

BILL ANALYSIS

SB 1140

Page 1

Date of Hearing: June 17, 2008

ASSEMBLY COMMITTEE ON JUDICIARY

Dave Jones, Chair

SB 1140 (Steinberg) - As Amended: June 2, 2008

SENATE VOTE : 35-3SUBJECT: ELDER AND DEPENDENT ADULTS: FINANCIAL ABUSEKEY ISSUE : SHOULD THE Elder Abuse and Dependent Adult Civil Protection Act BE REVISED AND EXPANDED IN ORDER TO BETTER PROTECT FRAIL AND VULNERABLE ADULTS FROM FINANCIAL ABUSE?

SYNOPSIS

The Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) was enacted to protect elder and dependent adults from abuse and exploitation. The bill, sponsored jointly by the American Association of Retired Persons, California Advocates for Nursing Home Reform and the California Alliance for Retired Americans, expands EADACPA to better protect vulnerable adults by (1) adding the taking or appropriation of property by undue influence to the definition of financial abuse; (2) creating a new cause of action for financial abuse against a person who takes property from an elder or dependent adult who lacks capacity and then refuses to return the property after a demand for return of the property is made; (3) and establishing that the statute of limitations for the filing of an EADACPA financial abuse action is four years from the date the plaintiff discovers, or should have discovered, the facts constituting the abuse.

The author states that incapacitated and unduly influenced elder and dependent adults are devastated by the loss of property taken from them and this bill seeks to prevent or minimize that abuse by authorizing elder or dependent adults to recover attorney's fees where their property is taken through undue influence or where a person delays returning property taken from an incapacitated elder. Supporters add that this bill is necessary to prevent abuse by "those who would exploit the most vulnerable of our population." There is no known opposition.

SUMMARY : Expands the protections of the Elder Abuse and Dependent Adult Civil Protection Act. Specifically, this bill :SB 1140

Page 2

- 1) Provides that "financial abuse" occurs when a person takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult by undue influence, as defined. Also defines assisting another in such conduct as financial abuse.
- 2) Deems a person or entity to have taken, secreted, appropriated, obtained or retained property of an elder or dependent adult for a wrongful use if the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.
- 3) Provides that a person or entity takes, secretes, appropriates, obtains or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer,

or testamentary bequest, regardless of whether the property is held directly or by a representative of the elder or dependent adult.

- 4) Clarifies that compensatory damages are included in the remedies available for financial abuse under EADACPA.
- 5) Clarifies that EADACPA permits recovery from the employer of a person who takes the elder or dependent adult's property by means of his employment and that the standards in Civil Code Sec. 3294, which limits the employer's liability, apply to the imposition of punitive damages, but not to compensatory damages or attorney's fees on such employer.
- 6) Requires a person who takes, secretes, appropriates, obtains or retains real or personal property of an elder or dependent adult who lacks capacity as defined, or who is of unsound mind, but not entirely without understanding, as provided in Civil Code Section 39, to return the property upon demand. Provides a civil action to an elder or dependent adult who lacks capacity or is of unsound mind to recover the property that was not returned after a demand, with all the remedies available under EADACPA, including attorney's fees.
- 7) Extends the statute of limitations for actions for damages pursuant to the EADACPA financial abuse provisions to four years after the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, the facts

SB 1140
Page 3

constituting the financial abuse.

EXISTING LAW :

- 1) Establishes EADACPA to protect elderly and dependent adults from abuse. (Welfare & Institutions Code Section 15600 et seq. Unless stated otherwise, all further statutory references are to that code.)
- 2) Provides that "financial abuse" occurs when a person takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both, or when a person assists another in that conduct. (Sections 15610.30(a)(1) and (a)(2).)
- 3) Deems a person or entity to have taken, secreted, appropriated or retained real or personal property of an elder or dependent adult for a wrongful use if the conduct was done in bad faith. (Section 15610.30.)
- 4) Permits an elder or dependent adult to bring a financial abuse civil action when real or personal property is taken or appropriated from the elder or dependent adult for a wrongful use or with intent to defraud, or both. (Section 15657.5.)
- 5) Provides that actions brought under EADACPA shall be commenced according to the applicable statutes of limitations as provided in other statutes. Provides, in the case of financial abuse, that the applicable statute of limitations is three years after plaintiff discovers the facts constituting the financial abuse. (Code of Civil Procedure Section 338.)
- 6) Provides that a contract with a person of unsound mind, but not entirely without understanding, made before the incapacity of the person has been judicially determined, is subject to rescission. Provides a rebuttable presumption that a person is of unsound mind when he or she is substantially unable to manage his or her own financial resources or resist fraud or undue influence. (Civil Code Section 39.)

FISCAL EFFECT : As currently in print this bill is keyed fiscal.

COMMENTS : EADACPA was enacted to protect elder and dependent adults from abuse and exploitation. EADACPA recognizes that elders and dependent adults may have disabilities and cognitive

SB 1140
Page 4

impairments, such as Alzheimer's disease and other dementia disorders, which often leave them incapable of seeking help and protection from others; and that elders and dependent adults suffer physical impairments and poor health, conditions that place them in a dependent and vulnerable position. Further, legislative findings codified in EADACPA state that cases of elder and dependent adult abuse 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.

Under EADACPA, an elder or dependent adult whose property is wrongfully taken by another may bring a civil action for financial abuse to recover the loss of the property and the expense of hiring an attorney to bring the action. This remedy is available to the elder or dependent adult when a person takes their property for a wrongful use or with intent to defraud or both. Under EADACPA, wrongful use is defined as retaining possession of property where the person taking it knew, or should have known, that the elder or dependent adult had the right to have the property made readily available to him or her or representative.

The author writes that this bill seeks to strengthen EADACPA and better protect elder and dependent adults:

Each year in California, incapacitated and unduly influenced elder and dependent adults are devastated by the loss of property taken from them. Many of these adults have limited resources and the inability to earn income to make up the loss. Moreover, the psychological impact of exploitation significantly increases an elder's rate of mortality. The ability to quickly recover their property may be critical in restoring an elder or dependent adult's self-esteem and independence.

In many situations involving incapacitated and unduly influenced elder and dependent adults, the sole remedy is rescission. Unfortunately, rescission is a grossly inadequate remedy. While the ultimate goal of rescission is the return of the elder or dependent adult's property, the procedure requires the plaintiff to bear their own attorney's fees. In addition, because rescission only requires the return of the property, defendants are encouraged to delay resolution so as to promote a

SB 1140
Page 5

compromise settlement.

It is particularly true for elders who may be late in life that "justice delayed is justice denied." SB 1140 addresses these problems by authorizing elder or dependent adults to recover attorney's fees where their property is taken through undue influence or where a person delays returning property taken from an incapacitated elder.

This bill creates a new basis for financial abuse of elder and dependent adults -- undue influence . Under existing law,

financial abuse of an elder or dependent adult consists of taking their property for a wrongful use or with intent to defraud, or both. Wrongful use is defined as retaining possession of property where the person taking it knows, or should have known, that the elder or dependent adult has the right to have the property in his or her possession or to have the property "made readily available."

This bill adds undue influence as another basis for financial abuse of an elder or dependent adult. Undue influence, as defined by Civil Code Section 1575, consists: (1) in the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress. Proponents argue that this expansion is necessary because elders are often exploited through undue influence and under circumstances where the current elements necessary for financial abuse are lacking, thus making an important remedy of EADACPA - attorney's fees and costs to the plaintiff - unavailable today.

This bill provides a new remedy when an elder or dependent adult lacks capacity -- return the property to avoid attorney's fees .

Under the bill, if an elder or dependent adult from whom property has been taken lacked capacity, he or she or a representative is able to demand a return of the property and, if the property is not returned, may file an action for all remedies available under EADACPA, which includes return of the property and attorney's fees and costs.

A person who enters a contract as a result of undue influence or who lacks capacity does not consent freely to the contract, thus

SB 1140

Page 6

the transaction is voidable by an action for rescission. However, rescission, according to proponents, is an inadequate remedy for elders because not only must the elder bear the attorney's fees in pursuing the rescission action (and these fees are not recoverable by the elder in an action for rescission), but also the person who took the property is encouraged to delay resolution so as to promote a compromise settlement. Rescission is particularly an inadequate remedy for elders who may not be able to prosecute their cases to the end. Further, abusers may be found not culpable because they can claim they did not know that the elder or dependent adult lacked capacity to consent to the taking of the property.

This bill addresses these problems by authorizing elders or dependent adults to recover attorney's fees and costs where their property is taken through undue influence or where the person taking the property delays the return of the property. In the case of the elder or dependent adult who lacks capacity, this bill requires that a demand for the return of the property first be made. Thus, someone who did not know that the elder or dependent adult lacked capacity would be given the opportunity to return the item taken. Practitioners in elder abuse contend this would be of great assistance to them in obtaining a just and speedy resolution of the problem - the elder would get the property back quickly, and the person who wrongly took the property would not be exposed to attorney's fees and costs available in an EADACPA action.

This bill sets the statute of limitations for EADACPA financial abuse actions at four years from discovery . Since EADACPA does not specify a statute of limitations within the act, EADACPA actions must be filed according to rules set forth in the Code of Civil Procedure, which sets the statute of limitations for an action for financial abuse to three years of discovery of the facts constituting the abuse. (Code of Civil Procedure Section 338.) _

The bill creates a specific statute of limitations for EADACPA financial abuse cases of four years after the plaintiff discovers, or, through the exercise of reasonable diligence, should have discovered, the facts constituting the financial abuse. This four-year statute of limitations also applies to actions commenced when a person or entity refuses to return property taken from an elder or dependent adult who lacks capacity, as defined.

SB 1140

Page 7

Proponents contend that this four-year statute of limitations is needed because many elders and dependent adults who become victims of financial abuse take longer to realize what has happened to them, or to reach out for help in a timely manner.

This bill redefines taking or appropriating property . Under current law, a person is deemed to have taken or appropriated an elder or dependent adult's property in bad faith if the person knew or should have known that the elder or dependent adult had the right to have the property transferred or made available to the elder or dependent adult or their representatives. In this context, "should have known" means it is obvious to a reasonable person that the elder or dependent adult had a right to the property transferred. (Section 15610.30(b).) _

The bill deletes bad faith and instead provides that a person takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, and regardless of whether the property is held directly by the elder or dependent adult or by an attorney-in-fact, conservator, trustee, or other representative of the elder or dependent adult. This change clarifies the conduct constituting financial abuse and the instrument of transfer that is subject to scrutiny.

This bill replaces the current definition of "taking for a wrongful use" with a new standard . Current law provides that a person is deemed to have taken or appropriated property of an elder or dependent adult for a wrongful use if the person took or appropriated the property in bad faith. A person is deemed to have taken the property in bad faith if the person knew or should have known that the elder had a right to transfer or make the property available at the time of the taking.

Instead, the bill provides that a person or entity is deemed to have taken or appropriated an elder's property for wrongful use if, among other things, the person knew or should have known that taking or appropriating the property is likely to be harmful to the elder or dependent adult. This definition shifts the proof required from the defendant's knowledge or presumed knowledge of the elder's or dependent adult's right to the property taken, to the defendant's knowledge or presumed knowledge of the effect of the taking on the elder or dependent

SB 1140

Page 8

adult, to which a reasonable person standard is applied. This shift of focus should encourage more advocates to assist elders and dependent adults in recovering their property.

ARGUMENTS IN SUPPORT : The American Association of Retired

Persons (AARP), a co-sponsor of SB 1140, lauds the bill for providing "a very strong and meaningful protection for our most vulnerable adults."

The California Alliance for Retired Americans, another co-sponsor of the bill, writes that elder "financial abuse has reached epidemic proportions in our country and state and still continues unabated. Few such activities are more despicable than talking advantage of those who are incapacitated or unduly influenced. And while existing law enables an elder whose property is wrongfully taken by another to bring a civil action to recover the loss and the cost of hiring an attorney, it doesn't give the same right to an incapacitated senior or one who has been unduly influenced. This unfortunate limitation in the law is what SB 1140 addresses by enabling an elder to recover property and the cost of an attorney when the property was taken by undue influence or where the elder lacks full mental capacity."

Writes California Advocates for Nursing Home Reform, also a co-sponsor: "When the Legislature enacted [EADACPA], it recognized that elders and dependent adults are particularly vulnerable to exploitation, including financial abuse. Elder Financial Abuse is now a national epidemic. SB 1140 is an important step forward in this fight against those who would exploit the most vulnerable of our population."

These statements are echoed by other proponents, notably the Alzheimer's Association that state: "Current law, which only provides for rescission, is not even an option for those who are incapacitated. Clearly there is no deterrent to individuals who are not well-intentioned and [who] take a person's property knowing they have limited cognitive functioning. [SB 1140] will correct a serious weakness in current law intended to protect persons with cognitive impairment, such as Alzheimer's disease and other dementia disorders. Given the expected doubling of Californians living with this disease by 2030 - from the current 500,000 to one million - exploitation will only become a bigger problem."

SB 1140
Page 9

REGISTERED SUPPORT / OPPOSITION :

Support

American Association of Retired Persons (sponsor)
California Advocates for Nursing Home Reform (sponsor)
California Alliance for Retired Americans (sponsor)
Alzheimer's Association
American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO
California Association of Area Agencies on Aging
California Commission on the Status of Women
California Mental Health Directors Association
California Senior Legislature
Congress of California Seniors
Consumer Attorneys of California
County Welfare Directors Association of California
Gray Panthers of California
San Francisco Consortium for Elder Abuse Prevention
San Joaquin County Commission on Aging

Opposition

None on file

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