

Same Road, Different Stops

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Elder abuse litigation is a growing area of practice due to our aging population and the fact that increased life expectancy has led to an increase in the prevalence of mental infirmities. Add financial woes and the result is a sharp increase in financial abuse being perpetrated against elders.

Elder law issues cut across all practice areas. It is important attorneys have the tools to identify issues and respond accordingly. Most of the legal discourse focuses on physical abuse, including nursing home litigation; however, financial abuse is just as prevalent as physical abuse.

GOVERNING STATUTE

California has a strong statutory framework for civil prosecution of elder abuse, known as the "Elder Abuse and Dependent Adult Civil Protection Act" ("EADCPA"). The EADCPA is found in the Welfare and Institutions Code, starting at Section 15600.

The EADCPA reflects important legislative findings, including the following:

The Legislature further finds and declares that infirm elderly persons and dependent adults are a disadvantaged class, that cases of abuse of these persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits.

As the name of the statute suggests, the statutory protections of the EADCPA extend to two separate classes: (1) to elders; and (2) to dependent adults.

At the outset, it is important to understand some of the definitions

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found in the EADCPA. An "elder" is defined as a person over the age of 65, whereas a "dependent adult" generally means a person between the ages of 18 and 64 "who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights." (Welfare & Inst. Code §§ 15610.27, 15610.23.)

Financial abuse of an elder or a dependent adult is defined as follows:

- "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:
 - 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.
 - 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.
 - 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 1575 of the Civil Code.
 - 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.

In 2008 the California Legislature passed Welfare & Inst. Code § 15610.30 which strengthened the EADCPA's financial abuse provisions. The amendments, effective in 2009, accomplished the following:

- The definition of "financial abuse" under § 15610.30 was expanded to include the word, "obtains," to the description of prohibited conduct so a broader category of wrongdoers is covered;
- The definition of "financial abuse" was expanded to include the taking, secreting, appropriating, obtaining, or retaining, or assisting in the taking, secreting, appropriating, obtaining, or retaining, of real or personal property of an elder or dependent adult by undue influence;
- The definition of "wrongful use" (§ 15610.30(b)) was expanded to include the taking of property when the person knew *or should have known* it would be harmful to the elder;
- The remedies for financial abuse were expanded (§ 15657.5) to authorize the recovery of compensatory damages and to provide for vicarious liability of employers;
- Section 15657.6 was added to allow recovery on behalf of elders, who lack capacity or are of unsound mind, if property is not promptly returned upon demand;
- Section 15657.7 was added to provide a four-year statute of limitations for financial elder abuse claims.

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In *Das v. Bank of America, N.A.*, 186 Cal. App. 4th 727, the Second District Court of Appeal held, because the 2008 amendments to the definition of financial abuse were substantive, they are not retroactive. *Id.* at 736-737. *Das* (which involved a financial elder abuse claim against a bank for failing to report suspected abuse) is also significant because the court rejected a strict liability rule for "assisting" financial abuse under § 15610.30(a)(2) stating instead: "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." *Das v. Bank of America, N.A.*, 186 Cal. App. 4th 727, 745 (2010).

REMEDIES

A number of remedies are available under the EADCPA, including compensatory damages, reasonable attorneys' fees and costs, punitive damages, and reimbursement of the costs of the conservator. (Welfare & Inst. Code "W&IC" § 15657 et seq.) Treble damages may also be available under Civil Code § 3345 ("Acts Against Senior Citizens or Disabled Persons") in cases involving unfair or deceptive acts or practices or unfair methods of competition. (Civil Code § 3345 (b).)

The standard of proof for compensatory damages in a financial elder abuse case is preponderance of the evidence. (§ 15657.5(a)).

Prospective elder law practitioners need to know the burden of proof necessary to recover attorneys' fees is different depending on whether the case involves physical abuse or financial abuse. To recover attorneys' fees in a physical abuse (or neglect) case, the plaintiff must show *by clear and convincing evidence* the defendant is guilty of recklessness, oppression, fraud or malice. (W&IC § 15657). In contrast, to recover attorneys' fees in a financial abuse case, the plaintiff must only demonstrate recklessness, oppression, fraud or malice *by a preponderance of the evidence*. (Welfare & Inst. Code § 15657.5).

TYPES OF ABUSE

Elders are particularly susceptible to scams and physical abuse. In 1998 the Legislature noted:

Annually, 225,000 incidents of adult abuse occur in California - an increase of over 1000 percent over the number of incidents in 1986-87. Twenty-three percent of the incidents involve physical abuse, 32 percent involve fiduciary abuse, 22 percent involve mental suffering, and 3.8 percent involve sexual abuse. In addition to the victimization by another person, in more than 50 percent of the incidents the elder or dependent adult is unable to meet his or her own needs due to frailty, untreated health conditions, mental or emotional problems, or family dysfunctions. (Welfare & Inst. Code Div. 9, Pt. 3, Ch. 11 Note.)

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The following are some of the most common fact patterns involving financial abuse of the elderly:

- In-home care workers. These individuals look for elders who are alone and isolated and without regular contact from their families. They may pretend to have a romantic interest in the elder. The abuser may forge checks, may coerce the elder to sign over property, cars or valuables. Home workers may coerce elders into revising wills to include them or their family members. There are instances where home workers have convinced vulnerable elders to marry or to legally adopt them.
- High cost annuities sold to elders who are unlikely to ever benefit from the annuity. Typical scams include selling deferred annuities to elders in their 80s or 90s or who are already in poor health and are unlikely to live long enough to receive payments.
- Sweepstakes and other scams such as those involving e-mails from Nigeria, Canada or other countries, telling the elder that they won a large cash prize, but need to wire the taxes to a foreign account to claim the winnings.

REPRESENTING THE ELDERLY CLIENT

Representing elderly clients against financial abuse is very rewarding; however, it comes with specific challenges.

Victims of financial elder abuse are often embarrassed and afraid. If the fraud has been committed by a family member, the elder may be frightened about the consequences that will befall the family member. It is important to address these concerns at the outset and for the elder to understand whether the family member is a necessary defendant, and whether the elder will be expected to testify against the family member.

Often the fraud against the elder is on-going and it is important to consider whether a temporary restraining order is needed to stop the abuse during the pendency of the litigation. Protective orders under the EADCPA require proof by a preponderance of the evidence of past act or acts of elder abuse. See *Bookout v. Nielson* 155 Cal. App. 4th 1131 (4th Dist. 2007).

Finally, the advanced age of victims of financial elder abuse may present barriers to an adequate recovery. There is a good chance a 90-year-old victim may not survive the four to five years it could take for a case to wend its way through our over-taxed trial and appellate courts. And, even if the client does live into his or her mid to late 90s, a delay of four to five years would mean the client would have little time (statistically) to enjoy a recovery. In addition, diminishing mental capacity may mean a client is unable to fully participate in the trial. As a result, it is critical for counsel to bring a motion for trial preference under Code of Civil Procedure ("CCP") § 36, when warranted.

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Under CCP § 36(a)(2), preference shall be granted to a party, over 70, who has a substantial interest in the case and whose health "is such that a preference is necessary to prevent prejudicing the party's interest in the litigation." Even if the plaintiff does not meet this standard, preference may still be granted if good cause is shown under CCP § 36(e). Motions for trial preference may be supported by an attorney's affidavit under CCP § 36.5 based on information and belief as to the medical diagnosis and prognosis of an elderly party. A CCP § 36.5 affidavit is not admissible for any purpose other than a CCP § 36(a) motion. If trial preference is granted, the trial must be set no more than 120 days from the date the preference is granted. Continuances are sharply restricted. CCP § 36(f).