

BILL ANALYSIS

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

SB 611	S
Senator Steinberg	B
As Amended March 26, 2007	
Hearing Date: April 10, 2007	6
Welfare and Institutions Code	1
GMO:rm	1

SUBJECT

Financial Abuse of Elder and Dependent Adults: Attachment

DESCRIPTION

This bill would permit 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.

BACKGROUND

The Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) [Welfare & Institutions Code 15600 et seq.] was enacted in 1994 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."

(more)

SB 611 (Steinberg)
 Page 2

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 [Code of Civil Procedure 481.010 to 493.060, commonly known as the Attachment Law]. C.C.P. 483.010(c) limits the use of attachments to commercial transactions and prohibits them in consumer transactions.

This bill intends to make the remedy of attachment available to a plaintiff in a case involving financial abuse of an elder or dependent adult.

CHANGES TO EXISTING LAW

Existing law, the Elder Abuse and Dependent Adult Civil Protection Act, provides civil remedies to victims of elder or dependent adult abuse, neglect, or abduction, including recovery of damages and attorney's fees. [W. & I. C. 15600 et seq.]

Existing law, the Attachment Law, secures the assets of a debtor through seizure of the debtor's assets prior to litigation and judgment of a creditor's claim. The Attachment Law 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. Existing law also 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. [C.C.P. 483.010 et seq.]

This bill would allow the use of attachment in cases involving financial abuse of an elder or dependent adult.

This bill would provide that this remedy is in addition to any other remedies available to a plaintiff.

SB 611 (Steinberg)
Page 3

COMMENT1. Stated need for the bill

The author states:

Perpetrators of financial abuse are often family members, trusted care providers, and unscrupulous sellers who obtain the property of elders by exploiting their isolation and vulnerability to high-pressure sales tactics. Perpetrators often quickly waste the assets wrongfully taken or are otherwise financially irresponsible. Moreover, perpetrators have ample opportunity during the pendency of a lawsuit to transfer or otherwise dispose of assets, and the wrongfully taken property is often unrecoverable by the time a judgment is obtained a year or more after filing suit. As a result, the legislative objective of encouraging attorneys to pursue these claims has been largely frustrated...

The California Department of Justice estimates that one in twenty elder adults will be the victim of neglect or physical, psychological or financial abuse. That amounts to an estimated 225,000 elder or dependent adults that experience abuse each year.

Proponents of the bill and the author hope that by expressly allowing the use of the prejudgment remedy of attachment in cases of financial abuse of an elder or dependent adult, more attorneys will be encouraged to represent victims of financial abuse and thereby preserve the victim's assets that could otherwise be easily taken or wasted by an abuser.

2. Attachment: use and procedure

Attachment is a well-established procedure that, when used correctly according to the statutory scheme, seizes and imposes lien rights on the defendant's property, and

secures for the plaintiff a fund from which any later

SB 611 (Steinberg)
Page 4

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 usually must post a bond for 150% of the amount attached in order to protect the defendant from loss in 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 almost never pursued where a defendant is financially secure because it would not be necessary nor would the attachment justify the cost and effort of obtaining the writ.

Generally, attachment is authorized only where the following conditions apply:

- (1) the claim is a contract claim for money [C.C.P. 483.010(a).];
- (2) a minimum amount is claimed [C.C.P. 483.010(a).];
- (3) the claim is not secured or the security is valueless [C.C.P. 483.010(b)];
and
- (4) the claim arises out of a commercial transaction [C.C.P. 483.010(a)].

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 as follows:

- An action by the Director of Food and Agriculture to recover fees [Food & Ag.C. 281.];
- Attaching a vessel with all furnishings when summons is served, (without a showing of probability of success) [Harbor & Nav. C. 495.1];
- An action for recovery of public funds paid to person engaged in unlawful sale of controlled substances [Health & Saf.C. 11501];
- An action to collect sales and use tax [Rev. C. 6713];

SB 611 (Steinberg)
Page 5

- An action of an injured worker against his or her employer [Labor C. 3707];
- Mechanic's liens [Civ. C. 3152]; and
- A lien foreclosure suit involving manufactured timber products [Civ. C. 3065a].

SB 611 would allow the use of prejudgment attachment as a remedy 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 would be as provided in the Attachment Law. As well, procedural safeguards that require the posting of a bond and allowing defendant to oppose the attachment would apply.

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 contingency fee basis, who may be reluctant to advance the cost of the bond. However, in the few exceptional cases, proponents assert, SB 611 could make a difference in whether the abused elder is able to recover his or her assets.

3. Injunction or TRO either difficult to obtain or enforce; attachment is appropriate

Since an attachment is a drastic, though provisional, remedy, some have expressed concerns about its use in the context of an EADACPA action for financial abuse. An injunction or a temporary restraining order (TRO) issued by a court, for example, could freeze the assets of the elder or dependent adult wrongfully held by defendant while the EADACPA action is pending, if it can be shown that immediate and irreparable harm to the assets of the elder or dependent adult will occur without the court's intervention. However, practitioners who specialize in financial abuse cases contend that a TRO would not protect victims as well as an attachment.

EADACPA claims do not generally plead a cause of action seeking injunctive relief; therefore, the basis for a TRO would have to be to maintain the status quo to prevent the defendant from transferring assets [C.C.P. 526(a)(3), which requires a finding of irreparable harm].

SB 611 (Steinberg)
Page 6

According to the practitioners, while judges may sometimes prohibit a transfer of assets with a TRO, they will rarely, if ever, grant a request for a mandatory injunction by ordering the defendant to transfer the assets to a third party for safekeeping. In the first place, an order prohibiting the defendant from transferring or wasting assets will probably go unheeded (defendants will still waste assets). Secondly, transferring the assets to a third person requires finding a reliable third party to safeguard the assets and also means court supervision for the duration of the litigation.

A writ of attachment, on the other hand, empowers the plaintiff (abused elder or dependent adult or their personal representative) to levy on defendants' assets (including property of plaintiff wrongfully taken) through the sheriff, who will take possession of the property or funds or impose liens on the property. The defendant is protected through an undertaking (a bond) that the plaintiff is required to post prior to issuance of the writ. To obtain the writ of attachment, the plaintiff must show the probable validity of the claim of financial abuse, and not necessarily a showing of irreparable harm, which in the case of an injunction will always be required. 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 no opposition to SB 611 has been received by staff, 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 civil attorneys to take the cases of victims of financial abuse was precisely the intent of the Legislature when it enacted EADACPA.

4. Supporters argue attachment is proper and needed

California Advocates for Nursing Home Reform, a co-sponsor of this measure, states: "This bill would help victims of elder financial abuse recover property

SB 611 (Steinberg)
Page 7

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."

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? These perpetrators will not be brought to justice unless and until there are stronger methods for stopping the loss?"

The Ombudsman Services of San Mateo County also advocates for this bill, stating that SB 611 would provide a significant safeguard to protect the frail and vulnerable elder population from the results of exploitation.

Support: Los Angeles County District Attorney's Office; Gray Panthers; California Alliance for Retired Americans; American Association of Retired Persons (AARP); Ombudsman & HICAP Services of Northern California; Ombudsman Services of San Mateo County; California Continuing Care Residents Association; American Federation of State and Municipal Employees (AFSCME); California Advocates for Nursing Home Reform; Elder Angels, Inc.; Consumer Attorneys of California; Consumer Action; Older Women's League of California; 10 Attorneys; 10 individuals

Opposition: None Known

SB 611 (Steinberg)
Page 8

HISTORY

Source: California Advocates for Nursing Home Reform and Steve Reiss, Esq.

Related Pending Legislation: None Known

Prior Legislation: None Known
