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Legal Tools for Assisting Victims of Elder Abuse

LA Law Library

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Presented by:

Nicholas Levenhagen, Esq.

Bet Tzedek Legal Services

323-648-4735

nlevenhagen@bettzedek.org

Bet Tzedek's Services

- Bet Tzedek uses direct legal services, impact litigation, community outreach, and legislative advocacy to assist low-income individuals throughout Los Angeles County
- Assisted 26,390 individuals since January 1, 2017
- 70% of LA County's conservatorship services through our no-cost clinic
- Over half of Bet Tzedek's clients are over age 60
- 1,218 volunteers in 2016

The Changing Landscape of Elders in America



- People are living longer, living alone and increasingly at risk.
 - ▣ Currently Elders are 13% of population
 - ▣ By 2050 Elders will be 20% of population
- Older adults living alone with limited resources
 - ▣ 2017 SSI rate is \$895/mo. in California
- Estimated that 1 in 10 older adults have been victims of elder abuse

Bet Tzedek: Elder Justice

Planning for the Future... Holistic Approach



- Accessing public benefits
 - ▣ SSI, Medicare, Medi-Cal, IHSS
- Preparing legal documents
 - ▣ Wills, Trusts, Advance Directives, Durable Powers of Attorney
- Referrals for medical treatment and case management
 - ▣ USC, Alzheimer's Assn., LACRC, JFS
- Housing/Proper Level of Care
 - ▣ Low-Income Renters' Rights

Bet Tzedek: Elder Justice

Protection from abuse



- Elder Abuse
- Restraining Orders
- Kick-outs, freeze assets, other orders
- Consumer, tax, and other fraud/scams
- Real estate fraud
- Conservatorship

Elder Abuse....a growing problem

- Estimated that 1 in 10 elders have been abused
- Estimated that for every 1 elder abuse incident reported 23 go unreported
- Estimated that 70-90% of abusers are family members or known to the victim
- The annual cost of elder financial fraud is billions
- Abused elders are at higher risk of death than non-abused elders

Difficult Cases

- Case examples:

- ES

- PB

- AP

- PACE



- Elder Abuse Forensic Center

- USC, APS, AG, LAPD, LASD, PG, Ombudsperson, BT

- Address difficult cases of elder abuse in LA

Criminal and Civil Responses

Criminal Justice System

Example of possible Crimes:

- Theft
- Exploitation
- Embezzlement
- Forgery
- Fraud
- Larceny

Enhanced remedies for elders under Penal Code 368. Abuser could be put in jail and/or face fines for each act committed.

Civil Actions

- Elder Abuse Restraining Order
- Sue for Breach of Fiduciary Duty
- Help client revoke DPOA
- Ask court to order accounting
- Sue to get money back (conversion)
- Sue to undo transaction or property transfer (cancellation/recission)
- Petition for Conservatorship to protect senior and act on her behalf.
- Enhanced remedies and attorneys fees under EADACPA

What is Elder Abuse?

Elder and Dependent Adult Civil Protection Act

Definition of Elder Abuse - Civil

Welfare & Institutions Code 15600 et seq. defines elder abuse as:

- physical abuse,
- neglect,
- financial abuse,
- abandonment,
- isolation,
- abduction,
- other treatment resulting in physical harm or pain or **mental suffering**, or
- the deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

Elder and Dependent Adult Civil Protection Act Elder Abuse Restraining Orders

- EARO protects
 - ▣ People age 65 or older
 - ▣ Dependent adult: person 18 to 64 years old with physical or mental limitations that restrict ability to carry out normal activities or protect his/her rights.
 - ▣ People with developmental or intellectual disabilities.
- Who can file?
 - ▣ Victim, agent under power of attorney, trustee pursuant to trust document, conservator, GAL, APS
 - ▣ Starting in July 2016, the law allows APS social workers to file an EARO on behalf of a victim of elder abuse if the victim lacks capacity

Elder and Dependent Adult Civil Protection Act

EAROs: Types of Relief

- Conduct
 - ▣ Physically abuse, financially abuse, harass, threaten, destroy personal property, etc.
 - ▣ Communication: phone, mail, text, email, etc.
- Stay Away
 - ▣ Prevents defendant from going near victim, his/her house, car, work, church, etc.
 - ▣ Can include additional protected persons
 - ▣ Usually 100 feet unless parties live together or close by
- Residence exclusion
 - ▣ The court will not grant a residence exclusion unless petitioner is on title to the property or a named lease-holder. The defendant can be a co-owner of the property or a co-tenant. If the parties own the property together and the defendant is removed, the defendant still has the right to force a sale of the property.

Elder and Dependent Adult Civil Protection Act

EAROs: Types of Relief

- Conduct Order Regarding Animals
 - If the victim owns an animal or there is an animal residing in the victim's household, the court can grant petitioner exclusive care and order defendant to stay away
- Other Orders
 - The judge can make any other order that prevents defendant from doing something
 - Defendant "cannot" do _____. (E.g. – accompany victim to the bank, be a joint title-holder on bank account, change beneficiary on life insurance, use victim's car, etc.)
 - Judge can't make orders requiring the defendant to affirmatively perform an act. There is no way for the restraining order court to enforce such an order. (E.g. – return victim's personal property, return stolen money)
 - Opportunity for creative solutions

Elder and Dependent Adult Civil Protection Act

EAROs: Filing

- Documents needed
 - EA-100 Request for Orders to Stop Elder or Dependent Adult Abuse
 - EA-109 Notice of Court Hearing
 - EA-110 Temporary Restraining Order
 - Response and Proof of Service Forms
 - CLETS 001
 - FAM-018 – Declaration re Notice
 - <http://www.courts.ca.gov/selfhelp-elder.htm>
- How to file
 - No fees for EARO
 - Self-help centers, EARO Clinic: starting mid-July 2017: Eaclinic@bettzedek.org
 - Direct representation by Bet Tzedek

Elder and Dependent Adult Civil Protection Act

EAROs: Filing

- Supporting the EARO
 - Victim Declaration
 - Physical and cognitive diagnoses, ADLs, medications, history and details of abuse
 - Police Reports
 - Witness Declarations
 - Financial Documents
 - Medical records/provider declaration
 - Photos, emails, texts, other communications or recordings
- Notice and Service Requirements
 - 24 hours telephone notice for a temporary order unless the victim is scared that providing notice will result in harm, then request for waiver of notice.
 - Defendant must be personally served with the temporary order/date of hearing at least five days before the hearing.

Elder and Dependent Adult Civil Protection Act

EAROs: Filing

- Filing with the Court
 - Temporary restraining orders are issued on the day the court reviews them. The judge will either grant the temporary order and set a hearing date in 21 days or will deny the temporary order and set a hearing within 21 days.
 - The clerk will make copies of TRO documents for the petitioner/victim, the defendant, and the police.
- Standard of Proof
 - The court may issue an EARO if reasonable proof of a past act of abuse.
 - Preponderance of the evidence for EARO v. clear and convincing evidence
- Hearing
 - The person bringing the EARO and any witnesses or declarants must appear.
 - Judge will grant a 3-5 year restraining order if finding of elder abuse.

Financial Elder Abuse

Elder and Dependent Adult Civil Protection Act

Definition of Financial Elder Abuse: W&I Code § 15610.30

- "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.
- **Wrongful use** = knew or should have known conduct likely to be harmful

Financial Elder Abuse

- ❑ Signing and cashing checks without permission
- ❑ Unauthorized credit card/ATM use
- ❑ Coercing or deceiving someone into signing a financial document: contract, will, power of attorney
- ❑ Real estate transactions: transfer of title, refinancing
- ❑ Home repair and unsolicited work
- ❑ Identity theft
- ❑ Taking out loans or establishing credit accounts in someone else's name

Financial Elder Abuse

Remedies

- Probate
 - Conservatorship (plus action to recover money and property)
 - Trust actions
 - Acts involving agents
- Civil
 - Restraining Orders
 - Request accounting
 - Actions to recover property or money
 - Request accounting
- Small Claims
 - For cases where loss is less than \$10,000
 - Small claims clinic: Southwestern law school



Financial Elder Abuse

Remedies

Probate: Conservatorship

- Cases of incapacity
 - Abuse has occurred or is likely to occur
 - Self-neglect
 - Additional reasons for conservatorship beyond remedying the abuse
- Due Process in Competency Determinations Act
 - Presumption of incapacity
 - Mere diagnosis of illness (stroke, dementia, etc.) not enough by itself
 - Are there alternatives to conservatorship available?
- Who will be the conservator?
 - Family, friend, private fiduciary, or public guardian?

Types of Conservatorship

Probate

- General (elder)
- General with Alzheimer's orders
- Limited (developmental disability)

LPS

(Lanterman Petris Short)

For Involuntary Mental Health Treatment only

- Threat to self or others
- Grave disability-
Unable to care for self

Temporary Conservatorship



- ❑ Only use when emergency circumstances require
- ❑ Probate Investigator must see client before hearing
- ❑ Private attorney (PVP) for conservatee must visit before hearing and appear at hearing
- ❑ Appropriate in Elder Abuse situations (financial, physical)
- ❑ Use of kick-out orders

Capacity Declaration

- Doctor must give evidence as to incapacity (memory, orientation, judgment, executive functioning, hallucinations, emotional lability)
- Doctor must make specific finding as to capacity to make **medical decisions**
- Doctor must make **specific finding regarding dementia** and need for psychotropic drugs, dementia medications and/or placement in locked facility
- Doctor **must list** all medications used or needed by C'ee (Court is concerned about over-medication)

How to Obtain a Conservatorship



- File a Petition and Pay Fees
- Notice to Parties
- Have Hearing and/or Trial
- Order Signed by Judge
- Letters Signed by Conservator
- Post Bond (10% of Estate), inventory & appraisal
- File Accountings Every Year

Financial Elder Abuse

Probate Actions to Recover Property

- Probate Code § 850

(a) The following persons may file a petition requesting that the court make an order under this part: (1) A guardian, conservator, or any claimant, in the following cases... (D) Where the minor or conservatee has a claim to real or personal property title to or possession of which is held by another.

- Probate Code § 856

[I]f the court is satisfied that a conveyance, transfer, or other order should be made, the court shall make an order authorizing [the execution of] a conveyance or transfer to the person entitled thereto, or granting other appropriate relief.

- Prohibited Donative Transfers: Probate Code § 21380

Presumption of fraud or undue influence for written donative transfers to drafters, caregivers, and fiduciaries who transcribe or cause an instrument to be transcribed.

- Probate Code § 4541: Revocation of Powers of Attorney

Financial Elder Abuse

Remedies

Civil

- Breach of Fiduciary Duty
 - (1) The existence of a fiduciary relationship giving rise to a fiduciary duty, (2) breach of that duty, and (3) damage proximately caused by the breach.
 - Agent under POAs, Trustee, Conservator, Spouse, Banks, Mortgage brokers, Lenders, Financial advisors, Attorneys, Real estate agents.
- Accounting & Conversion
 - Accounting: (1) A fiduciary relationship or other circumstances appropriate, (2) A balance due from the defendant that can only be ascertained by an accounting.
 - Conversion: (1) plaintiff's ownership or right to possession of the property at the time of the alleged conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages. Money claims require a specific, identifiable sum.
- Breach of Written or Oral Contract

Financial Elder Abuse

Remedies: Real Estate Fraud Civil

- Cancellation
 - ▣ Cancellation Based Upon Forgery
 - ▣ Cancellation Based Upon Non-Delivery
 - ▣ Cancellation Based Upon Fraud in Factum
- Rescission
 - ▣ Rescission Based Upon Fraud
 - ▣ Rescission Based Upon Undue Influence
 - ▣ Rescission Based Upon Mistake
- Quiet Title (may toll statute if continued residence on disputed property)
- Property Tax Consequences
 - ▣ Property tax assessment rules and exemptions
 - ▣ Letter to the Office of the Assessor with copy of judgment



Financial Elder Abuse

Consumer Fraud Scams

National Council on Aging's Top 10 Scams

- ❑ Medicare/Insurance Fraud
- ❑ Counterfeit prescriptions
- ❑ Funeral & Cemetery Scams
- ❑ Fraudulent Anti-Aging Products
- ❑ Telemarketing
- ❑ Internet Fraud
- ❑ Investment Schemes
- ❑ Homeowner/Reverse Mortgage Scams
- ❑ Sweepstakes and Lottery Scams
- ❑ The Grandparent Scam



SCAM

Financial Elder Abuse

Consumer Fraud Scams

Property Assessed Clean Energy (PACE) Bonds

- Financing energy-efficient or water conservation improvements to home
 - LA County residential PACE program launched in 2015
 - LA County issues improvement bonds to finance work
 - PACE providers (Renovate America/HERO or Renew Financial/California First) contract with County to administer program.
 - PACE providers purchase, securitize, and sell the bonds to investors.
 - PACE providers train home improvement contractors to market and solicit homeowners, and complete the home improvement work.
 - LA County enters into assessment contact with the homeowner for the cost of the work plus high fees and interest.
 - LA County Assessor collects payment through the property taxes.

Financial Elder Abuse

Consumer Fraud Scams

Property Assessed Clean Energy (PACE) Bonds

- Problems
 - High fees and interest rates, more affordable options for consumers
 - PACE 20 year loans have an 8.35% interest rate or higher
 - No ability to repay assessment, providers claim TILA/RESPA do not apply
 - **Contractor misrepresentations, fraud, undue influence, and incomplete work**
 - No authority monitoring/supervising contractors or the PACE providers
 - Home improvements are grossly overpriced and may not be energy efficient
 - Problems with electronic signatures, particularly for seniors
 - Super priority lien; Fannie, Freddie, FHA, and VA will not purchase mortgages with PACE lien on the property
 - Inflated monthly mortgage payments when there is an impound for property taxes
 - Takes time for lien to be removed even when paid off – must advocate for removal
 - **RISK OF FORECLOSURE OR TAX SALE!**

Elder Abuse is a Community Problem with a Community Response

- APS
- Forensic Centers
- Victims Resources
- Community awareness
- Mandatory Reporting



Resources

- Adult Protect Services Hotline 877-477-3646
- Public Guardian 213-974-0515
- Long Term Care Ombudsman 800-334-9473
- Bet Tzedek Legal Services 323-549-5828
- Genesis Program (Dept. of Mental Hlth) 213-351-7284
- Center for Civic Mediation 213-896-7284
- National Center on Elder Abuse www.ncea.org
- Los Angeles Caregiver Resource Center 800-540-4442
- California Advocates for N. Home Reform www.canhr.org
- Los Angeles Alzheimer's Association 323-938-3379



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