" funds from Cook on very favorable terms. LaFarre "borrowed" $70,000 and signed a promissory note that provided for interest-only payments of $200 per month for three years and then a principal repayment in June 2015, when Cook would have been over age 92. The girlfriend's note was even more egregious. She obtained a $100,000 "loan," executing a promissory note that provided for a single balloon payment due in August 2015.

LaFarre disavowed all knowledge of the change to Cook's estate plan, contending that he found the will when an overflowing recycling bin tipped over in Cook's driveway, days after his death. LaFarre emphasized at trial that the estate planning documents were notarized and the defendant's handwriting expert testified that the signature on the estate planning documents was Cook's signature.

No witness testified that Cook intended to change his estate plan, and five separate witnesses—two family members, Cook's appointed trustee under the original trust, Cook's longtime employer, and the former girlfriend of one of Cook's great-nephews all testified that Cook told them after the purported amendment to the trust that he planned to leave his money to his family and that his trustee was the person appointed in the original documents. Each of these conversations and facts was entirely inconsistent with Cook having changed his trust, and it appeared as though he was wholly unaware that the changes had occurred.

The case was filed both as a challenge to the probate proceedings in the probate court and as a stand-alone civil financial elder abuse case in the civil department. The plaintiff sought and received an expedited trial pursuant to C.C.P. § 36, and the civil case proceeded to a jury trial[11]. The case came down to two critical issues for the jury: (1) Did the defendant commit financial elder abuse? (2) Was the defendant a "caregiver" as defined by the probate code?

The jury returned a verdict for our client, the plaintiff. They found financial abuse, and went on to find that LaFarre was a "caregiver," giving rise to a presumption of undue influence because he was the recipient of Cook's estate. The jury also found that LaFarre had not rebutted the presumption of undue influence by clear and convincing evidence, as required by the probate code.

The case demonstrates that a financial elder abuse trial can draw from a wide array of law. Practitioners must understand the interrelated pieces. For example, the CACI Verdict Form related to financial elder abuse asked the jury "Did Cyrus LaFarre take, appropriate, obtain or retain Rudolph Cook's property for a wrongful use or with the intent to defraud or by undue influence?" The jury's answer was a unanimous "Yes." The Special Verdict Form related to the caregiver determination, which the plaintiff utilized to shift the burden to the defendant, asked the jury to make the underlying findings to show LaFarre was a caregiver.[12]

Because of the utilization of both the caregiver undue influence presumption and the general financial abuse jury instructions, the plaintiff was able to demonstrate that the purported amendment

---

[11] Every elder abuse case should be explored to see if a C.C.P. § 36 Motion for Preference is available.

[12] Was Cook a "dependent adult" as defined by (*see* Probate Code § 811), did LaFarre provide "health or social services" for Cook (*see* Probate Code § 21632(b)), and was LaFarre compensated for those services, other than what he received in the purported trust amendment? *See generally* Probate Code §§ 21632, 21380. The jury answered each of those three questions "Yes." The jury was then asked "Did Cyrus LaFarre prove by clear and convincing evidence that the August 2012 Amendment was <u>not</u> the result of undue influence?" The jury answered "No."

was the result of financial elder abuse in two separate ways: one relying on the jury's judgment that LaFarre's conduct was "for a wrongful purpose, through fraud, or through the result of undue influence" and the second relying on the existence of an evidentiary presumption to support a finding of undue influence in connection with the trust amendment.

The court awarded damages in the amount LaFarre paid out of the trust to attorneys and to himself as "trustee"[13] as well as attorneys' fees pursuant to the EADACPA and probate code.[14] Subsequent to the elder abuse jury verdict, the plaintiff returned to the probate court and relied on the doctrine of *res judicata* to obtain a finding that the purported amendment was invalid. The net result was the return of the trust's assets to the 2001 trust plan, consistent with Cook's wishes.

Financial Elder Abuse through a Conspiracy or Involving Multiple Defendants: Khodayar and Manijeh Foroudian v. Robin Wilson, et al.

In contrast with the Shook trial, where the victim of financial abuse was deceased and only a single defendant was named, many financial abuse cases require the untangling of complex schemes involving numerous parties, each with different pieces of knowledge and roles in the overall architecture of the abusive conduct. In these cases, as explained in *Das v. Bank of America* and *Wood v. Jamison*, the plaintiff must show that third parties who assisted in the transaction have actual knowledge, although a plaintiff can rely on circumstantial evidence and objective standards of knowledge and wrongdoing in order to do so.

One such case illustrating these difficulties is *Foroudian v. Wilson, et al.* In that case, the plaintiffs were a formerly married couple who resided together in their San Bruno, California, home that they owned free and clear of any mortgage. Their son had begun dating a woman who lived in San Francisco, who orchestrated a complex scheme and series of loan transactions which resulted in (1) the Foroudians owing a $400,000 "hard money" loan to a private lender, secured by their property in San Bruno; and (2) Mr. Foroudian being put on title to a property in San Francisco, which secured a series of loans ranging from $1.2 million to $1.5 million, also made by private lenders.

During the process of the loans, the plaintiffs made attempts to stop the transaction from going forward. First, Ms. Foroudian wrote the words "UNDER DURESS" next to her signature on at least one title document while she was signing at the title company's offices in San Francisco. Second, two days after the loan documents were executed, the Foroudians sent a cancellation notice to the title company—a document it acknowledged receiving—related to the loan on their primary residence. If that loan had been cancelled, the entire scheme would have collapsed and their son's girlfriend (Robin Wilson) would not have been able to obtain either loan in the Foroudians' name. However, the title company allowed the girlfriend to cancel the Foroudian's rescission.

The Foroudians sued their son, Wilson, the lender on the San Bruno house (four trusts and a corporation), the title company that arranged the transactions, the title officer, and a broker who had arranged for some of the loans. The Foroudians alleged that Wilson had orchestrated the entire scheme, and that the various other defendants had participated and were liable because they had "assisted" Wilson.

The plaintiffs defeated a demurrer by the lenders and the case proceeded through discovery. In discovery, the plaintiffs obtained a series of damning e-mails between the title officer and Wilson. Those e-mails showed that, after receiving the cancellation notice, the title officer contacted Wilson,

---

[13] Amazingly, over $100,000 annually in trustee fees, nearly all of which were paid after the civil financial abuse suit was filed.

[14] Plaintiff did not seek punitive damages.

not the Foroudians, and the two exchanged a series of e-mails in which Wilson informed the title officer that she was working to force the transactions forward, regardless of the Foroudians' objections. The case settled, giving the Foroudians a full recovery. The lynchpin to the successful resolution was the "assist" liability language of the EADACPA.

Conclusion

Financial elder abuse is a massive problem in California. Any senior can become a victim, regardless of their background. The EADACPA provides a strong tool to combat abuse. Practitioners must appreciate the nuances in this area of law and the interconnection between the elder abuse statutes and other substantive law and use that knowledge to the advantage of senior citizens.

Key Takeaways

1. A financial elder abuse plaintiff can prevail by showing that a third party was aware of the wrongdoing of the direct abuser. Proving "knowing assistance" does not always require direct knowledge or participation, but can also be proven by inferences from the circumstances.
2. A plaintiff can rely on presumptions of undue influence. In doing so, the plaintiff must be prepared to argue that the definitions of and standards for proving undue influence under the family code, probate code, or civil code are the same as found in the welfare and institutions code.
3. Practitioners should focus on punitive damages as elder abuse cases often have realistic punitive damage potential.