

# TRUSTS AND ESTATES

CALIFORNIA  
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## **The Nuts and Bolts of a Civil Financial Elder Abuse Claim**

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# Standing

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## While the Elder is Still Alive

- If Competent - Usually only the Elder!
- But if elder incompetent? Guardian Ad Litem, Conservator, or other similar representative

After Elder has died standing is governed by section 15657.3 of the W&I Code:

(d) (1) Subject to paragraph (2) and subdivision (e), 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. If there is no personal representative, the right to commence or maintain an action shall pass to any of the following, if the requirements of Section 377.32 of the Code of Civil Procedure are met:

# Standing

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Section 15657.3 continued

- (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 Section 48 of the Probate Code, as limited in this subparagraph. As used in this subparagraph, "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.

# Standing

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Who is a “successor-in-interest?”

- “Successor in interest” is a “beneficiary of the decedent’s estate or other successor in interest who succeeds to a cause of action or to a particular item of the property that is the subject of a cause of action.”  
(Code Civ. Proc., § 377.11.)

# Standing

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Who is an interested person?

Think probate code definition from P.C. Section 48:

- (a) Subject to subdivision (b), “interested person” includes any of the following:
  - (1) An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding.
  - (2) Any person having priority for appointment as personal representative.
  - (3) A fiduciary representing an interested person.
- (b) The meaning of “interested person” as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.

# Standing

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EADACPA has similar provisions. See W&I Section 15657.3(d)(1)(c) but **Not Creditors!**

(C) An interested person, as defined in Section 48 of the Probate Code, as limited in this subparagraph. As used in this subparagraph, “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.

# Standing

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**Problem:** frequently, the alleged elder abusers are the persons with standing. E.g. personal representatives and trustees

## Case Law

*Estate of Lowrie* (2004) 118 Cal.App.4th 220

The statute should be liberally construed to encourage reporting and prosecution of elder abuse. [Grandchild of deceased elder with a contingent financial interest in the elder's estate had standing to bring an elder abuse action against the trustee of the elder's trust.]

*Mahan v. Charles Chan Insurance Agency* (2017) 14 Cal.App.5<sup>th</sup> 841, 860-861

As "a remedial statute [EADACPA] is to be "liberally construed on behalf of the class of

# Standing

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## Stricter Interpretation of Standing Rules

*Lickter v. Lickter* (2010) 189 Cal.App.4th 712

Grandchildren did not have standing to sue their father for elder abuse of father's mother unless they could show by clear and convincing evidence that father and other remainder beneficiaries would be disinherited under Probate Code section 259.

# Statute of Limitations

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## **Financial Elder Abuse – Four Years [W&I Section 15657.7 – Discovery Rule Applies:**

An action for damages pursuant to Sections 15657.5 and 15657.6 for financial abuse of an elder or dependent adult, as defined in Section 15610.30, 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.

- N.B.: In an action under Welf. & Inst. Code § 15657.6, for failing to return property taken from a person of unsound mind, the statute begins to run from the defendant's failure to return the property, even if the property was taken more than four years earlier.

# Jurisdiction (where to file)

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## Probate Court Jurisdiction

- Probate department generally does not have jurisdiction to hear civil claims.
- Exceptions:
  - As court of general jurisdiction it has the power to resolve related civil claims between *same parties* already before it. (Prob. Code, § 800; *Harnedy v. Whitty* (2003) 110 Cal.App.4th 1333.)
  - Certain statutes grant the probate department concurrent jurisdiction over third parties not otherwise before it:
    - Welf. & Inst. Code, § 15657.3(a) (for financial elder abuse actions)
    - Prob. Code, § 855 (for actions to determine title to estate property)
    - Prob. Code, § 17000(b)(3) (for actions between trustees and third parties)
  - Failure to object to probate department's exercise of jurisdiction over the third party at the outset waives ability to later challenge probate department's order adjudicating the controversy for lack of jurisdiction. (Prob. Code, § 800; *Harnedy v. Whitty, supra*, 110 Cal.App.4th 1333.)

## Jurisdiction

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- An action for financial elder abuse is considered a general civil claim. (Welf. & Inst. Code, § 15657.3(a).)
- Nonetheless, because EADACPA specifically grants the probate department concurrent jurisdiction over a financial elder abuse action where there is a pending conservatorship, the action is filed under the existing conservatorship case number if the matter is to be heard by the probate department.

# Jurisdiction

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Probate Code 850 claims allowing joining of related cases

• **Probate Code § 850** authorizes a petition broadly covering disputes concerning adverse claims to property involving estates, trusts, conservatorships, and guardianships.

• **Probate Code § 855:**

- “An action brought under this part may include claims, causes of action, or matters that are normally raised in a civil action to the extent that the matters are related factually to the subject matter of a petition filed under this part.”

• **But see Probate Code § 856.5:**

- “The court may not grant a petition under this chapter if the court determines that the matter should be determined by a civil action.”

• Additionally, see **Probate § 854** regarding abatement.

# Jurisdiction

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Probate Court is authorized to transfer to a civil department

- Filing a financial elder abuse claim initially as part of a probate action does not guarantee the claim will be heard by the probate department.
- In transferring a claim from probate to civil department, court should consider:
  - 1) the absence of a pending conservatorship proceeding;
  - 2) the presence of 3<sup>rd</sup> party litigants (i.e., litigants who are not directly interested in the estate as fiduciaries, beneficiaries or heirs); and
  - 3) whether there has been a timely request for a jury trial.
- On a finding by the probate court that the matter should be determined in a civil proceeding, probate department may transfer the elder abuse action to the civil department, even when the probate department would otherwise have concurrent jurisdiction. (Welf. & Inst. Code, § 15657.3(b).)

## Jurisdiction

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- Death of conservatee does not deprive probate department of power to hear pending financial elder abuse claim.
- Common practice post-death is to bundle financial elder abuse claim with the 850 claim in a single probate petition.
- Probate Code § 855 gives the probate department authority to hear factually-related civil claims, including financial elder abuse claims, that are bundled with the 850 claim.
- However, Probate Code § 856.5 allows probate department to transfer entire matter, including both the 850 claim and the financial elder abuse claim, to the civil department. (The 850 claim would be tried in civil department as a quiet title action).

# Jurisdiction

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Pros and cons of electing to file in civil court

Pros:

- Availability of a jury – depending on facts, possibly bigger upside for plaintiff/petitioner
- If victim is alive and over 70, has trial setting preference

Cons:

- Judges *possibly* less familiar
- Slower proceedings
- If probate claims are pendent, may have to try them first, which may limit relief in the legal claims

# Jurisdiction

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Pros and cons of electing to file in probate court

Pros:

- Judges more familiar with elder law
- Some probate courts set trials faster

Cons:

- No jury trial
- If facts are sympathetic, threat of large damages promotes settlement, if you are plaintiff/petitioner
- Possibly slower to set for trial

## Immediate Relief (TROs etc.)

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Governing Statute is W&I Code Section 15657.03

- (a) (1) An elder or dependent adult who has suffered abuse, as defined in Section 15610.07, may seek protective orders as provided in this section.
  
- (2) 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 a power of attorney, a person appointed as a guardian ad litem for the elder or dependent adult, or other person legally authorized to seek the relief.

## Immediate Relief (TROs etc.)

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15657.03 continued

(3) (A) A petition under this section may be brought on behalf of an elder or dependent adult by a county adult protective services agency in either of the following circumstances:

- (i) If the elder or dependent adult has suffered abuse as defined in subdivision (b) and has an impaired ability to appreciate and understand the circumstances that place the elder or dependent at risk of harm.
- (ii) If the elder or dependent adult has provided written authorization to a county adult protective services agency to act on that person's behalf.

## Immediate Relief (TROs etc.)

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- Injunctive relief can range from obtaining temporary, emergency protective relief to a permanent injunction to enjoin the conduct of an individual or entity.
- Injunctive relief can be obtained under general civil law, elder abuse statutes and domestic violence statutes.
- In cases of financial abuse, there is often other types of elder abuse being committed which are also subject to restraint which assist in stopping further financial abuse. Civil injunctions and domestic violence restraining orders are available.

## Immediate Relief (TROs etc.)

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- Civil injunctions are governed by Code of Civil Procedure section 527 and California Rules of Court, rules 3.1150 - 3.1152 which provide the specific procedures that must be followed when seeking civil injunctions, including a temporary restraining order.
- Civil injunction requires demonstrating imminent irreparable harm, probability of success on the merits and a balancing of equities.

## Immediate Relief (TROs etc.)

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- An elder who has suffered financial abuse may seek a protective order, including a TRO:
  - 1) enjoining someone from abusing, intimidating, molesting, attacking, stalking, threatening, sexually assaulting, battering, or harassing the petitioning elder,
  - 2) preventing the destruction of the elder's personal property, and
  - 3) excluding someone from the elder's home.
- Family members residing in the home with the elder and caregivers can be added as protected parties to receive the full protection of the TRO.

# Immediate Relief (TROs etc.)

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## TRO check-list

- Must fill out the following Judicial Council Forms:
  - Form EA-100, Request for Elder or Dependent Adult Abuse Restraining Orders;
  - Form CLETS-001, Confidential CLETS Information;
  - Form EA-109, Notice of Court Hearing; and
  - Form EA-110, Temporary Restraining Order.
- Must state the specific facts on which relief is sought.
- A supporting memorandum is not required.
- May be issued ex parte without notice.
- Must be personally served on defendant at least 5 days before the hearing, unless the court for good cause orders a shorter time.

## Immediate Relief (TROs etc.)

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Attaching the assets of the Elder Abuser is a possibility,

“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.”

(W&I Code Section 15657.01)

## Immediate Relief (TROs etc.)

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Attachment under EADACPA is an exception to the rule that a writ of attachment is only available in an action on a claim of money based in contract, where the amount of the claim is a fixed or readily ascertainable amount. (CCP §483.010(a)). A writ of attachment may be issued on either an *ex parte* application or on noticed motion. (C.C.P. §485.010).

# Pleadings

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Usually pleadings are available in Elder Abuse actions. If brought in a civil action then it is apparent that you can answer, demur or cross-complain (if appropriate) just like in any civil action:

C.C.P. section 422.10: The pleadings allowed in civil actions are complaints, demurrers, answers, and cross-complaints.

If the action is in Probate Jurisdiction, the pleadings must all be verified.

Answers are replaced by “responses” or “objections.”

# Pleadings

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Per Probate Code section 1000: (a) Except to the extent that this code provides applicable rules, the rules of practice applicable to civil actions, including discovery proceedings and proceedings under Title 3a (commencing with Section 391) of Part 2 of the Code of Civil Procedure, apply to, and constitute the rules of practice in, proceedings under this code. All issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions.

Notwithstanding that general rule, some Probate Judges have their own practices. E.g., There is no provision in the Probate Code that makes demurrers unavailable in probate cases, but some counties do not allow them, or didn't.

Certain judges do not require leave of court for later amendments of a probate petition after the response has been filed. Under P.C. section 1000, leave of court should be required.

# Pleadings

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## Causes of action

Causes of action may impact what court or department you want to be in: probate or civil

## Claims in a civil complaint may include

Financial Elder Abuse

Fraud (misrepresentation and concealment – Civil Code sections 1709, 1710)

Conversion

Breach of Fiduciary Duty

# Pleadings

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**Probate Petition Claims** may include:

850 Claims (bring property held by another back to the elder's estate, whether it be a trust, or a conservatorship, if elder alive, or trust or probate estate after death)

17200 Removal of Alleged Abuser from a fiduciary position

17200 Accounting of wrongfully taken property

# Pleadings

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Note - Depending on which claims predominate, the respondent in a probate petition may be able to change venue to the civil department.

(b) The department of the superior court having jurisdiction over probate conservatorships shall not grant relief under this article if the court determines that the matter should be determined in a civil action, but shall instead transfer the matter to the general civil calendar of the superior court. (W&I Code Sec. 15657.3(b)

# Pleadings

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Other possible causes of action, whether as part of a civil complaint or a probate petition (see Probate Code section 855 [“An action brought under this part may include claims, causes of action, or matters that are normally raised in a civil action to the extent that the matters are related factually to the subject matter of a petition filed under this part”].)

- 1) Consumer Legal Remedies Act. (Civ. Code, §§ 1750-1784.)
- 2) Unfair Competition Law. (Bus. & Prof. Code, § 17206.1.)
- 3) Senior Insurance Act. (Ins. Code, § 785 *et seq.*)

- Consumer claims may be coupled with financial elder abuse claims when abuser of elder is a business or professional providing products or services.
- To increase the deterrent effect of these senior protection laws, the legislature also adopted Civil Code § 3345, which permits trebling certain penalties.

# Pleadings

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- Civil Code § 3345 allows for treble damages for “unfair or deceptive acts or practices or unfair methods of competition” against “seniors citizens or disabled persons” (i.e., elders and dependent adults).
- The trier of fact may award the senior or disabled person up to 3x greater than is authorized or imposed. (Civ. Code, § 3345(b).)
- Applies to damages awarded under EADACPA, CLRA and Civil Code § 3294. (*Ross v. Pioneer Life Ins. Co.* (C.D. Cal. 2008) 545 F.Supp.2d 1061, 1066; *Clark v. Super. Ct. (Nat'l Western Life Ins. Co.)* (2010) 50 Cal.4th 605.)

# Pleading

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## **Negligence Cause of Action – Insurance Coverage? Pros and Cons**

- Think about whether you want to plead negligence, as a means of invoking the insurance coverage of respondents
- May provide a fund when a family member has dissipated the elder's property
- May make it easier to settle – if the elder abuse litigation is in the family context, emotions may rule – presence of an insurer might provide the voice of reason, and promote settlement
- But, if you prove your oppression, malice, fraud theories too well, it might preclude insurance coverage because they depend on intentional rather than negligent acts