

## WHAT IS ELDER ABUSE LAW?

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“Respect your elders” is an old adage which is acquiring an enhanced significance under California’s Welfare and Institutions Code (Sections 15600 et seq.). These provisions, known as the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA), offer legal remedies to “elders” who are victims of various forms of abuse.

”Elder” is defined in the statutes as any person 65 years of age or older who is residing in California at the time of the alleged abuse. The term “abuse” is interpreted broadly and includes any of the following:

- physical abuse;
- neglect;
- fiduciary abuse; and
- abduction (added as of January 1, 1998).

The above listed categories are more specifically defined in sections 15610.63(d), 15610.57 and 15610.30 of the Welfare and Institutions Code. This article provides a brief overview of each of these areas so as to allow for an overall grasp of the intended protections of the Act.

Physical Abuse may take on any form, but typically includes assault, battery, unreasonable constraint, prolonged deprivation of food or water, rape (and other forms of sexual assault and battery), and the use of physical or chemical restraint or psychotropic medication where the restraint or medication is used for (1) a means of punishment; (2) beyond the time authorized by a doctor treating the elder; or (3) for any purpose not authorized by the prescribing doctor. (Welfare and Institutions Code, Section 15610.63.)

Neglect , unlike the other forms of abuse under the Act, may only be committed by a person or entity having custody, or charged with the care of the elder. Typical instances of neglect involve poorly staffed nursing homes, or neglect in the home care provided by a family member or live in nurse or aide. Neglect means that the care giver acted unreasonably by failing to exercise that degree of skill or render that level of care for which a reasonable person would exercise or render under similar circumstances. It includes, but is not limited to, failure to provide for any of the following:

- personal hygiene;
- basic living necessities such as food, clothing or shelter;
- medical care;
- mental health care;
- protection from health and safety hazards; and
- prevention of malnutrition.

Cases of negligence often involve skilled nursing facilities which contract to provide care and rehabilitation services to elders who may be suffering from Alzheimer's or recovering from stroke or other ailments. Typically, the skilled nursing facility (convalescent home) contracts to provide all basic necessities and complete medical care. At a minimum, the spirit of the Act attempts to ensure a safe environment with a dignified existence during the elder patient's stay at the facility.

Fiduciary Abuse (as of January 1, 1998) is defined in one of two ways. First, "fiduciary abuse" means abuse by a person who stands in a position of trust and confidence to the elder, and takes or uses the elder's money or property for personal gain or any purpose not lawfully required to accomplish the purpose of the position of trust. Second, it can occur in any situation in which the following circumstances occur: (1) an elder or the elder's representative requests a third party to transfer property which the third party is holding for the elder; (2) the third party, without good cause, does not transfer the property as requested; and (3) the third party acts in bad faith in not transferring the property. For purposes of application of this section, the definition of fiduciary abuse is not limited to persons who are considered to be in a legally defined fiduciary role such as a conservator or real estate broker.

#### REMEDIES UNDER THE ACT

The remedies under this Act supplement remedies traditionally available under causes of action for constructive fraud, and fraud in the commercial setting, including the remedies provided in the Business and Professions Code.

Perhaps most importantly, this Act provides for reasonable attorneys fees and postmortem personal injury damages when abuse is proven by clear and convincing evidence. Additionally, if the elder dies as a result of the abuse, the family or appropriate representative of the estate may recover pain and suffering damages as a result of the abuse suffered by the elder prior to death. Additionally, where the abuse is proven by clear and convincing evidence, and plaintiff can establish recklessness, oppression, fraud, or malice in the commission of the abuse, plaintiff is entitled to recover punitive damages. (Civil Code § 3294) Finally, there is an argument that punitive damages may be Trebled if it can be shown that Civil Code Section 3345 applies.

In short, the remedies available under the current statutory framework are substantial and create greater incentives for abuse victims and their families to pursue their rights. The availability of postmortem pain and suffering damages, attorneys fees, and punitive damages provides a means to discourage large chain nursing homes from continuing practices which may create an environment prone for neglect. The Act also arms elders with a means to pursue those who have traditionally taken commercial advantage of them through sales and investment schemes.