

BILL ANALYSIS

SENATE JUDICIARY COMMITTEE
 Senator Ellen M. Corbett, Chair
 2007-2008 Regular Session

SB 1140	S
Senator Steinberg	B
As Amended March 10, 2008	
Hearing Date: March 25, 2008	1
Welfare & Institutions Code	1
GMO:rm	4
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SUBJECT

Financial Abuse of Elder or Dependent Adults

DESCRIPTION

The bill would add the taking or appropriation of property by undue influence to the definition of financial abuse of an elder or dependent adult. It would create a presumption that a person has taken or appropriated property of an elder or dependent adult for a wrongful use, if the person knew or should have known that his or her conduct is likely to be harmful to the elder or dependent adult.

The bill would create a new cause of action for financial abuse against a person who takes the property of an elder or dependent adult who lacks capacity and then refuses to return the property after a demand for return of the property was made by the elder or dependent adult.

Finally, the bill would establish that the statute of limitations for the filing of an Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) financial abuse action, including the new cause of action for property taken from an elder or dependent adult who lacks capacity, is four years from the date the plaintiff discovers, or should have discovered, the facts constituting the financial abuse.

The bill would clarify that in an action under EADACPA, the court shall award attorney's fees and costs in addition to compensatory damages and all other remedies otherwise

(more)

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provided by law.

BACKGROUND

EADACPA was enacted to protect the state's elder and dependent adult population from abuse and exploitation (Welfare and Institutions Code Sec. 15600 et seq. All references are to this code unless otherwise indicated.) EADACPA recognizes that elders and dependent adults may have developmental disabilities and cognitive 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 a lawyer to bring the suit. (Sec. 15657.5.) This remedy is available to the elder or dependent adult when a person takes their property "to a wrongful use" or "with intent to defraud" or both. (Sec. 15610.30(a)(1).) Under EADACPA, wrongful use is defined as retaining possession of property where the person taking it either 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 their representative. On the other hand, fraud requires a misrepresentation of a material fact with the intent that the victim justifiably rely upon the misrepresentation.

According to the sponsors, SB 1140 is a follow-up to the author's SB 611 (Ch. 45, Statutes of 2007) that authorized the use of pre-judgment attachment to secure recovery of property taken from an elder or dependent adult (Sec. 15657.01). SB 611 provided an important tool for attorneys who take on EADACPA cases.

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SB 1140 would further the goal of lessening the difficulty of pursuing these civil actions and fine-tuning the causes of action that could be brought on behalf of this very vulnerable population.

CHANGES TO EXISTING LAW

1.Existing law provides that "financial abuse" occurs when a person takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both, or when a person assists another in that conduct. (Secs 15610.30(a)(1) and (a)(2).)

This bill would add 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 in Section 1575 of the Civil Code. Likewise, assisting another in this conduct would be defined as financial abuse by this bill . . .

Existing law 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.

This bill would deem 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.

This bill would provide 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, whether or not the property is held directly by the elder or dependent adult or by a representative.

2.Existing law 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

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defraud, or both. (Sec. 15657.5.)

This bill would require the person who takes, secretes, appropriates, obtains or retains real or personal property of an elder or dependent adult who lacks capacity as defined in Probate Code Sec. 812 to return the property upon demand.

This bill would create a new civil cause of action for an elder or dependent adult who lacks capacity to recover the property that was not returned after a demand, and for all the remedies available under EADACPA, including attorney's fees.

3. Existing law provides that actions brought under EADACPA shall be commenced according to the applicable statutes of limitations as provided in other statutes. In the case of financial abuse, the applicable statute of limitations is three years after plaintiff discovers the facts constituting the financial abuse. (Code of Civil Procedure Sec. 338.)

This bill would extend the statute of limitations for actions for damages pursuant to the EADACPA financial abuse provisions, including the new civil cause of action for taking property when the elder or dependent adult lacks capacity, to four years after the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, the facts constituting the financial abuse.

The bill makes several other clarifying, technical, and conforming amendments.

COMMENT

1. Need for the bill

The author states:

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

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significantly increases the 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? SB 1140 would protect California's seniors by ensuring that unduly influenced elder and dependent adults also have access to the remedies provided by EADACPA.

2. A third basis for financial abuse: 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." Fraud, on the other hand, requires misrepresentation of a material fact with the intent that the victim justifiably rely upon the abuser's misrepresentation.

SB 1140 would add undue influence as a third basis for financial abuse of an elder or dependent adult. Proponents believe that this is necessary because elders are often exploited through undue influence and under circumstances where the statutory elements necessary for financial abuse (taking for a wrongful use, intent to defraud) are lacking, and thus an important remedy of EADACPA, attorney's fees and costs to the plaintiff, are not available.

For example, an elder may be pressured by a family member to change the terms of a will or encouraged strongly by the elder's longtime stockbroker to purchase 1000 shares of stocks in a company that became bankrupt soon thereafter. In both cases there might not have been any misrepresentation of fact, nor would the property taken have been one that the elder had a right to "make readily available." In other words, the conduct of the potential abuser would not fit the current definition of financial abuse, yet the results are the same, i.e., the elder is unknowingly deprived of his or her property. Without the availability of an award of attorney's fees and costs to

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the plaintiff, as there would be in an EADACPA action, an elder or dependent adult would have to expend more money to rescind the action taken or recoup money that was lost.

Undue influence is defined by Civil Code Sec. 1575. It 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; or
- (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.

The courts have held that "undue influence" consists of "persuasion that exceeds accepted standards and approaches the boundaries of coercion." (*Odorizzi v. Bloomfield School District* (1966) 246 Cal.App.2d 123, 130.) Actual misrepresentations of law or fact are not essential to undue influence. (*Odorizzi, supra* at 130.) Another court described undue influence as the application of pressure on a mental, moral, or emotional weakness. (*Kelley v. McCarthy* (1936) 6 Cal.2d 347, 364.)

Advocates contend that undue influence should be recognized as a separate basis for financial abuse because it focuses on the state of mind of the elder or dependent adult at the time the property is taken from them, rather than on that of the person taking the property. An EADACPA lawsuit based on undue influence may be less difficult to prove than one based on intent to defraud, thus allowing advocates to more easily recover (or more quickly recover) the elder's or dependent adult's property.

However, there may be some distinctions drawn between conduct such as a grandson pressuring his grandmother to deed her home to him now so he can draw equity out of the

home and a longtime stockbroker who convinces grandmother to purchase 1000 shares of Bear Stearns several months before the investment bank collapsed unexpectedly. In the first example, there is no question that an EADACPA

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action based on undue influence would provide justified relief for the grandmother. In the second, the transaction could have simply been one of bad judgment and luck on the part of both the stockbroker and the elder, assuming the elder did not lack capacity at the time of the transaction. An interesting situation could arise if, for example, the elder purchased the stocks in late September 2007, when it appeared that financial stocks were rebounding from year lows, was placed into a conservatorship in February 2008, and now the Bear Stearns stocks are worth pennies on the dollar. Would the stockbroker now be vulnerable to an EADACPA action based on undue influence? How would the stockbroker defend against an EADACPA action by the conservator to recoup the money paid for the Bear Stearns stock, alleging undue influence? Proponents of SB 1140 argue that in either case, the stockbroker friend would be vulnerable to a lawsuit, whether it is based on a wrongful taking of property with undue influence under Civil Code Section 1575 or an EADACPA action based on undue influence. The difference is that in the second scenario, the elder would be able to recover attorney's fees and costs. The advantage of being able to recoup attorney's fees and costs, of course, is that in meritorious cases, it creates incentives for the defendant to settle and settle quickly in order to avoid payment of fees. To an elder, the speedy resolution of a case that could otherwise take years and could drain their remaining funds and waning energy at the end of their lives is literally priceless.

In non-meritorious cases, however, the threat of an adverse attorney's fees award puts pressure on the defendant to settle in order to limit the person's exposure to a larger loss. And while the defendant may prevail, the expense of litigation will not be minor.

Thus, adding "undue influence" as a basis for an EADACPA suit could provide elders with a valuable tool to recover assets taken from them. However, there is a question whether the law could be abused by overzealous litigants.

3. New remedy available to elder or dependent adult who lacks capacity: return the property and avoid attorney's fees

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Under SB 1140, if an elder or dependent adult from whom property has been taken lacked capacity, he or she or a representative would be 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 could include 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 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 the person who took the property is encouraged to delay resolution so as to promote a compromise settlement. That rescission is an inadequate remedy is particularly true for elders who may be in their late years and who may not be around 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.

SB 1140 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 would require that a demand for the return of the property first be made. Thus, a person or entity who did not know that the elder or dependent adult lacked capacity at the time he or she signed a contract to purchase an annuity, for example, would be given the opportunity to take back the contract and return the money paid for the annuity. 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 their money back quickly, and the person who sold the annuity (and the investment company) would not be exposed to attorney's fees and

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costs available to plaintiff in an EADACPA action.

Suggested amendment: To clarify that the demand for the return of the property is to be made by the elder or dependent adult or a representative, the following amendment is suggested:

On page 4, line 36, after "demand" insert: by the elder or dependent adult or a representative of the elder or dependent adult

Suggested amendment : To ensure that all the remedies available under Sec. 15657.5, including attorney's fees and costs, are also available to this civil cause of action, the following amendments are suggested:

On page 4, line 38, after "to" add: the
On page 4, line 38, before the period, add: , including attorney's fees and costs

It should be noted that "lack of capacity" is specifically defined in Probate Code Section 812. The definition is incorporated by cross-reference in this new provision of EADACPA.

4. Statute of limitations for EADACPA financial abuse actions set at four years from discovery

Because 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 (C.C.P.). Under C.C.P. Section 338, an EADACPA action for financial abuse must be filed within three years of discovery by the aggrieved party of the facts constituting the abuse.

SB 1140 would create a specific statute of limitations for EADACPA financial abuse cases and extend the statute

of limitations for these cases to four years after the plaintiff discovers, or, through the exercise of reasonable diligence, should have discovered, the facts constituting the financial abuse.

Proponents contend that the longer statute of limitations is needed because many elders and dependent adults who

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become victims of financial abuse take longer to realize what has happened to them, or to reach out for help in a timely manner. However, in extending the statute of limitations to four years, SB 1140 would also commence the running of the statute at the point of discovery, through the exercise of reasonable diligence, on the plaintiff's part of facts constituting financial abuse. This is a fair requirement, used in several statutes of limitations where delayed discovery is used as the starting point for the running of the statute.

This four-year statute of limitations would also apply to actions commenced when a person or entity refuses to return property taken from an elder or dependent adult who lacks capacity as defined in Probate Code Sec. 812.

5. SB 1140 would redefine 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. "Should have known" in this context means it is obvious to a reasonable person that the elder or dependent adult had a right to the property transferred. (Sec. 15610.30(b).)

SB 1140 would delete this provision and instead provide that a person takes, appropriates, 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 language clarifies to a great degree what kind of conduct constitutes financial abuse, what instrument of transfer would be subject to scrutiny, and that it matters not if the elder or dependent adult holds the property right directly or indirectly through others.

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Suggested amendment: On page 3, line 28, strike out "an attorney-in-fact, conservator, trustee, or other" and insert "a". The named persons or entities are already included in the definition of "representative" in the new subdivision (d), which is former subdivision (c).

6. Different standard for taking property for a wrongful use

SB 1140 would replace the current definition of "taking for a wrongful use" with a new standard. Current law provides that a person would be 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. Current law then provides that a person shall be 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.

SB 1140 would instead provide that a person or entity would be deemed to have taken or appropriated the elder's property for wrongful use if, among other things, the person or entity takes or appropriates the property and the person knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.

This definition of taking for a wrongful use would shift 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 adult, to which a reasonable person standard may be applied. Again, this shift of focus would encourage more advocates to assist elders and dependent adults in recovering their property.

7. Clarifying other technical ambiguities in EADACPA financial abuse actions

Other provisions in SB 1140 would clarify certain remaining ambiguities in the financial abuse provisions of EADACPA.

It would permit recovery when the property

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taken is part of an elder or dependent adult's trust or by agreement, gift, or will (Proposed Sec. 15610.30(c)).

It would add "compensatory damages" to Sec. 15657.5 (a) and (b) to clarify that "all other remedies otherwise provided by law" includes, not excludes, compensatory damages.

It would rewrite Sec. 15657.5 (b) to clarify that EADACPA permits recovery from the employer of a person who takes the elder's property by means of his employment and that the standards described in Civil Code Sec. 3294 apply to the imposition of punitive damages, not to compensatory damages or attorney's fees, on such employer.

Suggested amendment: The entire section addresses attorney's fees and costs when preponderance of the evidence shows defendant is liable for financial abuse. "Costs" was inadvertently omitted from subdivision (c), which addresses employer liability.

On page 4, line 26, before the period add "and costs"

8. Supporters agree SB 1140 would bring more meaningful protections to vulnerable adults

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 Gray Panthers of California states that the bill would allow "incapacitated elders, many of whom [with] various forms of dementia, to recover property taken from them by undue pressure," as well as facilitate the services of a lawyer for assistance. This proponent recounted an experience with a senior who came daily to the Robertson Adult Day Health Care Center and who did not understand what was taking place with his property. Had this bill been in place, according to this proponent, it would have protected that senior, who "died penniless

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and heartbroken with little understanding of what had taken place about his home."

These statements are echoed by other proponents, notably the Alzheimer's Association that stated, in a letter dated March 13, 2008: "[c]urrent 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."

The California Advocates for Nursing Home Reform (CANHR), another co-sponsor of SB 1140 summed it up: "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." (Letter dated March 13, 2008.)

Support: The San Francisco Consortium for Elder Abuse Prevention; American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME); Alzheimer's Association; Gray Panthers; one retired attorney

Opposition: None Known

HISTORY

Source: California Advocates for Nursing Home Reform (CANHR), the American Association of Retired Persons (AARP), and Steve Reis, Esq.

Related Pending Legislation: None Known

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Prior Legislation: AB 2611 (Simitian, Ch. 886, Statutes of 2004) reduced the standard of proof for financial abuse to preponderance of the evidence, but allowed punitive damages upon clear and convincing evidence of recklessness,

oppression, fraud, or malice.

SB 611 (Steinberg, Ch. 45, Statutes of 2007)
(See Background.)
