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*18 THE ELDER ABUSE AND DEPENDENT ADULT CIVIL PROTECTION ACT (CHAP. 774, STATS. 1991)

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New Law

Governor Wilson signed The Elder Abuse and Dependent Adult Civil Protection Act (“EADACPA” pronounced ee-dak-pa) [FN1] into law on October 10, 1991. Since it was not emergency legislation it became effective on January 1, 1992.

Beverly Hills Bar Association's Primary Role

The Beverly Hills Bar Association introduced the bill through co-authors Senators Henry Mello (D) and Ed Davis (R). [FN2]

Impact

EADACPA is likely to have more impact on the quality of life for elders and dependent adults than any civil rights legislation within the last several years.

Overview

EADACPA is designed to protect elders and dependent adults. [FN3] The legislative findings include:

- (i) such persons are a disadvantaged class, [FN4]
- (ii) criminal prosecutions against abusers of such people are rare; and
- (iii) few civil suits are filed due to problems of proof and court delays.

This is “to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.” [FN5]

Who Is Protected?

The new law targets a broadly defined class of people called dependent adults and all people over age 65. “Dependent adult” includes “any person between the ages of 18 and 64 who has physical or mental limitations which restrict his or her ability to ... protect his or her rights.” It is unclear if a fairly normal person's neuroses or emotional handicaps entitle him or her to “dependent adult” status.

Fiduciary Abuse Defined

One of the wrongs against which they are protected is fiduciary abuse. It is broadly defined but presumably limited to those fiduciary abuses that are currently actionable. [FN6]

Potential Defendants

If a business person, whether colleague, employer or vendor of goods or services, “stands in a position of trust to an elder or a dependent adult,” and intentionally or recklessly “set[s property] aside or assigns [it] to a particular purpose” [FN7] “not in the due and lawful execution of the elder's or *19 dependent adult's trust,” [FN8] he or she may be liable for attorneys' fees and costs and damages for pain and suffering.

Therefore, defendants may include banks, trust and insurance companies, lenders and CPAs who serve as financial planners.

Incentives For Lawyers

EADACPA invite attorneys to sue to enforce the rights of abused elders and dependent adults, and to obtain damages.

Attorneys' Fees

An attorneys' fee award is required if the plaintiff proves by clear and convincing evidence that the defendant was guilty of recklessness, oppression, fraud or malice in committing physical abuse [FN9], neglect [FN10] or fiduciary abuse. [FN11]

Costs

“Costs” include reasonable fees for a conservator's services devoted to litigating the claim.

Defendant's Incentives To Settle

Factors In Awarding Attorneys' Fees

The attorneys' fees provisions are not mere window dressing. The court must consider [FN12] all relevant factors, including: [FN13]

- (a) The value of the abuse-related litigation in terms of the quality of life of the elder or dependent adult, and the results obtained,
- (b) Whether the defendant took reasonable and timely steps to determine the likelihood and extent of liability, and
- (c) The reasonableness and timeliness of any written offer in compromise made by a party to the action.

Pain & Suffering Damages Survive Death

Talk about attorneys' fees may seem meaningless since frail abused elders and dependent adults often die before trial. Many a case failed when the victim died before damages were awarded. Fearing an expensive loss of time and money, attorneys usually declined to handle contingency cases of obvious and severe abuse merely because the victim was rendered so frail by the abuse that death might come before the damage award, ending the hope of a truly significant recovery. Defendants have, therefore, had every incentive to delay. [FN14]

No longer. Damages for pain and suffering will be recoverable even after the victim's death, up to \$250,000, if the plaintiff satisfies the tests for the recovery of attorneys' fees. Contingency cases proving, by clear and convincing evidence, a reckless or intentional abuse of the frail are now viable. It will no longer be cheaper to kill an old person than to injure one. Conservators will be able to engage litigation counsel to vindicate the rights of victims who lack the ability to hire counsel themselves.

If the victim dies before the lawsuit ends, the suit may be maintained by the executor or administrator, if there is one, and, if not, by those entitled to the decedent's estate.

Example

Plaintiff seeks an order requiring a nursing home to (i) clean the beds of incontinent people more frequently to prevent bedsores, or (ii) adhere to minimum staffing obligations required by law.

*20 Although other laws purport to give nursing home residents a private right of action, attorneys have found courts to be restrained in awarding fees. The result has been that few attorneys have been attracted to the field of nursing home litigation. The new provision which bases an award of attorneys' fees on the effect upon the victim's "quality of life" will, however,

put teeth into the law, giving a practical meaning to many of the grandiose rights codified in various places.

Consumer Fraud & Fiduciary Abuse

In the context of consumer fraud or fiduciary abuse, litigation to recover an elderly person's home or life savings are actionable under EADACPA due to the importance of an elder's home and life savings for his or her quality of life. It is too late for the elder to earn it again. Attorneys' fee awards should now reflect that importance.

Public Interest Litigation

Rewards for successful public interest litigation will be enhanced by the new attorneys' fee award factors. Fees for litigation within the ambit of neglect and fiduciary or physical abuse must be compared against these factors, among others. Even when making fee applications for successful litigation based on other statutes, you should address these new factors, which will likely be supportive.

Employers

Incentives To Investigate Abuses

Factor (b) in awarding attorneys' fees invites the employer to promptly investigate whether an employee committed the abuse, and factor (c) encourages prompt and reasonable settlement offers by either side as discovery progresses.

Limits On Employer's Liability

Employers are not automatically subjected to EADACPA's special liability for attorney's fees and costs when an employee misbehaves. An employee is liable if:

- (i) an actionable tort took place,
- (ii) it was committed by the employer's agent with recklessness, oppression, fraud or malice,
- (iii) both (i) and (ii) are proven to a judge's satisfaction, and not merely a jury's satisfaction, by clear and convincing evidence, and
- (iv) a managerial agent of the employer knowingly participated in the wrong or knowingly ratified it.

In other words, the employer must either ratify the employee's misconduct or otherwise bring itself within Civil Code § 3294(b)'s standards for the assessment of punitive damages against employers.

How Abused Person's Family Develops The Case

Relatives of nursing home residents should notify the nursing home administrator of conditions needing correction. Written notice may be counter-productive. It would warn the facility that legal trouble is coming and could irreparably damage the family's and resident's relationship with the nursing home staff. The staff could "doctor" medical records and make retaliatory "transfers" to a hospital.

Instead, the family member should (i) informally tell the administrator about problems needing correction, (ii) in the presence of a witness who (iii) will make a file memo right after returning home. That should prevent the employer from escaping liability because "We had no idea" the abuse was occurring. Also, most people who work in nursing homes want to provide good services to nursing home residents. Conscientious nursing home administrators will appreciate the opportunity to correct a problem.

Another approach is to file a complaint with the local Department of Health office. The required on-site investigation typically keeps the complainant's identity confidential. If the investigators find violations, the operator is cited and the agency reports its findings. The administrative staff is put on notice that a serious problem needs attention. The facility's failure to address known abuses may constitute acceptance or "ratification" within Civil Code § 3294.

Businesses preying on gullible elders may be treated in a similar manner. Plaintiff's counsel may find it advisable to have the victim or a relative of the victim ask a managerial agent of the business to disavow and remedy the misconduct. Failure to do so may subject the employer to Civil Code § 3294(b).

Probate Court Jurisdiction

EADACPA encourages the filing of complaints in the Probate Court even while the victim is alive. This is because probate court:

(i) sees itself as the protector of the disabled, and is likely to be a friendly forum for the victims of abuse, and

(ii) may have greater expertise in handling controversies about whether someone is taking advantage of an incompetent. [FN15]

Such matters are typically heard more expeditiously in the Probate Court than on the general civil calendar.

Although the notion of the Probate department as a court of limited jurisdiction is not yet dead, EADACPA puts *21 another nail in the coffin. [FN16] Under EADACPA, the Probate Court is a court of general jurisdiction over civil actions and proceedings "involving a claim for relief arising out of the abuse of an elderly or dependent adult, if a conservator has been appointed for plaintiff prior to the initiation of the action for abuse." [FN17]

The Probate Court may hear and decide a complaint for relief from any wrong which is both (i) actionable and (ii) listed in Welfare and Institutions Code § 15610. Fiduciary misconduct [FN18]

and physical abuses such as neglect in a nursing home or elsewhere are now the province of the Probate Court.

Like Samson unleashed, the Probate Court is no longer partially handcuffed when confronted by financial or physical abuse of its conservatees. Damages, [FN19] attorneys' fees, third party jurisdiction and injunctive relief are tools which the Probate Court, in its sound discretion, may now employ to protect its conservatees if the action arises out of the abuse of an elder or dependent adult. [FN20] Abusive practices in a nursing home or swindles by con artists masquerading as mortgage brokers may be litigated in a probate court conservatorship proceeding as an unfair trade practice [FN21] for which damages, attorneys' fees and injunctive relief are sought.

Conclusion

The Legislature's hope is that by providing elders and dependent adults with the means to vindicate their rights in a civil context, EADACPA will eventually make litigation unnecessary. If abusers know they must pay for the harm they inflict, they may be deterred from wrongdoing.

Only time will tell.

[FN_a]. Mr. Hankin is the author of a law recently signed by Governor Pete Wilson that safeguards against elder abuse. He practices at Grayson Givner Booke Silver & Wolfe in the new field of Elderlaw.

[FN1]. Senate Bill 679 renames Chapter 11 (commencing with Section 15600) of Part 3 of Division 9 of the Welfare and Institutions Code as the "Elder Abuse and Dependent Adult Civil Protection Act." Article 8.5 (Sections 15657 through 15657.3) is added to Chapter 11 and entitled "Civil Actions for Abuse of Elderly or Dependent Adults."

[FN2]. EADACPA was a Beverly Hills Bar Association resolution conceived and drafted by the author of this article. The resolution was adopted at the State Bar's Conference of Delegates in 1989 after having been proposed twice. It was enacted in its third trip through the Legislature. It was formally sponsored by the Beverly Hills Bar Association with principal lobbying support given by CANHR, the L.A. Caregiver Resource Center and the Alzheimer's Disease Association. It was vigorously supported by a number of other organizations including the Los Angeles Chapter of the Arthritis Foundation.

[FN3]. "Dependent adult" means "any person between the ages of 18 and 64 who has physical or mental limitations which 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. Welf. & Inst.Code § 15610(b)(1). The term "Dependent adult" also includes "any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2 and 1250.3 of the Health and Safety Code. Welf. & Inst.Code § 15610(b)(2).

[FN4]. Welf. & Inst.Code § 15600(h). It is unclear whether, in the current pro-business and pro-government judicial climate, there is any benefit to be derived in court from being a member of a disadvantaged class. But the finding that elders and dependent adults are a disadvantaged class protects the legislation from an attack based on an equal protection argument.

[FN5]. Welf. & Inst.Code § 15600(j).

[FN6]. As proposed by its proponents, EADACPA was limited to wrongs which are both currently actionable and committed with malice. Critics of the Bill claimed EADACPA created new causes of action. In compromise, Welf. & Inst.Code § 15610(f), which defines “fiduciary abuse,” became a statutorily defined tort in the final Bill.

[FN7]. See the definition of “fiduciary abuse” in Welf. and Inst.Code § 15610(f), in footnote 11. The meaning of the term “appropriate” figures prominently in that definition. Webster's New Collegiate Dictionary says that “appropriate” means “to set aside or assign to a particular purpose or use; or to take or make use of, without authority or right.”

[FN8]. The quoted language is drawn from the definition of fiduciary abuse set forth in footnote 11.

[FN9]. Physical abuse is defined in Welf. & Inst.Code § 15610(c) to mean all of the following:

- (1) Assault, as defined in Penal Code § 240.
- (2) Battery, as defined in Penal Code § 240.
- (3) Assault with a deadly weapon or force likely to produce great bodily injury, as defined by Penal Code § 245.
- (4) Unreasonable physical constraint, or prolonged or continual deprivation of food or water.
- (5) Sexual assault, which means any of the following:
 - (A) Sexual battery, as defined in Penal Code § 243.4.
 - (B) Rape, as defined in Penal Code § 261.
 - (C) Rape in concert, as described in Penal Code § 264.1.
 - (D) Incest, as defined in Penal Code § 285.
 - (E) Sodomy, as defined in Penal Code § 286.
 - (F) Oral copulation, as defined in Penal Code § 288a.
 - (G) Penetration of a genital or anal opening by a foreign object, as defined in Penal Code § 289.
- (6) Use of a physical or chemical restraint or psychotropic medication under any of the following conditions:
 - (A) For punishment.
 - (B) For a period significantly beyond that for which the restraint or medication was authorized pursuant to the instructions of a physician licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given.
 - (C) For any purpose not consistent with that authorized by the physician.

[FN10]. Neglect, as defined in Welf. & Inst.Code § 15610(d), means the negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care

which a reasonable person in a like position would exercise. Neglect includes, but is not limited to, all of the following:

- (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.
- (2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.
- (3) Failure to protect from health and safety hazards.
- (4) Failure to prevent malnutrition.

[FN11]. Fiduciary abuse, as defined in Welf. & Inst.Code § 15610(f), “means a situation in which a person who has the care and custody of, or who stands in a position of trust to, an elder or a dependent adult, takes, secretes, or appropriates their money or property, to any use or purpose not in the due and lawful execution of his or her trust.”

[FN12]. Section 15657.1 sets out the factors for the determination of attorneys fees allowable under Section 15660. The chaptered version of the Bill has an obvious typographical error: the reference in § 15657.1 should have been to § 15657 rather than 15660.

[FN13]. Welf. & Inst.Code § 15657.1(a), (b) and (c).

[FN14]. See Probate Code § 573, and Welf. & Inst.Code § 15657(b) which overrides § 573.

[FN15]. The Senate Judiciary Committee Report noted: “Proponents have suggested that since probate courts are more familiar with elder and dependent adult issues, they would be more understanding in these types of cases.” The Committee report was indecisive about the accuracy of the proponents' suggestion that Probate Court judges tend to be more knowledgeable and expert in these matters. Sen.Jud.Cmte.Rprt., hearing on April 30, 1991.

[FN16]. In the context of decedents' estates (Probate Code § 7050) and trust estates (Probate Code § 17200), the Probate Court has become a court of general jurisdiction. Conservatorships and guardianships are the sole remaining areas suffering from a lack of general jurisdiction, and sadly those are the sole areas in which the estate belongs to a yet living person who may really need the economy and promptness that general jurisdiction in the Probate Court could provide.

[FN17]. Query when “an action for abuse” has been “initiated?” Must the general conservator be appointed before “initiation” of the “action for abuse,” or will the appointment of a temporary conservator suffice? Three issues must be addressed by counsel seeking Probate Court jurisdiction.

First, does the temporary conservator have the authority to begin an action? Unless there is an emergency or the Probate Court grants the temporary conservator the authority, the answer is clearly no.

Second, competent defense counsel will contend that the Legislature intended to not invest the Probate Court inappropriately with the burden of resolving civil controversies until the Probate Court has come to a firm decision that an ongoing general conservatorship is warranted.

Third, is an “action for abuse” initiated by a request for injunctive relief? Typically, a person petitioning for a temporary conservatorship will simultaneously seek a temporary restraining

order to prevent alienation of property obtained from the prospective conservatee. Would that request deprive the Probate Court of general jurisdiction, i.e. of the power to assess damage awards and attorneys' fees against the defendant, or the power to issue remedial injunctive relief against third parties?

If injunctive relief is the gist of or central to the action, then the answer is clearly “yes” that the action was “initiated” by the request for a temporary restraining order, and the Probate Court would thereafter lack general jurisdiction over the controversy.

Thus, the need to apply for to a Civil Court for an emergency TRO (which the relatively savvy Probate Court would be particularly willing to grant, if only it had the jurisdiction) may have to be weighed against the desire for the Probate Court's greater expertise and sensitivity to the problems of the aged and incapacitated, when the time for a damage award, third party joinder or attorneys fees rolls around.

[FN18]. See footnote 11 for the definition of “fiduciary abuse.”

[FN19]. The availability of damages in Probate Court is not entirely a new concept. Effective July 1, 1991, new Probate Code § 2619.5 brings into the conservatorship law a double damages provision that has long applied to decedents estate. Section 2619.5 provides: “A person who in bad faith has wrongfully taken, concealed, or disposed of property in the estate of the ward or conservatee is liable for twice the value of the property, recoverable in an action by the guardian or conservator for the benefit of the estate.” Unfortunately, the allowability of such double damages are in the court's discretion, and such awards have been extremely rare for decedents estates. The award's theoretical availability may not provide much fee incentive to the conservatorship litigator. The court may reasonably conclude that the conservatee needs those double damages to pay for his or her medical and custodial care, and that compensating the lawyer is a lower priority. Poor people have accordingly had less access to legal representation, which is a problem that EADACPA seeks to correct.

[FN20]. Welf. & Inst.Code § 15657.3.

[FN21]. Bus. & Prof.Code § 17200.

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