

BILL ANALYSIS

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Date of Hearing: June 19, 2007

ASSEMBLY COMMITTEE ON JUDICIARY
Dave Jones, Chair
SB 611 (Steinberg) - As Amended: May 31, 2007

SENATE VOTE : 29-9

SUBJECT: Financial Abuse of Elder and Dependent Adults:
Attachment

KEY ISSUE : IN ORDER TO HELP secure recovery from PERPETRATORS of elder abuse, SHOULD THE ATTACHMENT law BE AVAILABLE IN CASES INVOLVING FINANCIAL ABUSE OF ELDERS AND DEPENDENT ADULTS?

SYNOPSIS

This bill, sponsored by several senior's organizations, permits the use of the attachment law, which authorizes a plaintiff to attach the defendant's property to secure the amount of the claimed debt of defendant to plaintiff, in cases involving financial abuse of an elder or dependent adult under the Elder Abuse and Dependent Adult Civil Protection Act. This remedy would be in addition to any other remedy sought or that may be available to plaintiff. This bill is supported by numerous senior organizations as well as by the Trusts and Estates Section of the State Bar and the Los Angeles County District Attorney's Office. There is no known opposition.

SUMMARY : Allows the use of attachment in cases involving financial abuse of an elder or dependent adult. Specifically, this bill :

- 1) Permits the use of attachment law, by which a defendant's property is attached to secure a claimed amount of indebtedness to the plaintiff in connection with a civil action involving financial abuse of an elder or dependent adult.
- 2) Provides that this remedy may be pursued whether or not other forms of relief are demanded.

EXISTING LAW :

- 1) Provides, through the Elder Abuse and Dependent Adult Civil

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Protection Act, civil remedies to victims of elder or dependent adult abuse, neglect, or abduction, including recovery of damages and attorney's fees. (Welfare & Institutions Code Section 15600 et seq .)

- 2) Secures the assets of a debtor through seizure of the debtor's assets prior to judgment on a creditor's claim. Provides for a noticed hearing on a petition for a writ of attachment (in exceptional circumstances, an ex parte petition may be filed), with a supporting affidavit detailing the property to be attached, the amount to be secured, and, if appropriate, an estimate of attorney's fees and costs. Provides for a defendant to oppose the order of attachment by filing of a notice of opposition and supporting affidavit, or by filing a claim of exemption for exempt property, as defined. (Code of Civil Procedure Section 481.010 et seq .)

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

COMMENTS : The Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) was enacted in 1991 to deal with a large number of elders and dependent adults who were being victimized by unscrupulous individuals, even by family members, but had little chance of recovering money and property stolen from them. The EADACPA's intent was to encourage private attorneys to pursue claims of abuse of an elder or dependent adult, including financial abuse, by providing for enhanced remedies including recovery of reasonable attorney's fees. This intent, according to proponents of SB 611, "has largely been unrealized because many attorneys will not take these cases because of the uncertainty of recovery."

Attachment is an ancillary or provisional remedy to aid in the collection of a money demand by seizure of property in advance of trial and judgment. The money or property is held as security for eventual satisfaction of the judgment, unless released by the giving of other security. Attachment cannot be invoked unless a main action has been properly initiated; it is a remedy that is wholly statutory, and its scope and procedure are defined and limited by statutes. The use of attachment is limited to commercial transactions.

This bill, sponsored by California Advocates for Nursing Home Reform, California Alliance for Retired Americans and AARP,

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makes the remedy of attachment available to a plaintiff in a case involving financial abuse of an elder or dependent adult. According to the author:

California's elderly population is approximately 3.7 million, and is expected to nearly double to 6.4 million within the next two decades according to the U.S. Census Bureau. The California Department of Justice estimates 225,000, or 1 in every 20, elder or dependent adults experience abuse or neglect each year in California. Far too many seniors experience financial abuse at the hands of trusted care providers, relatives, and unscrupulous sellers that exploit their increased isolation and vulnerability to high-pressure sales tactics. . . .

Elder financial abuse cases seeking to recover wrongfully taken funds or property may take a year or longer, during which the perpetrator may hide or waste the assets. Judgments cannot be satisfied when the funds in question have disappeared. This leaves an abused elder feeling taken advantage of twice: first, by the predator who took his money; and second, by the legal system which permits the predator to hide and waste the funds during the course of the case.

Under current law, an elder may obtain a temporary restraining order ordering the defendant not to transfer assets while the lawsuit is pending. However, such an order does not actually prevent the defendant from transferring assets. It only exposes them to sanctions for doing so. Even if the defendant is sanctioned for violating the order, the assets have nevertheless disappeared. Attachment permits the court to secure the assets at the beginning of the case so a judgment may be satisfied.

Attachment Law : Attachment is a well-established procedure that permits the seizure of, and imposes lien rights on, the defendant's property, and secures for the plaintiff a fund from which any later judgment may be satisfied. The attachment procedure provides numerous safeguards against abuse and

requires judicial oversight. Among other things, the plaintiff must demonstrate a probability of success at a noticed hearing and post a bond in order to protect the defendant from loss in

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the event plaintiff's action is unsuccessful. Further, attachment permits a plaintiff to determine early in the case whether proceeding with the litigation is justified, especially if the defendant's financial status is in question. If the plaintiff's case is strong and demonstrated at the hearing on the attachment order, attachment could result in an early resolution of the case. Attachment is often not pursued where a defendant is financially secure because it is not necessary, nor would the attachment justify the cost and effort of obtaining the writ.

Generally, attachment is authorized only where the claim is a contract claim for money, a minimum amount is claimed and the claim is not secured or the security is valueless. While attachment is generally available only for claims arising out of commercial transactions -- and not for consumer transactions -- the remedy has been made applicable by statute to other situations, including an action for recovery of public funds paid to a person engaged in unlawful sale of controlled substances, an action to collect sales and use tax, and an action of an injured worker against his or her employer.

The Bill Appropriately Expands Attachment Law To Cases Involving Elder Abuse . This bill allows the use of prejudgment attachment in order to preserve the elder or dependent adult's assets wrongfully held by defendant until judgment is rendered. The procedure by which an attachment under EADACPA may be sought and issued is the same as provided in general attachment law. Procedural safeguards that require the posting of a bond and allowing defendant to oppose the attachment apply to protect the defendant.

Given the bonding requirement and the requirement to demonstrate a probability of success, few attachment petitions will likely be filed by plaintiffs' lawyers already handling the case on a contingency fee basis who may be reluctant to advance the cost of the bond. However, in the few exceptional cases, proponents assert, this bill could make a difference in whether the abused elder is able to recover his or her assets.

A writ of attachment empowers an abused elder or dependent adult or their personal representative to levy on a defendant's assets (including property wrongfully taken from the plaintiff) through the sheriff, who will take possession of the property or funds or impose liens on the property. The defendant is protected

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through an undertaking (a bond) that the plaintiff is required to post prior to issuance of the writ. Thus, the well-established rules relating to attachment could be applied easily, once the statutory authority for the use of attachment in EADACPA financial abuse cases is enacted.

Although there is no known opposition to SB 611, proponents acknowledge that there may be some concern about the volume of litigation that might be engendered by the bill, due to the increased ability of attorneys to secure enforcement of a judgment in these cases. Proponents point out that encouraging

attorneys to take the cases of victims of financial abuse was precisely the intent of the Legislature when it enacted EADACPA.

ARGUMENTS IN SUPPORT : California Advocates for Nursing Home Reform, a co-sponsor of this measure, states:

This bill would help victims of elder financial abuse recover property which has been wrongfully taken before perpetrators have a chance to hide or waste it.

It does so through a judicial procedure which is well-established, requires court supervision, and provides significant safeguards for innocent defendants. This bill would go a long way in helping elders recover from the devastating effects of financial abuse. . . . Attachment would permit the elder's attorney at the beginning of a case to attach the property wrongfully taken and thereby secure a fund from which damages and attorney's fees may be paid. This will certainly result in more recoveries for defrauded elders.

Adds the Trusts and Estates Section of the State Bar:

Typically, elders and dependent adults who are victims of financial abuse find that much, if not all of their financial resources have been depleted by the perpetrator who has preyed upon them. Often times, the assets which have been misappropriated are depleted long before final disposition of the financial abuse case. Moreover in many instances, the alleged financial abuser uses the ill-gotten gains to defend himself or herself in the financial abuse action which has been commenced. This bill would permit the court to attach the ill-gotten gains,

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preserving them for the elder or dependent adult who is the victim of financial exploitation, until final adjudication of the civil action.

The goal of SB 611 is to protect elders and dependent adults who are victims of financial abuse. The bill will preserve remaining assets that are in the hands [of] the financial perpetrator by allowing the courts to issue an order attaching assets which are claimed to be the ill gotten gains of the elder and dependent adults. The attachment procedure is a useful tool to prohibit the perpetrator from disposing of the elder or dependent adult's assets in his or her possession prior to final disposition of the case.

An attorney, whose practice is mostly in elder law, writes that "this bill would assist in helping elders recover from the devastating effects of financial abuse, and without it, not much will be done because the assets will be squandered or hidden before perpetrators can be brought to justice. . . . As a sole practitioner I cannot afford to take cases of financial exploitation of elders, where legal fees are currently tenuous at best due to the disappearance of the assets. . . . [This bill] will certainly result in more representation and more recoveries for elders."

REGISTERED SUPPORT / OPPOSITION :

Support

American Association of Retired Persons (sponsor)
California Advocates for Nursing Home Reform (sponsor)
California Alliance for Retired Americans (sponsor)
American Federation of State and Municipal Employees
California Continuing Care Residents Association
California School Employees Association

California Senior Legislature
Consumer Action
Consumer Attorneys of California
Elder Law and Advocacy
El Dorado County Commission on Aging
Gray Panthers
Jewish Family and Children's Services of the East Bay
Los Angeles County District Attorney's Office
Older Women's League of California

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Ombudsman & HICAP Services of Northern California
Ombudsman Services of San Mateo County
Suse Moyal Center for Older Adult Services
Trusts and Estate Section of the State Bar
Many individuals

Opposition

None on file

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Analysis Prepared by : Leora Gershenzon / JUD. / (916)
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