

## **Does Your Elder Have Standing?**

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Who is the proper plaintiff in an elder financial abuse action? The answer to this question can sometimes be substantially more complex than first appears. Failing to name the proper plaintiff can result in your action being dismissed. If this occurs after the period of limitations has run, your client may be left without a remedy. Accordingly, considering substantive and procedural issues of standing at the outset of an elder financial abuse action may help avoid serious problems later.

### **I. WHAT IS STANDING?**

The requirement of standing is provided by CCP § 367. It states:

“Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute.”

The statutory purposes of limiting the prosecution of an action to the real party in interest are to protect a defendant from multiple claims arising out of the same harm and to prevent a claimant from transferring the right and thereby defeating a defendant's cross-complaint or setoff. (*Giselman v. Starr* (1895) 106 C. 651, 657.) Standing is the procedural consequence of being the real party in interest, and an action filed by a person who lacks standing is subject to dismissal. The real party in interest is determined by the applicable substantive law, and ordinarily, the person having the right to sue for injury to property is the owner of the property. (*Vaughn v. Dame Construction Co.* (1990) 223 Cal.App.3d 144, 147.) However, the real party in interest is actually the party who has title to the particular cause of action rather than title to the property itself. (*Powers v. Ashton* (1975) 45 Cal.App.3d 783, 788.) Thus, the essential element of standing is injury to one's interests in the property rather than ownership of the property itself, although these interests are most often held by the same person. Nevertheless, it has often been recognized that one who is not the owner of property may nonetheless be the real party in interest if that person's interests in the property are injured or damaged. (*Vaughn v. Dame Construction Co.* (1990) 223 Cal.App.3d 144, 148.) Injury to an interest in property gives rise to a cause of action for that harm, which is itself a discrete property right called a

“chose in action.” (*Parker v. Walker* (1992) 5 Cal.App.4th 1173, 1182; see also CC § 953.) Thus, it is the owner of the chose in action who actually has standing to sue.

## **II. WHY IS STANDING OFTEN AN ISSUE IN ELDER FINANCIAL ABUSE ACTIONS?**

Questions of standing often arise in elder financial abuse cases because (1) the property taken may be held in a trust or estate; (2) harm caused by financial abuse may cause injury to the person as well as injury to property; and (3) the death of the elder and rules of survivability of actions affect standing. Moreover, questions of standing are often further complicated by a combination of these factors.

## **III. WHO HAS STANDING WHERE THE PROPERTY IS HELD IN A TRUST OR BY AN ESTATE?**

In the context of trusts and estates, an important distinction exists between the person enjoying the benefit of an interest and the person with the legal authority to commence an action to protect that interest. Since a trust is not a legal entity, the real party in interest with standing to bring an action in connection with trust property is the trustee, and an action brought directly by a beneficiary is subject to dismissal. (*Saks v. Damon Raike & Co.* (1992) 7 Cal.App.4th 419.) Similarly, a testamentary estate is not a legal entity, and the real party in interest in an action brought in connection with estate property is the personal representative of the estate. (*Lazar v. Lazar's Estate* (1962) 208 Cal.App.2d 554, 557.)

The inability of a beneficiary of a trust to commence an action in connection with trust property can create issues where the right asserted is based on a claim of elder financial abuse. Elder financial abuse is defined as the taking of “property of an elder” to a wrongful use or with intent to defraud. (W & I Code § 15610.30(a).) Where an elder’s property is held in a trust, is it nevertheless property of an elder? In at least one U.S. District Court decision, the court ruled that the elder did not have standing to bring the claim and that the claim could only be asserted by the trustee of the trust; it therefore dismissed the elder for lack of standing. (2006 WL 2479122.) However, because the elder was also the trustee of the trust, the court permitted the financial abuse action to proceed,

but only in the name of the trustee. The decision implied that had the trustee not been an elder, the entire cause of action would have been dismissed. It seems apparent that the age of the trustee should be irrelevant to whether elder financial abuse has occurred and that this decision confuses the issue of “what is property of an elder?” with the issue of “who has standing to bring the elder financial abuse action?” For the purposes of stating a cause of action for elder financial abuse, the trustee would appear to be a mere nominal owner of the property. For example, where an elder has placed his property in a trust and designated a non-elder as trustee, such property should be characterized as “property of an elder” notwithstanding the age of the trustee. To do otherwise would defeat the expressed purpose of the Legislature to provide elders with a remedy for financial abuse because it is the elder (beneficiary) who is harmed, not the trustee. This would appear to be even more obvious where a corporate trustee manages the elder's property, as then a cause of action for elder financial abuse could never be stated. Conversely, taking property from a trust in which the beneficiary is a child and the trustee (perhaps a professional trustee of a financial institution) is 65 years old should not be characterized as elder financial abuse simply because the trustee happens to be 65. Thus it appears that where an elder’s property is held in a trust, the trustee has standing to bring the action; however, the determination of whether property is “property of an elder” within the meaning of W & I Code § 15610.30 should be determined without regard to whether it is nominally owned by a trustee. The reasoning would be similar with regard to estates. In any event, this is an issue of first impression and must await appellate clarification.

#### **IV. WHOSE INTERESTS ARE HARMED BY THE FINANCIAL ABUSE?**

A victim of elder financial abuse may recover compensatory damages, attorney’s fees, and costs (W & I Code § 15657.5(a)) and punitive damages (CC § 3294). While it has never been directly decided, a victim of elder financial abuse may apparently also recover damages for pain, suffering, and disfigurement. This is strongly implied by W & I Code § 15657.5(b)(1), which specifically provides that, under certain circumstances, damages for pain, suffering, and disfigurement survive the death of the elder. If such damages survive the death of the elder, then they arguably must be recoverable before death as well. Thus, the same act of elder financial abuse may result in personal injury to

the elder as well as economic injury to the elder's property. Therefore, standing may depend upon the nature of the claimed harm. An example helps illustrate this issue. An elder transfers all of his property, including his watch, into a trust in which another is the trustee. A caretaker tricks the elder into giving the caretaker the elder's watch, and the elder suffers anxiety attacks as a result of the loss. Who has standing to bring an elder financial abuse action against the caretaker? With regard to the recovery of compensatory damages for the loss of the watch, arguably the trustee is the real party in interest and accordingly is the only person with standing. With regard to the recovery of damages for pain and suffering, presumably the elder is the sole person with standing. This issue may be analogous to what might occur in an automobile accident, in which property damage to the automobile as well as personal injury to the driver occur. If the automobile is held in a trust, the trustee must bring the action for the property damage while the driver must bring the action for personal injuries.

## **V. DOES AN ELDER FINANCIAL ABUSE CLAIM SURVIVE THE DEATH OF THE VICTIM?**

CCP §§ 377.10 through 377.62 generally control the continued viability of a claim after the death of a claimant. CCP § 377.20(a) provides:

“Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period.”

For elder financial abuse, W & I § 15657.3(d) specifically provides for survival of the right. For causes of action which typically accompany elder financial abuse – fraud, negligence, conversion, etc. – the rights survive by virtue of CCP § 377.20. For less common causes of action, it would be prudent to examine each such right to determine whether it might somehow be “otherwise” affected by statute. Accordingly, elder financial abuse and commonly related causes of action survive the death of the victim.

## **VI. WHO HOLDS THE RIGHTS ARISING OUT OF ELDER FINANCIAL ABUSE FOLLOWING THE DEATH OF THE VICTIM?**

The survival statutes also describe who takes the rights previously held by the decedent and who has standing to commence an action. CCP § 377.30 provides:

“A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent’s successor in interest . . . .”

Accordingly, the right to the survival action belongs to the person who would succeed to that chose in action. Where the decedent dies with a will, the chose in action passes to the legatee of that interest; where the decedent dies without a will, then it passes to the heir or heirs; and where the decedent dies with a trust, it passes to the beneficiary entitled to that interest. (CCP §§ 377.10 and 377.11.) Of course the testamentary disposition will determine who succeeds to the particular chose in action; however if the testamentary plan is silent, the chose in action would presumably pass to the person who would have succeeded to the property itself had it not been taken or harmed. Where the wrongful conduct consists of elder financial abuse and results in both property and personal injury damages, different persons may hold these rights. For example, in the earlier example of the caretaker who wrongfully takes the elder’s watch and the elder thereafter dies, the right to the watch (and presumably the chose in action which now replaces the watch) might be passed to a specific beneficiary through the trust. By contrast, the personal injury claim would pass through the decedent’s residuary estate and then according to the decedent’s testamentary plan. In either event, the chose in action for the watch and the chose in action for the personal injury might ultimately pass to different persons.

## **VII. WHO HAS STANDING TO COMMENCE AN ACTION FOLLOWING THE DEATH OF THE VICTIM?**

CCP § 377.30 (which provides that the survival right “passes to the decedent’s successor in interest”) also provides that the action is to be “commenced by the decedent’s personal representative or, if none, by the decedent’s successor in interest.” Thus, where the property right passes by will or intestacy, a legatee or heir receives the interest, but – at least initially – only the personal representative has standing to bring the action. However following final distribution, the personal representative would be

discharged and the legatee or heir would acquire standing. (Alternately, the chose in action could be retained by the personal representative and the probate kept open until the litigation is completed.) Similarly, where the property right passes from one trust to another trust (such as from a revocable living trust to a survivor's or family trust), the beneficiary may be entitled to the property interest, but only the trustee has standing to bring the action. Again in the example, the trustee (or successor trustee) of the revocable living trust would be the person with standing to sue on the chose in action – that is the loss of the watch. If that trustee conveys the chose in action to the trustee of the recipient trust, then the trustee of the recipient trust would acquire standing. Where the chose in action first passes through a pour-over will, the executor would be the only person with standing; however, upon final distribution, the interest would pass into the trust and thereafter the trustee would be the only person with standing. This hierarchy for determining the real party in interest for all survival actions is reiterated specifically for elder financial abuse actions by W & I Code § 15657.3(d), which also provides that “the right to maintain an action shall be transferred to the personal representative of the decedent, or if none, to the person or persons entitled to succeed to the decedent’s estate.”

#### **VIII. WHAT HAPPENS IF A CONFLICT EXISTS BETWEEN THE HOLDER OF THE INTEREST AND THE PERSON WITH STANDING TO SUE UPON IT?**

Since a distinction exists between who owns the chose in action and who may commence an action on that right, it is possible for different persons to hold these rights. And where different persons hold these rights, it is possible for a conflict to arise between them. This is particularly true in elder financial abuse cases where the trustee (where the victim is alive) or the personal representative or trustee (where the victim has died) may sometimes be the alleged abuser; that is, the person owning the right wishes to prosecute an action against the abuser, but the abuser is the real party in interest with the sole authority to commence such an action. In such a situation, the personal representative or trustee is unlikely to commence an action against himself. This problem has arisen in the general context of estate and trust administration. (*Landis v. First Nat. Bank* (1937) 20 Cal.App.2d 198 and *Olson v. Toy* (1996) 46 Cal.App.4th 818.) In such circumstances, an heir or beneficiary may plead “special circumstances” to avoid the general rule that the

only person with standing is the personal representative or trustee. The analogous problem arose for the first time in the context of elder financial abuse in *Estate of Lowrie v. Lowrie* (2004) 118 Cal.App.4th 220. There, the Second District decided that a beneficiary had standing to bring the action. However, the beneficiary was also the successor trustee to the alleged abuser, and therefore had standing under the general rule when the abuser was disqualified as trustee pursuant to Probate Code § 259. In *dictum*, the court suggested an even broader interpretation of standing might be justified and might include persons with a mere expectancy or contingent interest. (*Estate of Lowrie v. Lowrie* (2004) 118 Cal.App.4th 220, 230 and 231, footnote 12.)

## **IX. WHO SHOULD YOU NAME AS PLAINTIFFS?**

In an AB trust, upon the death of the trustor, the trustee or successor trustee of the living trust typically must apportion assets between the A and the B trusts, and this decision is normally based on tax considerations. However, when one of the assets to be apportioned is a chose in action for elder financial abuse, this decision will affect who has standing and can become even more complex where the alleged abuser is a trustee and/or beneficiary of one or both of the trusts. Ideally, the chose in action should be retained by the trustee of the conveying trust while the lawsuit is pending. Similarly, where the chose in action passes through a will, it should be retained by the executor and the probate kept open until the litigation is resolved. However, it is certainly possible that the estate administration has already been completed by the time a lawsuit on the right is ready to be filed. The attorney preparing the complaint must carefully analyze who originally owned the chose in action, the chain of ownership thereafter, and who now has standing. Because standing is so critical to the viability of the action and because of the complexities discussed above, it might be prudent to name as plaintiffs all persons aligned with your client who might potentially have standing. While the defendant may later obtain the dismissal of one or more of your plaintiffs for lack of standing, your action will nevertheless proceed in the name of the person whom the court has ruled does have standing. However, failing to include the person or persons with standing will be fatal to the entire action.

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