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Practice Tips

***19 LITIGATING FINANCIAL ELDER ABUSE CLAIMS**

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UPON TURNING 65 YEARS OLD, a resident of California qualifies for the dubious honor of becoming one of the more than 200,000 victims of financial elder abuse each year, [\[FN1\]](#) no matter whether that 65-year-old is suffering from dementia or other mental or physical infirmities. Statistics indicate that people over 65 are more heavily targeted by would-be financial predators. In fact, over 70 percent of people over the age of 50 have been approached fraudulently, with no less than \$3.8 billion lost by seniors to financial scams. [\[FN2\]](#)

As the California Legislature has recognized, “elder and dependent adult abuse is ... indiscriminate ... and factors such as one’s socioeconomic status, gender, race, ethnicity, educational background and geographic location do not provide an impregnable barrier against its broad, horrible reach.” [\[FN3\]](#) Financial abuse is estimated to account for 40 percent of all forms of reported abuse against seniors. [\[FN4\]](#) The statistics become more alarming when one considers estimates that as few as one in five elder abuse cases of any type is reported [\[FN5\]](#) and only one in 25 incidents of financial elder abuse is reported. [\[FN6\]](#)

California’s elderly population is substantial and growing. [\[FN7\]](#) In response to rising levels of crime against elderly persons and the underreporting of such crimes, the California Legislature has, over the last 17 years, repeatedly strengthened statutes to protect the elderly from self-serving relatives and cunning salespeople. One such law is California’s financial elder abuse statute, [Welfare and Institutions Code Section 15610.30](#).

The phrase “financial elder abuse” underscores its seriousness, yet the phrase remains misunderstood. To many people, the term “abuse” equates with physical abuse. Moreover, California’s financial elder abuse law does not raise the issue of mental or physical capacity. If you are 65 or older and incur financial loss due to fraud or other bad faith conduct, you are the victim of financial elder abuse. You or someone acting on your behalf may bring a claim under [Section 15610.30](#). Jurors and even judges (particularly since these cases do not necessarily get tried in Probate Court, where judges are more familiar with elder law) may not recognize the abuse element and lose sight of the wrongfulness of the taking.

To properly present a case, it is helpful to be knowledgeable about the background of California’s financial elder abuse statutes and to understand the procedures and issues common to litigating a financial elder abuse case, including the use of expert testimony. Financial elder abuse also interplays with issues of competence, capacity, and undue influence. By understanding the nature of a financial elder abuse claim, more attorneys will be able to properly identify cases of elder abuse when dealing with elderly clients and become empowered to advocate on their behalf.

Definition

Financial elder abuse occurs when a person or entity takes, secretes, appropriates, or retains (or assists in taking, secreting, appropriating, or retaining) “real or personal property of an elder or dependent adult to a wrongful use or with the intent to defraud, or both.” [\[FN8\]](#) It covers any appropriation or retention of property made in bad faith. [\[FN9\]](#) If the party knew or should have known that the elder had a right to possess the property, he or she will be deemed to have acted in bad faith. [\[FN10\]](#) The financial elder abuse statute is relatively new. Unlike other statutory protections benefiting the elderly, such as provisions regarding capacity and undue influence in the creation of wills or the inter vivos transfers that are found in the Probate and Civil Codes, the financial elder abuse statute was designed for the protection of the elderly regardless of capacity. In creating the statute, the legislature acknowledged the special vulnerability of elders to financial predators.

In its inception in 1994, the financial elder abuse statute imposed liability only on those who stood in a fiduciary relationship to an elderly person. Labeling the violation “fiduciary abuse,” the original law made it a violation for anyone standing in a position of trust with an elder to take or appropriate money or property for any use outside the purpose for which the money or property had been entrusted. [\[FN11\]](#) The legislative intent behind the statute was to improve the reporting and processing of elder abuse claims and to encourage attorneys to take elder abuse cases. According to the Assembly Floor Bill Analysis, statistics in 1994 indicated that only one in 14 incidents of elder abuse were reported, amounting to half a million instances of abuse going unreported each year.

Three years later, the legislature expanded the statute to allow recovery of attorney's fees in an effort to encourage more attorneys to take on financial elder abuse cases. It also expanded the definition of fiduciary abuse to include any person who takes advantage of the elderly and refuses without good faith to disgorge the property. [\[FN12\]](#) The following year, the statute was broadened again and redefined as financial abuse. The legislature focused on financial crimes as a general category of harm faced by elders. [\[FN13\]](#) The 1998 amendment made the first attempt to inject the intent required to constitute financial abuse, stating that financial abuse occurred wherever a person in a position of trust took the money or property of an elder with the intent to defraud.

Additionally, mandatory reporting was expanded under the 1998 law to include instances of financial exploitation, and minimum standards of investigation were established. The legislature expressed a strong need for these revisions, identifying a sharp increase in incidents of elder abuse since the late 1980s. [\[FN14\]](#) According to the legislature, financial abuse was a factor in roughly a third of cases of elder abuse and was more commonly experienced than either physical or mental abuse among the elderly population. [\[FN15\]](#)

The current version of the statute was adopted in 2000 as part of a bill sponsored by California Advocates for Nursing Home Reform, ***20** which asserted that the then-existing and proposed laws did not “sufficiently address the daily financial abuse problems faced by the elderly.” [\[FN16\]](#) The Assembly Floor Analysis heralded the bill as “a comprehensive approach to address the problems of financial abuse and misrepresentation directed against seniors.” The analysis continued:

California seniors are losing millions of dollars by purchasing unnecessary financial products from [persons] who have a financial stake in the sale. Current statutes designed to protect seniors are weak and ambiguous and need to be strengthened. This bill's multifaceted approach will combat elder abuse through strengthening protections and assisting in the prosecution of perpetrators. [\[FN17\]](#)

The 2000 amendment strengthened the definition of financial elder abuse by providing that financial abuse occurs wherever a perpetrator “takes, secretes, appropriates, or retains real or personal property of an elder” to a wrongful use or with intent to defraud or assists in the taking, secreting, appropriating, or retaining of such property. [\[FN18\]](#) Again, a use is wrongful if conducted in bad faith--that is, if a person or entity knew or should have known that the elder had a right to have the property transferred or made readily available, and it is obvious to a reasonable person that the elder maintained that right. [\[FN19\]](#) The amendment loosened the intent requirement. It is not necessary under the present statute that the taker maintain an intent to defraud; rather, a person is guilty of committing financial elder abuse so long

as it would be obvious to a reasonable person that the taker is not entitled to the elder's assets. [\[FN20\]](#)

Capacity Not an Issue

The legislature has recognized the special vulnerability of elders regardless of capacity and has created a statute that applies to any affected elder, while acknowledging that elders with developmental disabilities, mental or verbal limitations, or in poor health are more at risk. [\[FN21\]](#) The statute is still evolving. For example, one bill will provide a right of attachment in cases involving financial elder abuse. [\[FN22\]](#) Recently passed by both houses and signed by the governor, this modification will incentivize attorneys to handle financial abuse cases. Presently, one of the difficulties facing an attorney deciding whether to take a case is collecting from the perpetrators, who are often wasteful or irresponsible with the assets they take. Allowing for attachment would provide a more promising outlet for recovery and encourage efforts to recoup funds wrongfully taken from the elderly.

In addition to still being in evolution, the statutory scheme is of recent creation, and there is a lack of case law interpreting what constitutes financial elder abuse. Most elder abuse cases have not reached an appellate level and are therefore usually not reported. [\[FN23\]](#) The dearth of case law is also explained by the fact that most financial elder abuse cases never make it to court. The elderly are not often in a financial position to pay for litigation or may not want to disrupt their relationships with their caretakers. Often, an elder simply does not know that he or she has a case. [\[FN24\]](#)

In dealing with elderly clients, it is important to have a good understanding of the relevant documents and donative intentions. Moreover, to properly investigate a financial elder abuse claim, it is important to meet the elder separately from other family members to ascertain whether the elder truly consents to the intervivos transfer, modifications to testamentary documents, or other affairs affecting the estate. For example, two different elderly women may seek to transfer ownership of their houses to their adult children. One sees this as a potential tax break for herself or her family, while the other has been led to believe by her daughter that she would be better off living in a small apartment and selling the house at a below-market rate. The transfers may be the same, but in the latter case undue influence may have a role. Some incidents will be clear-cut cases of abuse (a son changes the locks on a house while his aged father is hospitalized, or a daughter trustee of her mother's life estate does not provide enough money for her mother's monthly upkeep). An attorney with elderly clients must be alert to the distinctions that turn simple transactions into situations of abuse.

Under [Section 15610.30](#), financial abuse of an elder occurs when someone obtains property of an elder for a wrongful use or with intent to defraud. The legislature recognized that old age by itself renders people vulnerable to financial abuse, irrespective of whether they are legally mentally sound. [\[FN25\]](#) In addition, [Probate Code Section 850](#) allows a personal representative to bring a case on behalf of a decedent holding a claim to real or personal property that is possessed or held in title by another. By utilizing [Section 850](#), a personal representative may make a claim of undue influence on behalf of a decedent under [Civil Code Section 1575](#), which defines undue influencing as: 1) the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him or her, of such confidence or authority for the purpose of obtaining an unfair advantage, 2) taking an unfair advantage of another's weakness of mind--i.e., the elder lacked the mental vigor to protect against impositions, [\[FN26\]](#) or 3) taking a grossly oppressive and unfair advantage of another's necessities or distress. [\[FN27\]](#) Undue influence occurs when people use their role and power to exploit the trust, dependency, or fear of others. They use this power to gain control over the weaker decision-making abilities of another person. [\[FN28\]](#)

Case law is more developed in the area of undue influence than with elder abuse. Like [Section 15610.30](#), undue influence under [Section 1575](#) does not require a showing of mental incapacity. A grantor can be of sound mind and considered legally mentally competent yet still be subject to undue influence. [\[FN29\]](#) Indeed, the concept of sound mind, typical to an inquiry regarding testamentary instruments, is not essential in determining whether an intervivos transfer is invalid. [\[FN30\]](#)

Because of the similarity of rights under the undue influence and financial elder abuse statutes, there will often be an overlap in factual circumstance leading to two separate claims. This presents interesting procedural challenges. The undue influence claim under [Civil Code Section 1575](#) is asserted as part of a petition brought under [Probate Code Section 850](#), typically accompanied by an effort to seek damages under [Probate Code Section 859](#). This cause of action is equitable and will be tried by the court.

On the other hand, the financial elder abuse cause of action, which is outside the Probate Code, is triable by a jury. There will likely be two simultaneous trials if the facts significantly overlap--one before the court and the other before the jury. Generally, the court first resolves the equitable issues. [\[FN31\]](#) Procedurally, the trial court may try the equitable issues first, without a jury. The court may, in this phase, dispose of the legal issues so that nothing further remains to be tried by a jury. [\[FN32\]](#) Or, alternatively, the court may choose to have an advisory jury. [\[FN33\]](#) The court is also within its discretion to wait to rule on the equitable issues until after the jury's decision, either guided by special verdict findings or not. The trial court has great discretion to set the procedures.

One significant difference between pursuing financial elder abuse claims and causes of action for undue influence is that in financial elder abuse litigation, the burden of proof rests on the petitioner. In undue influence cases, however, if the respondent is in a "confidential relationship" with the victim, the burden of proof shifts. The respondent who holds a confidential relationship will be presumed to have taken undue advantage of the victim's trust, unless the victim had independent advice and acted of his or her own volition and with full comprehension of the results of his or her action. [\[FN34\]](#) This shows the importance of conducting pretrial discovery directed to what the elder knew, what other advisers he or she had, and whether the perpetrator*[21](#) sought or suggested independent advice for the elder.

This more easily met burden makes undue influence a significant factor for an attorney to consider. A confidential relationship can be established with or without a technical fiduciary relationship, although a fiduciary is most certainly considered to be in a confidential relationship. Both exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. [\[FN35\]](#) A confidential relationship is found when one party gains the confidence of the other and purports to act or advise with the other's interest in mind. [\[FN36\]](#) Typically, when a stranger abuses a confidential relationship with an elder, he or she does so in a deliberate, predatory fashion. In contrast, a family member tends to be more opportunistic, for example taking funds "just once," discovering no one is watching, and then taking more. This family member may argue that he or she "would have been there" for the elderly person if need arose. However, the spending patterns of the person committing financial abuse generally belie that argument.

Presumptive Disqualification

Recent case law has made a caretaker a prima facie suspect if he or she becomes the beneficiary of a testamentary instrument, and the scope of who is considered a caretaker is being expanded. Care custodians are presumptively disqualified from receiving testamentary transfers, [\[FN37\]](#) and this includes long-time friends who assume a health-care role. [\[FN38\]](#) Under these conditions, in which courts and juries may be sympathetic to a wrongdoer for having performed at least some minimal care, expert testimony can substantiate a financial elder abuse claim. The requirements for expert testimony are that it relate to a subject sufficiently beyond common experience so as to assist the trier of fact, and that it be based on matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates. [\[FN39\]](#) An expert can explain the particular vulnerabilities of the victim with a depth outside the normal experience of a lay person. [\[FN40\]](#) For example, while everyone is influenced and persuaded in various ways, vulnerability to influence varies. The elderly are, under the financial elder abuse statutes, presumed to fall into a vulnerable category. Some of the factors that contribute to their vulnerabilities include mental and physical infirmities, dependence on others for help with finances and daily needs, loss of a spouse, lack of financial sophistication, and isolation. These factors underscore why, typically, the person who takes advantage is a family member or caretaker. An expert witness is critical to explaining how a seemingly competent and self-sufficient*[22](#) elder can nonetheless get fleeced by a son or daughter, salesperson, or neighbor. California courts have deemed such an opinion "virtually indispensable" to understanding the relationship between the facts and the results. [\[FN41\]](#)

As the population of elderly Californians continues to grow, financial elder abuse is an increasing concern. Knowing how to recognize financial elder abuse requires an understanding that anyone over the age of 65 can be the target of abuse. Situations of abuse may not always be readily apparent, and a good attorney will investigate any transaction affecting the financial affairs of an elderly client. Moreover, as the legislature continues to improve upon the recovery avenues available in financial elder abuse cases, such as through attachment or reimbursement of attorney's fees, the likelihood of a positive outcome in any financial abuse case should improve dramatically and encourage more attorneys to come to the aid of elderly clients.

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[FN1]. See Elder Financial Abuse Task Team Report to the California Commission on Aging, available at http://ccoa.ca.gov/pdf/Elder_Financial_Abuse.pdf (last accessed June 26, 2007) [hereinafter Task Team Report].

[FN2]. See *id.*

[FN3]. 2005 CA A.C.R. 8.

[FN4]. See Task Team Report, *supra* note 1.

[FN5]. See National Center on Elder Abuse, National Elder Abuse Incidence Study (1998), available at http://www.aoa.gov/eldfam/Elder_Rights/Elder_Abuse/ABuseReport_Full.pdf [hereinafter NCEA Study].

[FN6]. See John F. Wasik, *The Fleecing of America's Elderly*, CONSUMERS DIG., Mar./Apr. 2000.

[FN7]. The 2000 census reported nearly 3.6 million Californians over age 65, and it is estimated that by 2010 the number of Californians over 65 will approximate 4.5 million. See Census Tables 83 and 121, available at http://www.aging.ca.gov/html/stats/2000Census_aging_data.html (last accessed June 26, 2007).

[FN8]. [WELF. & INST. CODE §15610.30\(a\)](#).

[FN9]. See [id. §15610.30\(b\)](#).

[FN10]. *Id.* §15610(b)(1)-(2).

[FN11]. [WELF. & INST. CODE §15610.30](#), added by 1994 Cal. Stat. ch. 594 (S.B. 1681).

[FN12]. See [WELF. & INST. CODE §15610.30](#), amended by 1997 Cal. Stat. ch. 724 (A.B. 1172).

[FN13]. [WELF. & INST. CODE §15610.30](#), amended by 1998 Cal. Stat. ch. 946 (S.B. 2199).

[FN14]. See [WELF. & INST. CODE §15610.30\(1\)\(a\)](#), amended by 1998 Cal. Stat. ch. 946 (S.B. 2199).

[FN15]. See *id.*

[FN16]. Senate Judiciary Committee Bill Analysis of A.B. 2107, 2-3 (Aug. 9, 2000).

[FN17]. Assembly Floor Analysis of A.B. 2107, 2 (Aug. 29, 2000).

[FN18]. [WELF. & INST. CODE §15610.30](#), as amended by 2000 Cal. Stat. ch. 442 (A.B. 2107).

[FN19]. *See id.*

[FN20]. *See id.*

[FN21]. *See* [WELF. & INST. CODE §15610.30](#), added by 1994 Cal. Stat. ch. 594 (S.B. 1681).

[FN22]. *See* 2007 Cal. S.B. 611 (Steinberg).

[FN23]. *See* Brisk & Flynn, *No Bad Deed Should Go Unpunished: Evaluation and Discovery of Cases of Financial Elder Abuse of Elders*, 16 Fall NAELA Q. 8, 9 (2003).

[FN24]. *See id.*

[FN25]. *See* [WELF. & INST. CODE §15600](#).

[FN26]. *See* [O'Neill v. Spillane](#), 45 Cal. App. 3d 147, 155 (1975).

[FN27]. [CIV. CODE §1575](#).

[FN28]. *See* Margaret Thaler Singer, Ph.D., *Undue Influence and Written Documents: Psychological Aspects*, 10 THE CULTIC STUDIES J. 1, 19-32 (1993).

[FN29]. *See* [Balassi v. Balassi \(Estate of Gelonese\)](#), 36 Cal. App. 3d 854 (1974); *see also* Porter v. [Coleman \(Estate of Baker\)](#), 131 Cal. App. 3d 471 (1982); [Jamison v. Johnson](#), 41 Cal. 2d 1 (1953).

[FN30]. *See* [O'Neill](#), 45 Cal. App. 3d at 155.

[FN31]. *See* [Connell v. Bowes](#), 19 Cal. 2d 870 (1942).

[FN32]. *See* [Raedeke v. Gibraltar Savs. & Loan Ass'n](#), 10 Cal. 3d 665, 671 (1974).

[FN33]. *See id.*

[FN34]. *See* [Sparks v. Sparks](#), 101 Cal. App. 2d 129, 135-36 (1950).

[FN35]. *See* [Sime v. Malouf](#), 95 Cal. App. 2d 82, 98 (1949).

[FN36]. *See* [Kudokas v. Balkus](#), 26 Cal. App. 3d 744, 750 (1972).

[FN37]. *See* [PROB. CODE §21350](#).

[\[FN38\]](#). See [Bernard v. Foley, 39 Cal. 4th 794 \(2006\)](#).

[\[FN39\]](#). See [People v. Olguin, 31 Cal. App. 4th 1355, 1371 \(1994\)](#); [EVID. CODE §801](#).

[\[FN40\]](#). See [Estate of Duhaney, 246 Cal. App. 2d 653, 657 \(1966\)](#).

[\[FN41\]](#). [Natural Soda Prod. Co. v. City of L.A., 109 Cal. App. 2d 440 \(1952\)](#).