

**LICKTER V. LICKTER:
TAKING THE LEGS FROM UNDER ELDER
ABUSE STANDING**

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I. INTRODUCTION

The recent decision in *Lickter v. Lickter*¹ took an unnecessarily narrow view of the standing required to bring an elder-abuse action. Although seemingly correct from a will-contest, trust-contest or probate perspective, the opinion in *Lickter* is premised upon an incorrect interpretation of California’s elder-abuse statutes. This precedential decision will seriously undermine the legislative goal of preventing elder abuse.

II. STATUTORY BASIS FOR STANDING

Standing to bring an elder-abuse action, after the death of the abused elder, is governed by Welfare and Institutions Code section 15657.3(d), which provides:

(d)(1) Subject to paragraph (2) and subdivision (e), after the death of the elder or dependant adult, the right to commence or maintain an action shall pass to the personal representative of the decedent. If there is no personal representative, the right to commence or maintain an action shall pass to any of the following, if the requirements of Section 377.32 of the Code of Civil Procedure are met:

(A) An intestate heir whose interest is affected by the action.

(B) The decedent’s successor in interest, as defined in Section 377.11 of the Code of Civil Procedure.

(C) An interested person, as defined in Section 48 of the Probate Code, as limited in this subparagraph. As used in this subparagraph, “an interested person” does not include a creditor or a person who has a claim against the estate and who is not an heir or beneficiary of the decedent’s estate.

(2) If the personal representative refuses to commence or maintain an action or if the personal representative’s family or an affiliate, as those terms are defined in subdivision (c) of Section 1064 of the Probate Code, is alleged to have committed abuse of

the elder or dependent adult, the persons described in subparagraphs (A), (B), and (C) of paragraph (1) shall have standing to commence or maintain an action for elder abuse. This paragraph does not require the court to resolve the merits of an elder abuse action for purposes of finding that a plaintiff who meets the qualifications of subparagraphs (A), (B), and (C) of paragraph (1) has standing to commence or maintain such an action.

Probate Code section 48 in turn states:

(a) Subject to subdivision (b), “interested person” includes any of the following:

(1) An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding.

(2) Any person having priority for appointment as personal representative.

(3) A fiduciary representing an interested person.

(b) The meaning of “interested person” as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.

These statutes together form the basis for an interested person to bring a claim against someone who has abused an elderly or dependent adult, so that the abuser will not escape the consequences of his or her actions because of the death of the abused victim.

III. THE LICKTER CASE

The *Lickter* case concerned the standing of grandsons of a deceased elder to bring an elder-abuse action against various other family members. “[P]laintiffs Joshua and Jezra Lickter sued their father (Robert Lickter), their half sisters (Maggie and Kate Lickter), and their half sisters’ mother (Mary McClain) for elder abuse and other related causes of action that had belonged to their grandmother (Robert’s mother), Lois Lickter, when she died.”² Lois’s assets were held in a trust at her death, of which Robert became the trustee. The trust provided for a \$10,000 bequest to each of Joshua and Jezra, with the residue to Robert. If Robert predeceased Lois, the residue would go to Maggie and Kate or, if they also predeceased Lois, to their children. If Maggie and Kate had no children, then the residue would go to Lois’s living children by right of representation. Robert was Lois’s only child so, if all of Robert, Maggie and Kate had predeceased Lois (and because Maggie and Kate had no children), the residue would then have gone to Joshua and Jezra under the terms of Lois’s trust.³

The trial court found that there was no evidence sufficient to treat Kate, in particular, as if she had predeceased Lois pursuant to Probate Code section 259.⁴ Because Joshua and Jezra would have been entitled to a share of Lois's assets (in addition to their \$10,000 specific bequests) only if *all* of Robert, Maggie and Kate had predeceased Lois, the court ruled that Joshua and Jezra did not have standing to bring the elder-abuse action. The Court of Appeal in the Third District, in a published opinion, affirmed that ruling.

IV. THE *LICKTER* OPINION CAUSES THE UNDESIRABLE RESULT OF UNDERMINING ELDER-ABUSE LAWS

The following hypothetical scenario illustrates the undesirable yet unavoidable consequence of the published opinion in *Lickter*. Two grown sons, Adam and Carl, survived their father and widowed mother, Wilma Mae. For various reasons that are not important, Adam had been alienated from his parents since early adulthood. Accordingly, Wilma Mae drafted her will (or designed a trust), after her husband's passing and many years before her own death, in a way that left half of her estate to her son Carl and half to a charity called Benign, and nothing to Adam. In the event that Carl predeceased her, the entire estate (or trust assets) would go to the charity. Wilma Mae also named Carl as the personal representative in her will (or as the trustee in the scenario where Wilma Mae set up a trust instead of a will).

In her last year of life, Wilma Mae became ill and completely reliant upon her abusive but nearby son, Carl, who deprived her of nutrition and medication for months so as to hasten her demise and claim his inheritance. Adam, who lived in a distant part of the state, discovered this clear abuse upon returning to reconcile with his mother in her final weeks and to attend her funeral. For its own charitable and perhaps not-so-charitable reasons, Benign had no desire to challenge Carl or the will or trust in any way.

Looking at this scenario from a purely trust-contest, will-contest, or probate perspective, it may make sense to deprive Adam of standing to challenge the intended distribution of his mother's estate (especially since there is no claim that undue influence had been exerted at the time Wilma Mae drafted her will or trust). Will and trust contests are about the right to receive property, so that possible economic benefit confers standing. If Adam will receive nothing in any case, he has no stake in the outcome.

However, elder-abuse actions are not exclusively about money. From the viewpoint of the public policy that seeks to discourage elder abuse, it is undesirable to deprive Adam of such standing — particularly since neither Carl nor Benign can be counted upon to stop Carl from benefiting from his abuse of Wilma Mae. The California Legislature had this very concept in mind when it amended the relevant statutes to give persons in Adam's position standing to prevent abusers like Carl from profiting from their self-serving and despicable conduct toward a vulnerable elder. The *Lickter* case takes away that vital standing and thereby has the undesirable effect of promoting profit from elder abuse.

Specifically, the *Lickter* decision holds that, in order “to pursue such an action as a ‘beneficiary’ of the elder’s trust, the beneficiary must have ‘a property right in or claim against [the] trust estate . . . which may be affected by the’ elder abuse action.”⁵ This holding applies not only to beneficiaries but to all other interested persons who, although lacking a financial incentive, might otherwise take the difficult step of trying to stop an abuser from gaining through his mistreatment of an elder.

As correctly noted in the opinion, “an interested person” has standing under section 15657.3(d)(1)(C) of the Welfare and Institutions Code to commence or maintain an action for elder abuse in those instances when the personal representative refuses to commence such an action or when the personal representative or his family is alleged to have committed abuse of the elder.⁶ In other words, if Adam were an “interested person,” he would have standing to prosecute such a claim if Carl (the abuser and personal representative) or Benign will not do so.⁷ While the opinion in this case properly looks to section 48 of the Probate Code to determine whether a person such as Adam is an interested person, its analysis in construing that statute strays from the aim of legislative amendments to the law in 2007.

The term “interested person” under section 48 of the Probate Code expressly includes “[a]n heir, devisee, child, spouse, creditor, [or] beneficiary,” as well as “any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding.”⁸ In the scenario involving Wilma Mae and her sons, Adam certainly would not have standing to maintain an elder-abuse action against Carl as a devisee or beneficiary, since Wilma Mae died with a valid will or trust leaving nothing to him. Moreover, Adam obviously was neither Wilma Mae's spouse nor her creditor.⁹

In short, Adam's only hope of gaining standing comes from being Wilma Mae's heir (albeit one not named in the will) or child. This route, however, is foreclosed by the opinion in the *Lickter* case. Specifically, the opinion construes “the phrase ‘having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding’” as being “just as applicable to the more remote preceding terms — ‘heir, devisee, child, spouse, creditor, beneficiary’ — as it is to the immediately preceding term — ‘any other person.’”¹⁰ Accordingly, although Adam is Wilma Mae's child, he must also possess a financial stake in Wilma Mae's estate that could be affected by an elder-abuse proceeding before he can take appropriate steps to stop Carl from benefiting from abusing Wilma Mae. Stated differently, Adam must have a financial incentive to prosecute an elder-abuse action against his brother Carl, and not merely the love or concern that a child (even an estranged one) has for a suffering parent.

The opinion goes a step further in condoning the same result even if Adam were to inherit something from his mother's will or trust — as long as “the beneficial interest [Adam] had in the . . . estate was not one that could have been ‘affected by’” Adam prevailing in an elder-abuse action against Carl.¹¹ In other words, if Adam is

given his inheritance and that inheritance would not be increased by Adam prevailing against Carl in an action alleging elder abuse, there is nobody to stand in the way of Carl profiting from expediting Wilma Mae's demise.¹²

This result is inconsistent with the aim of the elder-abuse statutes, which are not designed to pave another road by which heirs or beneficiaries may enhance their existing financial stakes. Rather, the elder-abuse statutes were intended to discourage would-be abusers from hastening the death of an elder to promote their own financial gain. Indeed, section 48(b) of the Probate Code itself allows that "[t]he meaning of 'interested person' as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding." Therefore, while it may make sense to tether standing to a litigant's economic interest in the outcome of a probate case, a will contest, or a trust contest, it is both counterproductive and contrary to the legislative intent to inject such an element into the standing requirements to file or maintain an elder-abuse action.

Although the *Lickter* opinion does not expressly say so, it is likely that the appellate court employed a restrictive interpretation of standing in an effort to minimize the instances of meritless claims. For example, the court may have harbored a desire to deny standing to plaintiffs who lack a financial stake in the outcome of the litigation but who might still wish to vex their adversary relatives with groundless claims of elder abuse. Allowing such plaintiffs to maintain those actions would deplete the inheritance of their innocent adversaries while clogging the courts with such actions, whereas denying standing will curb that type of litigation abuse. However, while this approach may cut down on frivolous claims by persons with no financial stake in the outcome, it will do nothing to reduce frivolous claims by persons *with* a financial stake in the outcome – probably a greater danger. At the same time, it will eliminate meritorious claims by persons with no pecuniary interest in the outcome.

V. THE LEGISLATIVE RESPONSE TO *LOWRIE* CONFIRMS THE REMOVAL OF THE FINANCIAL STAKE REQUIREMENT

In fact, it was the removal of this financial-stake requirement that the California Legislature had in mind when it amended section 15657.3 of the Welfare and Institutions Code and thereby cured the flaw brought to light in *Estate of Lowrie*.¹³ It is vital to keep in mind here that the Legislature did not codify the analysis in *Lowrie*. Instead, the Legislature recognized and sought to cure the economic-interest problem brought to light in that decision while codifying its result.

In *Lowrie*, a granddaughter, Lynelle, sought to prosecute an elder-abuse claim against her uncle, Sheldon, regarding alleged abuse of Lynelle's grandmother and Sheldon's mother, Laura.¹⁴ At that time, section 15657.3 of the Welfare and Institutions Code afforded standing only "to the personal representative of the decedent, or if none, to the person or persons entitled to succeed to the decedent's

estate."¹⁵ A strict reading of the statute would have denied Lynelle standing because she was not her grandmother's personal representative and could "not succeed to [her grandmother]'s estate under the laws of intestate succession."¹⁶ Instead, she was "simply a beneficiary who was bequeathed \$10,000."¹⁷

In other words, even if Sheldon were determined to have predeceased the grandmother, the grandmother's daughter (Lynelle's mother) and not Lynelle would have taken under intestacy rules.¹⁸ Thus, Lynelle's mother or another of her uncles would have had standing to assert the claim, but Lynelle would not.¹⁹ Nonetheless, the Court of Appeal ultimately found that Lynelle had standing in light of the public policy underlying the elder-abuse statutes, that is, "to deter the abuse of elders by prohibiting abusers from benefiting from the abuse."²⁰

Specifically, the court found that, to effectuate the purpose behind the Elder Abuse Act,²¹ the interpretation of standing requires a flexible approach.²² Under a stricter interpretation, Lynelle (the granddaughter) would not have standing but the decedent's other surviving children would. By restricting Lynelle's standing, the public policy of inducing lawsuits to challenge elder abusers would not have been furthered.²³ Ultimately, the appellate court reasoned that Lynelle had a "strong incentive to pursue this action," but it could only reach that conclusion by virtue of the fact that Lynelle had a financial "expectancy, i.e., her contingent interest" because she had been named as a successor trustee.²⁴

Recognizing that the ability to bring an elder-abuse claim should not hinge on such status, the Legislature amended the statute in 2007 to preserve the result in *Lowrie* while eliminating the financial-interest barrier highlighted by that opinion. In fact, the Assembly Judiciary Committee commented that the then-proposed "non-controversial bill [sought] to clarify who may commence and maintain elder or dependent adult abuse actions . . . where the elder or dependent adult has died."²⁵ That same legislative committee noted that the "bill codifie[d] *Estate of Lowrie* by permitting an intestate heir whose interest is affected by the action . . . or an interested person . . . to commence or maintain an action . . . if the personal representative will not do it."²⁶ Clearly, while the Legislature intended that intestate heirs would have to possess an interest that would be affected by the action, no such requirement was intended for an interested person.

Under the *Lickter* opinion's interpretation of the post-amendment statute, instead of broadening standing to allow heirs, devisees, beneficiaries, spouses and children to assert an elder-abuse claim, the Legislature intended that only those with a sufficient economic interest would be allowed such standing. However, that was basically the state of the law prior to the amendment in 2007, when standing was restricted to personal representatives "or persons entitled to succeed to the decedent's estate."²⁷ No amendment was needed to accomplish such a result – since heirs, devisees, beneficiaries, spouses, and children could bring such actions prior to the amendment so long as they were entitled to succeed to the decedent's estate.

VI. CONCLUSION

The *Lickter* opinion leads to the undesirable consequence of requiring interested persons to have an economic stake in an elder's estate in order to possess the standing needed to take the selfless and often taxing step of bringing an action to prevent an elder abuser from profiting from his or her misdeeds. While there may be a risk that litigants will tend to misuse the elder-abuse statutes as a means to enhance their financial stake when no elder abuse took place, the restrictive interpretation of standing in the *Lickter* opinion – requiring plaintiffs to have an economic interest in an estate – will do nothing to cure that problem. Any potential risk of increasing the number of frivolous elder-abuse actions is outweighed by the benefits that stem from allowing meritorious claims to stand. Providing the ability to bring such an action to heirs, devisees, beneficiaries, spouses or children who have no financial stake in the outcome of such a lawsuit will advance the paramount goal of reducing the incentive to abuse elders in California. In sum, the vital public policy of preventing elder abuse is best served by interpreting the standing of interested persons as going beyond just those with a financial stake in such claims.

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1. *Lickter v. Lickter* (2010) 189 Cal. App. 4th 712 (hereafter "*Lickter*").
2. *Lickter, supra*, at p. 716.
3. *Id.* at p. 718.
4. Probate Code section 259 treats a person as having predeceased a beneficiary if that person is found by clear and convincing evidence to have committed certain acts of elder abuse and if other conditions are satisfied.
5. *Lickter, supra*, at p. 728.
6. *Lickter, supra*, at pp. 724-725; see Welf. & Inst. Code, sections 15657.3(d)(1)(C) and (d)(2).
7. Benign clearly would have standing to bring such an action, since it would stand to inherit the entire estate (or to acquire all of the trust's assets) if Carl, by virtue of being deemed an elder abuser, effectively predeceases Wilma. In that scenario, Benign is a "beneficiary . . . having a property right in or claim against a trust estate or the estate of [the] decedent which may be affected by the proceeding." Prob. Code, section 48(a)(1). Despite the ability to bring such a claim, charities or other interested persons in such circumstances often are motivated to refrain from challenging an abuser for numerous reasons. For example, charities typically are not inclined to start fights or delay the receipt of needed proceeds, while family members frequently wish to preserve personal relationships with surviving relatives. Likewise, beneficiaries with small stakes or a more remote relationship may not want to make such a significant investment if it promises only little economic return.
8. Prob. Code, section 48(a)(1).
9. A creditor would have no standing in any event under Welfare and Institutions Code section 15657.3(d)(1)(C).
10. *Lickter, supra*, at p. 726 (emphasis added).
11. *Lickter, supra*, at p. 729.
12. As noted earlier, Benign or other beneficiaries may have the ability to bring such an action, but also may lack the necessary incentive to do so.
13. *Estate of Lowrie* (2004) 118 Cal. App. 4th 220 (hereafter "*Lowrie*").
14. *Lowrie, supra*, at pp. 223-224.
15. *Id.* at p. 227, quoting Welfare and Institutions Code section 15657.3(d) as in effect before it was amended to expand standing.
16. *Id.* at pp. 227-228.
17. *Id.* at p. 228.
18. *Lowrie, supra*, at pp. 228-229.
19. As noted above, at the time *Lowrie* was decided, Welfare and Institution Code section 15657.3(d) provided 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." See *Lowrie, supra*, at p. 227.
20. *Lowrie, supra*, at p. 229.
21. The Elder Abuse and Dependent Adult Civil Protection Act, Welf. & Inst. Code, sections 15600 et seq.
22. *Lowrie, supra*, at p. 231.
23. *Id.* at p. 230.
24. *Id.* at pp. 230-231.
25. See Assem. Com. On Judiciary, Proposed Consent Analysis of Sen. Bill No. 183 (2007-2008 Reg. Sess.) as amended June 12, 2007.
26. *Ibid.*
27. *Lowrie, supra*, at p. 227.