

ELDER AND DEPENDENT ADULT
ABUSE AND PROTECTION:

IDENTIFY, STOP, REPORT & REMEDY

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My law background – briefly – 27 years of litigation experience, including civil and probate court litigation, trials and administrations in northern and southern California.

In probate court cases and litigation my experience includes representing fiduciaries (trustees, executors, and conservators), beneficiaries, and family members in trust, estate, conservatorship and elder abuse litigation and contentious administrations.

In civil litigation my primary experience includes serious personal physical and mental injuries and accidents, real property, business/commercial, environmental, products liability, unlawful business practices, and professional liability (trustee, real estate broker, accountant and D&O).

I have served as an officer and committee member with several professional organization committees, and on nonprofit boards. I am a current member of the San Mateo County Bar Association Estate Planning Section Executive Committee. I attended the University of San Francisco School of Law, and I also served an externship with Judge Marilyn Hall Patel in the U.S. District Court.

You can find additional information and written materials on my CV, blogs, LinkedIn, Twitter and Facebook. My blogs are: <http://californiaestatetrust.com> and <http://directorofficernews.com>.

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What is Elder and Dependent Adult Abuse?

Elder and dependent adult abuse occurs when an elder or dependent adult is taken advantage of, or is mistreated or neglected, or is unduly influenced, or is stolen from.

We will look at the legal requirements, but basically, when you see a situation that appears to be abuse, evaluate the facts and evidence, legal processes, claims or causes of action, and remedies available to stop and prosecute the abuse, to recover restitution and damages for the elder or dependent adult, and to safeguard his or her assets going forward.

Elder and dependent adult litigation is a relatively new legal area – in which there are many unanswered legal questions. It is a developing area. It is an area in which sometimes options and remedies are available, and sometimes not, and in which judgment calls sometimes must be made.

The instances of actual or possible reported and unreported elder and dependent adult abuse are very high, and resources simply do not exist to prevent, stop and remedy the abuse.

Generally, for applicable statutes refer to California Welfare and Institutions Code §§15600, et seq., the Elder Abuse and Dependent Adult Civil Protection Act (“EDACPA”).

Example – elder abuse or not – Mom’s sale of the professional building to her husband’s business partner “friend” for substantially less than FMV.

Standing – Very, Very Important!

In elder and dependent adult abuse cases it is very important initially to evaluate standing – who can and do you represent – and what standing does that person have or can that person obtain, often quickly, to take legal action?

Are you representing the elder or dependent adult? Can you represent the elder or dependent adult?

Are you representing a trustee, or a beneficiary who still has entitlement to assets from the trust?

Are you representing an attorney in fact?

Are you representing an executor, or successor in interest?

Are you representing a conservator?

None of the above? Can you obtain a conservatorship?

There can be advantages to a conservatorship, combined with a probate petition and/or civil complaint. Be aware that a prospective conservatee can oppose a conservatorship petition. I have seen more than one prospective conservatee threaten to disinherit.

Statutory Definition of Elder and Dependent Adult “Abuse” – W&I Code §15610.07

"Abuse of an elder or a dependent adult" means either of the following:

- (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
- (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

Statutory Definitions of “Elder” and “Dependent Adult” – W&I Code §§15610.27 / 15610.27

California Welfare and Institutions Code §15610.27 (“Elder”)

"Elder" means any person residing in this state, 65 years of age or older.

California Welfare and Institutions Code §15610.23 (“Dependent Adult”)

- (a) "Dependent adult" means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.
- (b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code. 15610.25.

Statutory Definition of “Physical Abuse” (refer to slide 6) – W&I Code §15610.63

"Physical abuse" means any of the following:

- (a) Assault, as defined in Section 240 of the Penal Code.
- (b) Battery, as defined in Section 242 of the Penal Code.
- (c) Assault with a deadly weapon or force likely to produce great bodily injury, as defined in Section 245 of the Penal Code.
- (d) Unreasonable physical constraint, or prolonged or continual deprivation of food or water.
- (e) Sexual assault: (1) Sexual battery, as defined in Section 243.4 of the Penal Code. (2) Rape, as defined in Section 261 of the Penal Code. (3) Rape in concert, as described in Section 264.1 of the Penal Code. (4) Spousal rape, as defined in Section 262 of the Penal Code. (5) Incest, as defined in Section 285 of the Penal Code. (6) Sodomy, as defined in Section 286 of the Penal Code. (7) Oral copulation, as defined in Section 288a of the Penal Code. (8) Sexual penetration, as defined in Section 289 of the Penal Code. (9) Lewd or lascivious acts as defined in paragraph (2) of subdivision (b) of Section 288 of the Penal Code.
- (f) Use of a physical or chemical restraint or psychotropic medication under any of these conditions: (1) For punishment. (2) For a period beyond that for which the medication was ordered by a physician and surgeon licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given. (3) For any purpose not authorized by the physician and surgeon.

Statutory Definition of “Neglect” (refer to slide 6) – W&I Code §15610.57

(a) "Neglect" means either of the following:

(1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.

(2) The negligent failure of an elder or dependent adult to exercise that degree of self care that a reasonable person in a like position would exercise.

(b) Neglect includes, but is not limited to, all of the following:

(1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.

(2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.

(3) Failure to protect from health and safety hazards.

(4) Failure to prevent malnutrition or dehydration.

(5) Failure of an elder or dependent adult to satisfy the needs specified in paragraphs (1) to (4), inclusive, for himself or herself as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health.

Statutory Definition of “Financial Abuse” (refer to slide 6) – W&I Code §15610.30

- (a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:
- (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
 - (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
 - (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70.
- (b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.

“Undue influence” is discussed and defined later in these slides.

Statutory Definition of “Financial Abuse” (refer to slide 6) – W&I Code §15610.30 (cont.)

(c) For purposes of this section, 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 an elder or dependent adult.

(d) For purposes of this section, "representative" means a person or entity that is either of the following: (1) A conservator, trustee, or other representative of the estate of an elder or dependent adult. (2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.

Bounds v. Superior Court (2014) 229 Cal. App. 4th 468 (deprivation of a property right includes a transaction that hasn't yet been completed, such as a contract with the property in escrow).

Statutory Definition of “Abandonment” (refer to slide 6) – W&I Code §15610.05

"Abandonment" means the desertion or willful forsaking of an elder or a dependent adult by anyone having care or custody of that person under circumstances in which a reasonable person would continue to provide care and custody.

Statutory Definition of “Isolation” (refer to slide 6) W&I Code §15610.43

(a) "Isolation" means any of the following:

(1) Acts intentionally committed for the purpose of preventing, and that do serve to prevent, an elder or dependent adult from receiving his or her mail or telephone calls.

(2) Telling a caller or prospective visitor that an elder or dependent adult is not present, or does not wish to talk with the caller, or does not wish to meet with the visitor where the statement is false, is contrary to the express wishes of the elder or the dependent adult, whether he or she is competent or not, and is made for the purpose of preventing the elder or dependent adult from having contact with family, friends, or concerned persons.

(3) False imprisonment, as defined in Section 236 of the Penal Code.

(4) Physical restraint of an elder or dependent adult, for the purpose of preventing the elder or dependent adult from meeting with visitors.

(b) There is a rebuttable presumption that the acts in (a) do not constitute isolation if they are performed pursuant to instructions by a California licensed physician or surgeon, who is caring for the elder or dependent adult at the time of the instructions, and gives the instructions as part of his or her medical care.

(c) The acts set forth in subdivision (a) shall not constitute isolation if they are performed in response to a reasonably perceived threat of danger to property or physical safety.

Statutory Definition of “Abduction” (refer to slide 6) – W&I Code §15610.06

"Abduction" means the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, of any elder or dependent adult who does not have the capacity to consent to the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, as well as the removal from this state or the restraint from returning to this state, of any conservatee without the consent of the conservator or the court.

Statutory Definition of “Care Custodian” (refer to slide 6) – W&I Code §15610.17

"Care custodian" means an administrator or an employee of any of the following public or private facilities or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff [see the statute for the long list of facilities and entities].

“We conclude that when an unrelated person renders substantial, ongoing health services to a dependent adult, that person may be a care custodian for purposes of the statutory scheme at issue, notwithstanding that the service relationship between the individuals arose out of a preexisting personal friendship rather than a professional or occupational connection. Accordingly, we affirm the judgment of the Court of Appeal.” *Bernard v. Foley* (2006) 39 Cal. 4th 794.

Statutory Definition of Goods or Services that are Necessary to Avoid Physical Harm or Mental Suffering (refer to slide 6) – W&I Code §15610.35

"Goods and services necessary to avoid physical harm or mental suffering" include, but are not limited to, all of the following:

- (a) The provision of medical care for physical and mental health needs.
- (b) Assistance in personal hygiene.
- (c) Adequate clothing.
- (d) Adequately heated and ventilated shelter.
- (e) Protection from health and safety hazards.
- (f) Protection from malnutrition, under those circumstances where the results include, but are not limited to, malnutrition and deprivation of necessities or physical punishment.
- (g) Transportation and assistance necessary to secure any of the needs set forth in subdivisions (a) to (f), inclusive.

Statutory Definition of “Mental Suffering” (refer to slide 6) – W&I Code §15610.53

"Mental suffering" means fear, agitation, confusion, severe depression, or other forms of serious emotional distress that is brought about by forms of intimidating behavior, threats, harassment, or by deceptive acts performed or false or misleading statements made with malicious intent to agitate, confuse, frighten, or cause severe depression or serious emotional distress of the elder or dependent adult.

Possible Indicators of Financial Elder Abuse

Elder and dependent adult financial abuse is on the rise, and within the community resources and coordination are inadequate to address the issue. Adding to that difficulty, the possible indicators of elder and dependent adult financial abuse are numerous – it isn't possible to provide an exhaustive list of financial abuse indicators – and although in some situations the occurrence of abuse is obvious many times whether actual abuse is occurring, or whether you should suspect that abuse is occurring, really depends upon the facts and circumstances at that time, and how you interpret those facts and circumstances. A legitimate explanation for the occurrence might also exist, or it is possible that the elder or dependent adult simply is making what might be considered to be an unwise decision that isn't being caused by abuse.

All of the above having been said, it is recognized that there is a community-wide need for the collaboration of people and resources, and a visible discussion about elder and dependent adult financial abuse, how to spot it and what to do when it is suspected. The below list of possible financial abuse indicators is intended to be for helpful discussion purposes, recognizing that each situation must be separately evaluated.

As an overall initial indicator, basically, possible elder or dependent adult financial abuse typically becomes apparent from a financial, asset or property situation that appears to be unnatural or out of character for that elder or dependent adult, or for the typical similar person in society.

Possible Indicators of Financial Elder Abuse (cont.)

So . . . the following are some of the possible indicators or situations where there is greater opportunity for abuse, including undue influence, to occur, but I am sure that you can also come up with additional indicators.

- √ Increased or unusual banking activity.
- √ An unusually, or out of the ordinary, large transaction.
- √ The purchase of an unusual item or service.
- √ Money being paid to or for the benefit of someone out of the ordinary. The person could be a stranger to the elder or dependent adult, a caregiver, a housekeeper, a neighbor, a friend, a gardener, or even a family member.
- √ A change in account title or authority.
- √ Someone improperly using his or her authority over the elder or dependent adult's account. Possible a trustee, attorney in fact, co-account holder, family member, "friend" or other person.
- √ Unusual credit card transactions or balances.
- √ A change in deed or real property or account title or ownership.
- √ Unusual ATM activity.

Possible Indicators of Financial Elder Abuse (cont.)

- √ Telemarketing and mail fraud; fake prizes; fake accidents; unnecessary purchases or home improvements; getting a windfall upon the payment of money or by providing information.
- √ Risky, unnecessary or unusual investments, insurance, warranties or annuities.
- √ Unusual people accompanying the elder or dependent adult; new or unusual acquaintances; new “friends,” boyfriends or girlfriends.
- √ The elder or dependent adult not speaking for himself, or herself; or some other person directing the elder or dependent adult, the situation or the proposed transaction.
- √ The elder or dependent adult acting in a secretive or evasive manner; or perhaps in an overly defensive or hostile manner in response to questions or even in response to typical conversations.
- √ The elder or dependent adult being forgetful, disorganized, disoriented, confused, or unaware of his or her surroundings or common events.
- √ The elder or dependent adult acting paranoid or fearful about the bank or investment or financial institution, or about his or her accounts.
- √ A change in the appearance, actions or demeanor of the elder or dependent adult; social withdrawal; unkempt; or health problems, including what is referred to as self-abuse.

Possible Indicators of Financial Elder Abuse (cont.)

- √ The elder or dependent adult being concerned about who will help or assist him or her, or take care of him or her.
- √ Expressions of concern, pressure, worry or fear.
- √ Excessive payment for a product or subscription, or for services; or payment for an unnecessary product or subscription, or for services.
- √ Excessive or unnecessary borrowing by the elder or dependent adult, or someone on his or her behalf.
- √ The elder or dependent adult wanting to avoid conversation.
- √ Unusual or unnatural will, trust, power of attorney, deed, mortgage or account terms or documents; or unusual or unnatural changes in the terms or conditions of those documents; or the unusual or unnatural selection or nomination of the person to exercise authority in or over those documents.
- √ Documents, checks, payments, etc., missing, misplaced or stolen.
- √ The elder or dependent adult being evicted, or loss of utilities.

Possible Indicators of Financial Elder Abuse (cont.)

- √ The elder or dependent adult becoming isolated from others, either because of other people causing that isolation, or because of the elder or dependent adult's lack of interest or motivation.
- √ Forged, missing, or strange-looking signatures.
- √ Changes in financial institution.
- √ Changes in account, IRA, or insurance beneficiaries.
- √ Unpaid bills.
- √ The sudden appearance, assistance or interest of strangers, friends or relatives.
- √ New people helping the elder or dependent adult around the house, or with the yard; home improvements.
- √ Associating with much younger people.
- √ Reluctance to discuss financial matters.
- √ The elder or dependent adult's increasing tiredness, withdrawal or depression.
- √ The sudden or unexplained transfer of assets.

Judicial Council Forms for Protective or Restraining Orders and Attachment

Elder or Dependent Adult Abuse Protection Heading/Series (select forms)

EA-109, Notice of Hearing (including ex parte, and temporary restraining orders)

EA-100, Request for Elder or Dependent Adult Abuse Restraining Orders

EA-100-INFO, Can a Restraining Order to Prevent Elder or Dependent Adult Abuse Help Me?

CLETS-001, Confidential CLETS Information

EA-110, Temporary Restraining Order (CLETS-TEA or TEF)

Attachment Heading/Series (select forms)

AT-105, Application for Right to Attach Order, Temporary Protective Order

AT-115, Notice of Application and Hearing for Right to Attach Order and Writ of Attachment

AT-125, Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment (Against a California Resident)

AT-130, Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment (Against a Non-Resident of California)

Judicial Council Forms for Protective or Restraining Orders and Attachment (cont.)

Domestic Violence Prevention (select forms)

DV-108, Request for Order: No Travel with Children (Domestic Violence Prevention)

DV-109, Notice of Court Hearing (Domestic Violence)

DV-100, Request for Domestic Violence Restraining Order

DV-101, Description of Abuse (Domestic Violence Prevention)

DV-110, Temporary Restraining Order (CLETS-TRO)

CLETS-001, Confidential CLETS Information

Civil Harassment Protection (select forms)

CH-109, Notice of Court Hearing

CH-100, Request for Civil Harassment Restraining Order

CH-100-INFO, Can a Civil Harassment Restraining Order Help Me?

CLETS-001, Confidential CLETS Information

CH-110, Temporary Restraining Order (CLETS-TCH)

Judicial Council Forms for Conservatorships – Temporary and General

There are many potential forms to consider, the following are some – consider a temporary without notice and a general conservatorship. Note, the conservatee can oppose, and might seek to disinherit:

Temporary Conservatorship:

GC-020, Notice of Hearing

GC-021, Order Dispensing with Notice (or GC-022, Order Prescribing Notice)

GC-111, Petition for Appointment of Temporary Conservator

GC-112, Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator (see also GC-112(A-2) Declaration Continuation Page)

GC-115, Order on Ex Parte Application for Good Cause Exception to Notice of Hearing

GC-141, Order Appointing Temporary Conservator

GC-150, Letters of Temporary Conservator

Judicial Council Forms for Conservatorships – Temporary and General (cont.)

There are many potential forms to consider, the following are some – consider a temporary without notice and a general conservatorship. Note, the conservatee can oppose, and might seek to disinherit:

Conservatorship (General):

GC-310, Petition for Appointment of Probate Conservator

GC-310(A-PF), Professional Fiduciary Attachment to Petition for Appointment of Conservator

GC-312, Confidential supplemental Information (Probate Conservatorship)

GC-313, Attachment Requesting Special Orders Regarding Dementia

GC-314, Confidential Conservator Screening Form

GC-320, Citation for Conservatorship (see also GC-322, Citation)

GC-333, Ex Parte Application for Order Authorizing Completion of Capacity Declaration – HIPAA

GC-334, Ex Parte Order Re Completion of Capacity Declaration – HIPAA

GC-335, Capacity Declaration (physician, psychologist, religious healing practitioner)

GC-335A, Dementia Attachment to Capacity Declaration

GC-340, Order Appointing Probate Conservator

CF-350, Letters of Conservatorship

Judge v. Jury Issues

- Probate Code section 825: “Except as otherwise expressly provided in this code, there is no right to a jury trial in proceedings under this code.”
- Conservatorships – a prospective conservatee has a right to be informed of his or her right to a jury trial and legal counsel including court appointed counsel, see, i.e., Probate Code §1828(a)(6).
- Judge trial – the Judge’s knowledge of probate court cases, background, and propensities. You would be amazed sometimes how different the Judge’s can be in their approaches.
- Jury trial for other claims or causes of action – for example, in a civil complaint pleading causes of action for elder abuse and/or breach of fiduciary duty (both CACI instructions) against a fiduciary, caregiver or other wrongdoer for a jury to adjudicate a breach of duty, a taking, or that a trust or trust amendment is invalid. This is a potential growth area in traditional probate litigation.
- Request an evidentiary hearing/trial, otherwise you might well not get one.
- Request a statement of decision if the case will be determined by the Judge.
- In which court or department will the evidentiary hearing or trial be held? Typically, for an evidentiary hearing or trial – more than ½ day or 1 day in length – the case will be sent to the civil division. What does the judge know about probate, estates, trusts, fiduciaries, beneficiaries, elder abuse, conservatorships, caregivers, and other issues?

Jury Instructions

The possibility of a jury trial is a growth area in traditional probate litigation. Jury instructions should be separately considered in each case, as facts will vary even if the causes of action are the same. The following are some of the CACI (Judicial Council of California Civil Jury Instructions) that might apply. Other CACI might also apply depending on the facts. Note, there are no CACI jury instructions in the will, trust and general conservatorship areas, but there are CACI for Lanterman-Petris-Short (LPS) conservatorships, the CACI 4000 Series.

CACI 100 Series – Pretrial

CACI 200 Series – Evidence

CACI 300 Series – Contracts

Negligence (General, Medical and Professional, the 400, 500 and 600 CACI Series)

CACI 1600 Series – Emotional Distress

CACI 1900 Series – Fraud or Deceit

CACI 2100 Series – Conversion

CACI 3100 Series – Elder and Dependent Adult Civil Abuse

CACI 3900 Series – Damages

CACI 4100 Series – Breach of Fiduciary Duty

Mental Capacity to Execute a Trust or Will (an area of law that is still developing)

The mental capacity to execute a trust or trust amendment is primarily based on Probate Code §§810-812, and the mental capacity to execute a will or will codicil is primarily based on Probate Code §6100.5; however, in the case of a trust or trust amendment §6100.5 may apply if the provisions are more simple in nature, and in the case of a will the provisions of §§810-812 may apply if the provisions are more complicated and in the nature of a trust. *Andersen v. Hunt* (2011) 196 Cal. App. 4th 722; *Lintz v. Lintz* (2014) 222 Cal. App. 4th 1346.

However, various other rules and case law may also apply including that it is the intent and natural wishes of the decedent testator that should prevail, extrinsic evidence and evidence of the surrounding circumstances might be admissible to determine the testator's intent, possible presumption that an executed document is valid, and presumptions and attacks against the validity of a document in certain other circumstances, including for example, undue influence, fraud, forgery, elder abuse, breach of fiduciary or confidential relationship, and mistake. Many of these are legal and procedural issues that will be determined by the Judge, and might be appealable.

California Probate Code §6100.5 - Competency to Execute a Will

(a) An individual is not mentally competent to make a will if at the time of making the will either of the following is true:

(1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.

(2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done.

(b) Nothing in this section supersedes existing law relating to the admissibility of evidence to prove the existence of mental incompetence or mental disorders.

(c) Notwithstanding subdivision (a), a conservator may make a will on behalf of a conservatee if the conservator has been so authorized by a court order pursuant to Section 2580.

California Probate Code §§810-812 - Competency to Execute a Trust

§810. There is a rebuttable presumption that people have the capacity to make decisions and be responsible for their acts or decisions.

California Probate Code §§810-812 - Competency to Execute a Trust

§811. (a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act shall be supported by evidence of a deficit in at least one of the following mental functions and evidence of a correlation between the deficit and the decision or acts in question:

- (1) Alertness and attention, including, but not limited to, the following: (A) Level of arousal or consciousness. (B) Orientation to time, place, person, and situation. (C) Ability to attend and concentrate.
- (2) Information processing, including, but not limited to, the following: (A) Short- and long-term memory, including immediate recall. (B) Ability to understand or communicate with others, either verbally or otherwise. (C) Recognition of familiar objects and familiar persons. (D) Ability to understand and appreciate quantities. (E) Ability to reason using abstract concepts. (F) Ability to plan, organize, and carry out actions in one's own rational self-interest. (G) Ability to reason logically.
- (3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following: (A) Severely disorganized thinking. (B) Hallucinations. (C) Delusions. (D) Uncontrollable, repetitive, or intrusive thoughts.
- (4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

California Probate Code §§810-812 - Competency to Execute a Trust (cont.)

§811(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.

§811(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

§811(d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.

§811(e) This part applies only to the evidence that is presented to, and the findings that are made by, a court determining the capacity of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing in this part shall affect the decision making process set forth in Section 1418.8 of the Health and Safety Code, nor increase or decrease the burdens of documentation on, or potential liability of, health care providers who, outside the judicial context, determine the capacity of patients to make a medical decision.

§812. Except where otherwise provided by law a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following: (a) The rights, duties, and responsibilities created by, or affected by the decision. (b) The probable consequences for the decision maker and, where appropriate, the persons affected by the decision. (c) The significant risks, benefits, and reasonable alternatives involved in the decision.

Constructive Fraud

There is constructive fraud and actual fraud. Cal. Civil Code §1571.

Constructive fraud occurs (Cal. Civil Code §1573):

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or,
2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

Proof of fraud by its very nature must largely be circumstantial and the contestant is not confined to the bare facts but is entitled to the benefit of all inferences that may be drawn. *David v. Hermann* (2005) 129 Cal. App. 4th 672, 686.

Constructive fraud consists of any breach of a duty whereby the person at fault or anyone claiming under him or her gains an advantage by misleading another person to that person's prejudice or the prejudice of anyone claiming under that person – constructive fraud and the presumption of constructive fraud also applies in the case of advantages taken of confidential and fiduciary relationships – in constructive fraud there is no need to show any elements of fraudulent intent, representation, falsity or deception. *Byrum v. Brand* (1990) 219 Cal. App. 3d 926, 937-38.

Actual Fraud

Actual fraud occurs in any of the following acts committed by a party to the instrument or document, or with her connivance, with intent to deceive another party, or to induce him to enter into the instrument or document (Cal. Civil Code §1572):

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
3. The suppression of that which is true, by one having knowledge or belief of the fact;
4. A promise made without any intention of performing it; or,
5. Any other act fitted to deceive.

Fraud embraces anything that is intended to deceive, including any statement, act, concealment and omission involving a breach of legal or equitable duty, trust, or confidence that results in injury, and may be provided by direct evidence or may be inferred from all of the circumstances in the case. *Ach v. Finkelstein* (1968) 264 Cal. App. 2d 667, 674-75.

Presumption of Fraud – Confidential and Fiduciary Relationships

A presumption of constructive fraud can occur when there is a breach of a duty arising from a confidential or fiduciary relationship. *Barrett v. Bank of America* (1986) 183 Cal. App. 3d 1362, 1368-69; *Estate of Arbuckle* (1950) 98 Cal. App. 2d 562, 568; *Boyd v. Bevilacqua* (1966) 247 Cal. App. 2d 272, 290-291.

A confidential relationship exists when a person reposes a trust and confidence in another person, including by one person in the integrity and fidelity of another person, and also when there is a fiduciary relationship such as between principal and agent although a fiduciary relationship need not exist for there to be a confidential relationship. *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1977) 67 Cal. App. 3d 19, 31; *Davies v. Krasna* (1975) 14 Cal. 3d 502, 510; *Estate of Cover* (1922) 188 Cal. 133, 143; Cal. Family Code §§721(b) and 1100(e); Cal. Civ. Code §1575(1); *Foster v. Keating* (1953) 120 Cal. App. 2d 435, 445 (holding that in an action for fraud, even if the relationship is not confidential or fiduciary in the strict legal sense of that term – it has been extended to every possible case in which a fiduciary relationship exists as a fact – such relation need not be legal, it may be moral, social, domestic or merely personal); see also Cal. Probate Code §39 which statutorily defines but does not limit the term fiduciary to mean personal representative, trustee, guardian, conservator, attorney-in-fact under a power of attorney, custodian, or other legal representative subject to the probate code.

W& I Code §15610.70 Statutory Definition of “Undue Influence” (refer to slide 10 – financial abuse)

(a) "Undue influence" means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:

(1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.

(2) The influencer's apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.

(3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following: (A) Controlling necessities of life, medication, the victim's interactions with others, access to information, or sleep. (B) Use of affection, intimidation, or coercion. (C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

(4) The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

(b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

Probate Code §86 Statutory Definition of “Undue Influence”

"Undue influence" has the same meaning as defined in Section 15610.70 of the Welfare and Institutions Code. It is the intent of the Legislature that this section supplement the common law meaning of undue influence without superseding or interfering with the operation of that law.

Undue Influence – Common Law

Undue influence consists of conduct that causes the testator to make a disposition of his or her property that is different from that which he or she would have done had he or she been permitted to follow his or her own inclination. *Estate of Baker* (1982) 131 Cal. App. 3d 471, 480-81; *Estate of Ricks* (1911) 160 Cal. 467, 480; *Rice v. Clarke* (2002) 28 Cal. 4th 89, 96; *Estate of Sarabia* (1990) 221 Cal. App. 3rd 599, 605.

Undue influence is typically proven by inference or circumstantial evidence, not limited to the actual time that the document was executed but also based on facts relevant to the issues both before and after execution. *Estate of Franco* (1975) 50 Cal. App. 3d 374, 382; *Estate of Baker* (1982) 131 Cal. App. 3d 471, 481.

Cal. Civ. Code §1575 Statutory Definition of Undue Influence

Undue influence exists upon any one of the following separate and distinct criteria): (1) the use, by one in whom 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) taking an unfair advantage of another's weakness of mind; or (3) taking a grossly oppressive and unfair advantage of another's necessities or distress).

Under Cal. Civ. Code §1575(2) the weakness of mind can be temporary and need not be incapacitating. *Odorizzi v. Bloomfield School District* (1966) 246 Cal. App. 2d 123, 131. Under Cal. Civ. Code §§1575(2) and (3) the use of over-persuasion is often accompanied by certain characteristics such as: discussion of the transaction at an unusual or inappropriate time; consummation of the transaction in an unusual place; insistent demand that the event be finished at once; emphasis on the untoward consequences of delay; the use of multiple persuaders; the absence of third-parties; or statements that there is no time to consult others. *Odorizzi* 246 Cal. App. 2d 123, 133.

Statutory Probate Code §21380 Presumption of Undue Influence (§§21380-21392)

(a) A provision of an instrument making a donative transfer to any of the following persons is presumed to be the product of fraud or undue influence:

(1) The person who drafted the instrument.

(2) A person in a fiduciary relationship with the transferor who transcribed the instrument or caused it to be transcribed.

(3) A care custodian of a transferor who is a dependent adult, but only if the instrument was executed during the period in which the care custodian provided services to the transferor, or within 90 days before or after that period.

(4) A person who is related by blood or affinity, within the third degree, to any person described in paragraphs (1) to (3), inclusive.

(5) A cohabitant or employee of any person described in paragraphs (1) to (3), inclusive.

(6) A partner, shareholder, or employee of a law firm in which a person described in paragraph (1) or (2) has an ownership interest.

Statutory Probate Code §21380 Presumption of Undue Influence (§§21380-21392) (cont.)

(b) The presumption created by this section [21380] is a presumption affecting the burden of proof. The presumption may be rebutted by proving, by clear and convincing evidence, that the donative transfer was not the product of fraud or undue influence.

(c) Notwithstanding subdivision (b), with respect to a donative transfer to the person who drafted the donative instrument, or to a person who is related to, or associated with, the drafter as described in paragraph (4), (5), or (6) of subdivision (a), the presumption created by this section is conclusive.

(d) If a beneficiary is unsuccessful in rebutting the presumption, the beneficiary shall bear all costs of the proceeding, including reasonable attorney's fees.

§21386. If a gift fails under this part, the instrument making the gift shall operate as if the beneficiary had predeceased the transferor without spouse, domestic partner, or issue.

Statutory Probate Code §21380 Presumption of Undue Influence (§§21380-21392) (cont.)

Note: there important statutory provisions that both restrict and expand the application of §21380. This can be a complicated area. See, i.e., §21384 (review of the instrument by an independent attorney), §21388 (non-liability of person transferring property subject to the instrument), §21390 (applicable notwithstanding a contrary provision) and §21392 (applicable to instruments that become irrevocable on or after January 1, 2011).

§21382. Section 21380 does not apply to the following instruments or transfers: (a) A donative transfer to a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor. (b) An instrument that is drafted or transcribed by a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor. (c) An instrument that is approved pursuant to a substituted judgment order (§§2580 et seq.), after full disclosure of the relationships of the persons involved. (d) A donative transfer to a public entity, a tax exempt entity under IRC §501(c)(3) or §501(c)(19), or a trust holding the transferred property for the entity. (e) A donative transfer of property valued at five thousand dollars (\$5,000) or less, if the total value of the transferor's estate equals or exceeds the amount stated in Section 13100. (f) An instrument executed outside of California by a transferor who was not a resident of California when the instrument was executed. The definition of the term cohabitant has the meaning provided by Cal. Penal Code §13700 (see Cal. Probate Code §21364).

Presumption of Undue Influence – Common Law

A presumption of undue influence arises shifting the burden to the proponent of the will or trust to prove that the document was not procured by undue influence when the person alleged to have exerted undue influence (1) had a confidential relationship with the testator; (2) participated in procuring the preparation or the execution of the document; and (3) unduly benefitted by the document. *David v. Hermann* (2005) 129 Cal. App. 4th 672, 684; *Estate of Baker* (1982) 131 Cal. App. 3d 471, 480-81; *Buchmayer v. Buchmayer* (1945) 68 Cal. App. 2d 462, 467 (holding that (1) it is not necessary to show weakness of mind or influenced decision making, and (2) the person against whom the presumption applies must establish that there was no breach of duty by her and that the transaction was understood by the testator and was entirely fair to him); see also *Lintz v. Lintz* (2014) 222 Cal. App. 4th 1346 (re undue influence and presumptions between spouses).

Activity on the part of the proponent in procuring the document may be established by inference, that is, circumstantial evidence. *Estate of Baker* (1982) 131 Cal. App. 3d 471, 481; *Estate of Garibaldi* (1961) 57 Cal. 2d 108, 113; *Estate of Jamison* (1953) 41 Cal. 2d 1, 8.

Remember (slide 31): A confidential relationship exists when a person reposes a trust and confidence in another person, including by one person in the integrity and fidelity of another person, and also when there is a fiduciary relationship such as between principal and agent although a fiduciary relationship need not exist for there to be a confidential relationship.

Enhanced Remedies – W&I Code §§15657 and 15657.1 – Physical and Neglect Abuse

§15657. Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse or neglect, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse the court shall award to the plaintiff reasonable attorney's fees and costs.

The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply [i.e., the prohibition against recovering pain and suffering damages post death don't apply]. However, the damages recovered shall not exceed the damages permitted by Civ. Code §3333.2(b).

However, the standards in Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

§15657.1. The award of attorney's fees pursuant to subdivision (a) of Section 15657 shall be based on all factors relevant to the value of the services rendered, including, but not limited to, the factors set forth in Rule 4-200 of the Rules of Professional Conduct of the State Bar of California, and all of the following:

- (a) The value of the abuse-related litigation in terms of the quality of life of the elder or dependent adult, and the results obtained.
- (b) Whether the defendant took reasonable and timely steps to determine the likelihood and extent of liability.
- (c) The reasonableness and timeliness of any written offer in compromise made by a party to the action.

Enhanced Remedies – W&I Code §§15657.5 and 15657.7 – Financial Abuse

§15657.5. (a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to compensatory damages and all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs, including but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article.

And where it is further proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs set forth in subdivision (a) above, compensatory damages, and all other remedies otherwise provided by law, the limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply [i.e., the prohibition against recovering pain and suffering damages post death don't apply].

§15657.7. An action for damages pursuant to Sections 15657.5 and 15657.6 for financial abuse shall be commenced within four years after the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered, the facts constituting the financial abuse.

Enhanced Remedies – W&I Code §§15657.6 and 15657.01 – Financial Abuse (cont.)

§15657.6. A person or entity that takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining the real or personal property of an elder or dependent adult when the elder or dependent adult lacks capacity pursuant to Section 812 of the Probate Code, or is of unsound mind, but not entirely without understanding, pursuant to Section 39 of the Civil Code, shall, **upon demand** by the elder or dependent adult or a representative of the elder or dependent adult, as defined in subdivision (d) of Section 15610.30, return the property and if that person or entity fails to return the property, the elder or dependent adult shall be entitled to the remedies provided by Section 15657.5, including attorney's fees and costs. This section shall not apply to any agreement entered into by an elder or dependent adult when the elder or dependent adult had capacity.

Therefore, always demand the return of the property in the beginning.

Enhanced Remedies – W&I Code §15657.01 – Attachment – Financial Abuse (cont.)

Notwithstanding Section 483.010 of the Code of Civil Procedure, an attachment may be issued in any action for damages pursuant to Section 15657.5 for financial abuse of an elder or dependent adult, as defined in Section 15610.30. The other provisions of the Code of Civil Procedure not inconsistent with this article shall govern the issuance of an attachment pursuant to this section. In an application for a writ of attachment, the claimant shall refer to this section. An attachment may be issued pursuant to this section whether or not other forms of relief are demanded.

See Cal. Code Civ. Proc. §487.010 for which property of corporate, partnership or other unincorporated associations, and natural person defendants can be attached. Note, unfortunately the scope of property of a natural person that can be attached is more limited because §487.010 was written and worded for business transactions. Nevertheless, at least seek to attach other property of a natural person defendant even if that property is not listed in §487.010.

Enhanced Remedies – W&I Code §15657.03 – Protective Restraining Orders for All Abuse

An elder or dependent adult who has suffered abuse as defined in Section 15610.07 [the broad definition of all elder abuse] may seek protective [restraining] orders as provided in this section.

A petition may be brought on behalf of an abused elder or dependent adult by a conservator or a trustee of the elder or dependent adult, an attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney, a person appointed as a guardian ad litem for the elder or dependent adult, or other person legally authorized to seek such relief.

The prevailing party in any action brought under this section may be awarded court costs and attorney's fees, if any.

Enhanced Remedies – W&I Code §§15657.3 and 15657.8 – Jurisdiction / Settlements

§15657.3. The superior court department having jurisdiction over probate conservatorships shall also have concurrent jurisdiction over civil actions and proceedings involving a claim for relief arising out of the abduction as defined in §15610.06, or the abuse of an elderly or dependent adult, if a conservator has been appointed for the plaintiff prior to the initiation of the action for abuse.

The death of the elder or dependent adult does not cause the court to lose jurisdiction of a claim for relief for abuse of that elder or dependent adult.

After the death of the elder or dependent adult, the right to commence or maintain an action shall pass to the personal representative of the decedent, or if there is no personal representative, to any of the following, if the [successor in interest] requirements of Cal. Code Civ. Pro. §377.32 are met:

- (A) An intestate heir whose interest is affected by the action.
- (B) The decedent's successor in interest, as defined in Section 377.11 of the Code of Civil Procedure.
- (C) An interested person as defined in Probate Code §48; however, "an interested person" does not include a creditor or a person who has a claim against the estate and who is not an heir or beneficiary of the decedent's estate.

§15657.3 (cont.).

If the personal representative refuses to commence or maintain an action or if the personal representative's family or an affiliate as defined in Probate Code §1064(c) is alleged to have committed abuse of the elder or dependent adult, the people described in (A), (B), and (C) above shall have standing to commence or maintain an action for elder abuse. This paragraph does not require the court to resolve the merits of an elder abuse action for purposes of finding that a plaintiff who meets the qualifications described in (A), (B), and (C) above has standing.

§15657.8. An agreement to settle a civil action for physical abuse (defined in Section 15610.63), neglect (defined in Section 15610.57), or financial abuse (defined in Section 15610.30), of an elder or dependent adult shall not include any of the following provisions, whether the agreement is made before or after filing the action: [confidentiality]

Enhanced Remedies – W&I Code §15657.05 – Abduction

§15657.05. Where it is proven by clear and convincing evidence that an individual is liable for abduction, as defined in Section 15610.06, in addition to all other remedies otherwise provided by law the court shall award to the plaintiff reasonable attorney's fees and costs.

Remember, "Abduction" means the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, of any elder or dependent adult who does not have the capacity to consent to the removal from this state and the restraint from returning to this state, or the restraint from returning to this state, as well as the removal from this state or the restraint from returning to this state, of any conservatee without the consent of the conservator or the court.

Cal. Business and Professions Code §§17200-17210 – Unfair Competition

§17200. . . . unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of the Business and Professions Code.

§17203. . . . Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 382 [re class actions] of the Code of Civil Procedure,

§17204. . . . Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction by the . . . or by a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.

Remedies: civil penalties and fines and restitution (not damages).

§17206. . . . Any person who engages, has engaged, or proposes to engage in unfair competition shall be liable for a civil penalty not to exceed two thousand five hundred dollars (\$2,500) for each violation,

In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

Cal. Business and Professions Code §§17200-17210 – Unfair Competition (cont.)

§17206.1. (a)(1) In addition to any liability for a civil penalty pursuant to Section 17206, a person who violates this chapter, and the act or acts of unfair competition are perpetrated against one or more senior citizens or disabled persons, may be liable for a civil penalty not to exceed \$2,500 for each violation

(b) As used in this section, the following terms have the following meanings:

- (1) "Senior citizen" means a person who is 65 years of age or older.
- (2) "Disabled person" means a person who has a physical or mental impairment that substantially limits one or more major life activities.

(A) As used in this subdivision, "physical or mental impairment" means any of the following:

(c) In determining whether to impose a civil penalty and the amount thereof, the court shall consider, in addition to any other factors, the extent to which one or more of the following factors are present:

- (1) Whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons.
- (2) Whether the defendant's conduct caused one or more senior citizens or disabled persons to suffer any of the following: loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person.
- (3) Whether one or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct.

Cal. Business and Professions Code §§17200-17210 – Unfair Competition (cont.)

§17207. (a) Any person who intentionally violates any injunction prohibiting unfair competition issued pursuant to Section 17203 shall be liable for a civil penalty not to exceed six thousand dollars (\$6,000) for each violation. Where the conduct constituting a violation is of a continuing nature, each day of that conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court shall consider all relevant circumstances, including, but not limited to, the extent of the harm caused by the conduct constituting a violation, the nature and persistence of that conduct, the length of time over which the conduct occurred, the assets, liabilities, and net worth of the person, whether corporate or individual, and any corrective action taken by the defendant.

§17208. Any action to enforce any cause of action pursuant to this chapter shall be commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section shall be revived by its enactment.

Additional consumer, consumer goods, and warranty statutes and statutory protections also exist which should be considered in appropriate circumstances.

Civil Code §3345 – 3X Certain Fines or Penalties to Redress Unfair Competition

(a) This section shall apply only in actions brought by, on behalf of, or for the benefit of senior citizens or disabled persons, as those terms are defined in subdivisions (f) and (g) of Section 1761, to redress unfair or deceptive acts or practices or unfair methods of competition.

(b) Whenever a trier of fact is authorized by a statute to impose either a fine, or a civil penalty or other penalty, or any other remedy the purpose or effect of which is to punish or deter, and the amount of the fine, penalty, or other remedy is subject to the trier of fact's discretion, the trier of fact shall consider all of the following factors, in addition to other appropriate factors, in determining the amount of fine, civil penalty or other penalty, or other remedy to impose. Whenever the trier of fact makes an affirmative finding in regard to one or more of the following factors, it may impose a fine, civil penalty or other penalty, or other remedy in an amount up to three times greater than authorized by the statute, or, where the statute does not authorize a specific amount, up to three times greater than the amount the trier of fact would impose in the absence of that affirmative finding:

Civil Code §3345 – 3X Certain Fines or Penalties to Redress Unfair Competition (cont.)

- (1) Whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons.
- (2) Whether the defendant's conduct caused one or more senior citizens or disabled persons to suffer: loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person.
- (3) Whether one or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct.

Punitive / Exemplary Damages – Cal. Civ. Code §3294

Yes, punitive or exemplary damages can be available in appropriate factual circumstances and should be considered for pleading purposes in elder abuse cases.

This can be a complicated legal area as to what conduct constitutes oppression, fraud or malice, and the facts that will also subject an employer to punitive damages (essentially, advance knowledge of the employee's unfitness for employment, authorization or ratification, by an officers, director or managing agent of the corporation or employer).

Cal. Civil Code §3294(a) provides:

In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

Class Actions – Cal. Code Civ. Proc. §382

Yes, class actions can be available in appropriate factual circumstances and should be considered for pleading purposes in elder abuse cases in appropriate factual situations.

Cal. Code Civ. Proc. §382 provides that if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

This can be a complicated legal area and needs to be carefully evaluated.

Resident Rights and Neglect and Abuse in Nursing Homes and Residential Care Facilities

California Advocates for Nursing Home Reform (CANHR) does a good job of providing information about nursing home and residential care facilities for the elderly, with citations to applicable statutes and regulations.

When an elder or dependent adult suffers an injury or death in a facility the questions often are whether the injury or death was naturally caused or caused by an inadequate situation or care at the facility, whether inadequate care was medical malpractice or abuse, and whether there are other deficiencies (i.e., staffing, care planning, records and documentation, etc.) that contributed to the injury or death.

You can find good discussions at the following CANHR links:

General link: <http://www.canhr.org/factsheets/index.html>

SNF specific link: http://www.canhr.org/factsheets/nh_fs/html/fs_CareStandards.html

Probate Code §§17200-17211

Pursuant to §17200, a trustee or beneficiary of a trust can petition the court concerning the internal affairs of the trust or to determine the existence of the trust, and proceedings concerning the internal affairs of a trust include but are not limited to:

- Determining questions of construction of a trust instrument.
- Determining the existence or nonexistence of any immunity, power, privilege, duty, or right.
- Determining the validity of a trust provision.
- Ascertaining beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument.
- Settling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers.
- Instructing the trustee.
- Compelling the trustee to do any of the following: (A) Provide a copy of the terms of the trust. (B) Provide information about the trust under Section 16061 if the trustee has failed to provide the requested information within 60 days after the beneficiary's reasonable written request, and the beneficiary has not received the requested information from the trustee within the six months preceding the request. (C) Account to the beneficiary, subject to the provisions of Section 16064, if the trustee has failed to submit a requested account within 60 days after written request of the beneficiary and no account has been made within six months preceding the request.

Probate Code §§17200-17211 (cont.)

§17200 (cont.).

- Granting powers to the trustee.
- Fixing or allowing payment of the trustee's compensation or reviewing the reasonableness of the trustee's compensation.
- Appointing or removing a trustee.
- Accepting the resignation of a trustee.
- Compelling redress of a breach of the trust by any available remedy.
- Approving or directing the modification or termination of the trust
- Approving or directing the combination or division of trusts.
- Determining petitions filed pursuant to Section 15687 and reviewing the reasonableness of compensation for legal services authorized under that section.
- Pursuant to §17200.1, all proceedings concerning the transfer of property of the trust shall be conducted pursuant to the provisions of Part 19 (commencing with Section 850) of Division 2.

Probate Code §§850-859 Petitions

- In appropriate circumstances Probate Code §850 allows a guardian, conservator, personal representative of a decedent, trustee, claimant, creditor or interested person to file a petition for, about or relating to a claim to, title to, possession of, ownership of, or transfer or conveyance of real or personal property. This also includes *Heggstad* petitions.
- Pursuant to §859, if a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to a conservatee, a minor, an elder, a dependent adult, a trust, or the estate of a decedent, or has taken, concealed, or disposed of the property by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse, as defined in Section 15610.30 of the Welfare and Institutions Code, the person shall be liable for twice the value of the property recovered by an action under this part. In addition . . . the person may, in the court's discretion, be liable for reasonable attorney's fees and costs. The remedies provided in this section shall be in addition to any other remedies available in law to a person authorized to bring an action pursuant to this part.
- Sections 850-859 are understood by some judges but not by others, and can often be overlooked.

Powers of Attorney and Advance Directives – the Probate Code §§4000 Series

A few notes about powers of attorney – Probate Code §§4000-4545:

§§4230-4238, duties:

§§4231 and 4237, in addition to the general standard of care, the attorney-in-fact must use his/her special skills and expertise.

§4231.5, **upon any breach of duty, the attorney-in-fact is chargeable with the losses and lost profits, possibly enhanced remedies under the financial elder abuse statutes, and possible attorneys' fees.**

§4232, an attorney-in-fact is a fiduciary.

§4234, the attorney-in-fact has a duty to keep in regular contact and communicate with the principal, and to follow the instructions of the principal absent court approval.

§4236, the attorney-in-fact shall keep records of all transactions, and has a duty to account upon the principal's request, as stated in the power of attorney, and in other circumstances.

§§4540-4545, any interested person can petition the Court about the power of attorney and actions or events taken or not taken under the power of attorney. No jury trial, §4504.

Powers of Attorney and Advance Directives – the Probate Code §§4000 Series (cont.)

A few notes about health care decisions and advance directives – §§4600-4806:

§§4765 and 4766, any interested person can petition the Court about the health care directive, health care decisions, and actions or events taken or not taken under the health care directive.

§4771, the Court in its discretion can award attorneys' fees (1) against the health care agent or surrogate if the Court determines “that the agent or surrogate has clearly violated the duties under the advance health care directive,” or (2) against the person who filed the petition if the Court determines that the petition was filed “without any reasonable cause.”

No jury trial, §4754.

See §§4780-4786 re requests re resuscitative measures, and §§4800-4806 re the written advance health care directive registry.

Conservatorships of the Person and Estate – the Probate Code §§1800, et seq., Series

Select Probate Code sections relevant to conservatorships:

1820. (a) A petition for the appointment of a conservator may be filed by any of the following: (1) The proposed conservatee. (2) The spouse or domestic partner of the proposed conservatee. (3) A relative of the proposed conservatee. (4) Any interested state or local entity or agency of this state or any interested public officer or employee of this state or of a local public entity of this state. (5) **Any other interested person or friend of the proposed conservatee**, but not someone who is merely a creditor and doesn't otherwise satisfy the requirements of (1), (2), (3) or (4) above.

1827. The court shall hear and determine the matter of the establishment of the conservatorship according to the law and procedure relating to the trial of civil actions, **including trial by jury if demanded by the proposed conservatee**.

1828. (a)(6) The proposed conservatee has the right to oppose the proceeding, to have the matter of the establishment of the conservatorship tried by jury, to be represented by legal counsel if the proposed conservatee so chooses, and to have legal counsel appointed by the court if unable to retain legal counsel.

Conservatorships of the Person and Estate – the Probate Code §§1800, et seq., Series (cont.)

Select Probate Code sections relevant to conservatorships (cont.):

See Probate Code §§2640-2647 relating to compensation of guardians, conservators and their attorney.

2651. The conservatee, the spouse or domestic partner of the conservatee, any relative or friend of the conservatee, **or any interested person** may petition to the court to have the conservator removed. The petition shall state facts showing cause for removal.

2653. (c) **If the court removes the conservator for cause**, as described in subdivisions (a) to (g), inclusive, of Section 2650 or Section 2655, both of the following shall apply: (1) **The court shall award the petitioner the costs of the petition and other expenses and costs of litigation, including attorney's fees, incurred under this article, unless the court determines that the conservator has acted in good faith, based on the best interests of the conservatee.** (2) The conservator may not deduct from, or charge to, the estate his or her costs of litigation, and is personally liable for those costs and expenses.

2654. Whenever it appears that the conservatee or the estate may suffer loss or injury during the time required for notice and hearing under this article, the court, on its own motion or on petition, may do either or both of the following: (a) Suspend the powers of the conservator pending notice and hearing to such extent as the court deems necessary. (b) Compel the conservator to surrender the estate to a custodian designated by the court.

Mandated Reporters of Adult and Dependent Adult Abuse

California Welfare and Institutions Code §§15630 through 15632 make people who have assumed full or intermittent responsibility for the care or custody of an elder or dependent adult, and officers and employees of financial institutions mandated reporters for reporting some types of physically-related and financially-related elder and dependent adult abuse in some situations.

These code sections are fairly detailed and not entirely clear in some situations. If you are a mandated reporter of elder and dependent adult abuse in California you know or should know §§15630 through 15632, your responsibilities, and the reporting requirements and procedures.

If you are a mandated report, what do you do next after the report? This depends on the specific individual situation at hand. Each situation is different.

Let's say for example that you have made the required timely report to the appropriate authority.

If you are a fiduciary or have ownership, custody, control or possession of the situation you might well have a duty to secure the situation, stop the abuse from occurring, and take actions to remedy the abuse or suspected abuse that has already occurred. You also don't want to be sued for alleged possible inappropriate actions or defamation, of course.

Click this blog post for [some indicators of possible financial elder and dependent adult abuse.](#)

Mandated Reporters of Adult and Dependent Adult Abuse (cont.)

California Welfare and Institutions Code §15630

(a) Any person who has assumed full or intermittent responsibility for the care or custody of an elder or dependent adult, whether or not he or she receives compensation, including administrators, supervisors, and any licensed staff of a public or private facility that provides care or services for elder or dependent adults, or any elder or dependent adult care custodian, health practitioner, clergy member, or employee of a county adult protective services agency or a local law enforcement agency, is a mandated reporter.

(b) Any mandated reporter who, in his or her professional capacity, or within the scope of his or her employment, has observed or has knowledge of an incident that reasonably appears to be physical abuse, as defined in Section 15610.63, abandonment, abduction, isolation, financial abuse, or neglect, or is told by an elder or dependent adult that he or she has experienced behavior, including an act or omission, constituting physical abuse, as defined in Section 15610.63, abandonment, abduction, isolation, financial abuse, or neglect, or reasonably suspects that abuse, shall report the known or suspected instance of abuse by telephone or through a confidential Internet reporting tool, as authorized by Section 15658, immediately or as soon as practicably possible. (note: the full statutes are lengthy and have different reporting requirements depending on the type of abuse and severity – you need to read and understand them all).

Mandated Reporters of Adult and Dependent Adult Abuse (cont.)

California Welfare and Institutions Code §15630.1

- (a) As used in this section, "mandated reporter of suspected financial abuse of an elder or dependent adult" means all officers and employees of financial institutions.
- (b) As used in this section, the term "financial institution" means any of the following [institutions described in] . . . (12 U.S.C. Sec. 1813(c)) . . . (12 U.S.C. Sec. 1813(u)). . . (12 U.S.C. Sec. 1752), including, but not limited to . . . (12 U.S.C. Sec. 1786(r)).
- (c) As used in this section, "financial abuse" has the same meaning as in Section 15610.30.
- (d) (1) Any mandated reporter of suspected financial abuse of an elder or dependent adult who has direct contact with the elder or dependent adult or who reviews or approves the elder or dependent adult's financial documents, records, or transactions, in connection with providing financial services with respect to an elder or dependent adult, and who, within the scope of his or her employment or professional practice, has observed or has knowledge of an incident, that is directly related to the transaction or matter that is within that scope of employment or professional practice, that reasonably appears to be financial abuse, or who reasonably suspects that abuse, based solely on the information before him or her at the time of reviewing or approving the document, record, or transaction in the case of mandated reporters who do not have direct contact with the elder or dependent adult, shall report the known or suspected instance of financial abuse by telephone or through a confidential Internet reporting tool, as authorized pursuant to Section 15658, immediately, or as soon as practicably possible. If reported by telephone, a written report shall be sent, or an Internet report shall be made through the confidential Internet reporting tool established in Section 15658, within two working days to the local adult protective services agency or the local law enforcement agency. (note: the full statutes are lengthy and have different reporting requirements depending on the type of abuse and severity – you need to read and understand them all).

Statutory Definition of “Reasonable Suspicion” – W&I Code §15610.65

"Reasonable suspicion" means an objectively reasonable suspicion that a person would entertain, based upon facts that could cause a reasonable person in a like position, drawing when appropriate upon his or her training and experience, to suspect abuse.

Other Statutory Definitions – “Serious Bodily Injury” – W&I Code §15610.67

"Serious bodily injury" means an injury involving extreme physical pain, substantial risk of death, or protracted loss or impairment of function of a bodily member, organ, or of mental faculty, or requiring medical intervention, including, but not limited to, hospitalization, surgery, or physical rehabilitation.

Other Statutory Definitions – “Imminent Danger” – W&I Code §15610.39

"Imminent danger" means a substantial probability that an elder or dependent adult is in imminent or immediate risk of death or serious physical harm, through either his or her own action or inaction, or as a result of the action or inaction of another person.

Intentional Interference with Expected Inheritance

- On May 3, 2012 the California Court of Appeal recognized the tort intentional interference with expected inheritance, which may apply when there aren't other causes of action or remedies available. *Beckwith v. Dahl* (2012) 205 Cal. App. 4th 1039.

No Contest Clauses – Probate Code §§21310-21315

Pursuant to California Probate Code §21310 a “contest” means a pleading filed with the court by a beneficiary that would result in a penalty under a no contest clause, if the no contest clause is enforced.

Before filing any document (petition, complaint, cross-complaint, objection, answer, response, or claim, or similar document) with the court, evaluate whether the filing could be considered a contest or would trigger a no contest clause – don’t file the document before all issues and risks have been evaluated and, if necessary, you have obtained informed, written client authorization and consent.

You will need to read all the relevant code sections (§§21310-21315) and case law for instruments, whenever executed, that became irrevocable on or after January 1, 2001, and prior case law for instruments that became irrevocable before January 1, 2001. Section 21313 further provides that this part is not intended as a complete codification of the law governing enforcement of a no contest clause – the common law governs enforcement of a no contest clause to the extent this part does not apply.

Other Legal Resources

There are several legal resources available with information about elder abuse and the law.

Publications that you should consider are by the California Continuing Education of the Bar:

- California Elder Law Litigation: An Advocate's Guide
- California Trust and Probate Litigation

- See also the Rutter Group legal guides

- See also the CEB and Rutter Group guides for civil litigation before trial, trial, evidence, appellate guides and others

Conservatorships of the Person and Estate – [Proposed] Probate Conservatorship Jury Instruction (will change with new developments)

There exists a rebuttable presumption affecting the burden of proof that all people including [proposed conservatee] have the capacity to make decisions and to be responsible for their acts and decisions.

The fact that [person who filed the petition for conservatorship] has filed a petition claiming that [proposed conservatee] should be conserved is not evidence that this claim is true.

Clear and convincing evidence is evidence of such high probability, based on evidence so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind.

The petition of [person who filed the petition] for the conservatorship of the person/estate of [proposed conservatee] must be denied unless [person who filed the petition] proves each of the following by clear and convincing evidence:

Conservatorships of the Person and Estate – [Proposed] Probate Conservatorship Jury Instruction (will change with new developments) (cont.)

1. That [proposed conservatee] has a deficit in mental function as established by the evidence of the actions or inactions of [proposed conservatee] not based on a mere diagnosis of a mental or physical disorder;
2. That the evidence of the deficit in mental function is more than isolated incidents of negligence or improvidence;
3. That the deficit in mental function significantly impairs [proposed conservatee's] ability to understand and appreciate the consequences of his/her actions and make decisions;
4. That as a direct result and cause of the deficit in mental function [proposed conservatee] is substantially unable to provide properly for his/her personal needs for physical health, food, clothing, or shelter [for conservatorship of the person];
5. That as a direct result and cause of the deficit in mental function [proposed conservatee] is substantially unable to manage his/her own financial resources or resist fraud or undue influence [for conservatorship of the estate];
6. That the granting of the conservatorship is the least restrictive alternative means available for the protection of the [proposed conservatee]; and
7. There is no means of third party assistance that is available as an alternative to the conservatorship.

Thank you for reading and listening. That's it for now. The end.

ELDER AND DEPENDENT ADULT ABUSE AND PROTECTION:

IDENTIFY, STOP, REPORT & REMEDY

David W. Tate, CPA, Esq.

April 16, 2015

Blog: <http://californiaestatetrust.com>