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In This Issue...

A Statutory Springing Durable Power of Attorney Springs to California

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California now has a statutorily authorized "springing" durable power of attorney. It applies to any power of attorney whether executed before, on or after January 1, 1991 if the power of attorney contains the designation hereafter discussed.

This paper will discuss several major subjects:

I. The new statutorily created "springing power"
II. Forms
III. Some Problems in Practice

The threshold question is: Should the principal use a "springing power" or an immediate power. This is not a legal question. It is a very practical problem faced, at the outset by every principal.

The writer favors "springing powers" and the vast majority of his clients favor "springing powers." The experience of some practitioners is the very opposite: They recommend, and their clients use, immediate powers, not springing powers. So, let's see if we can ferret out the practical differences and problems.

The major problem: How to determine the principal's incapacity. The main problem raised by most practitioners is related to the method of determining the principal's incapacity. The most common questions are:

1. How is the principal's "incapacity" to be determined?
2. How can third persons (banks, insurance companies, title companies, etc.) be persuaded, or compelled, to follow the instructions/directions of the attorney-in-fact?

These are very practical and important problems.

The first problem—determining the principal's incapacity—is discussed in section II, below, and sample forms are suggested.

The second problem—third party reliance—is more complex. There is no drafting technique that will force third parties to honor the instructions and directions of the attorney-in-fact. There are, however, some clauses that will push the recalcitrant third party in the direction of honoring the instructions and directions of the attorney-in-fact. Such as:

1. A clause relieving the third person from liability. *California Durable Power of Attorney Handbook*, Sec. 2.153. (Cal. CEB 1992).
2. Affidavit of non-termination or non-revocation. *California Durable Power of Attorney Handbook*, Sec. 3.34. (Cal. CEB 1992). See also general comments re "Aids To Acceptance by Third Parties," *California Durable Power of Attorney Handbook*, Secs. 2.56-2.61A. (Cal. CEB 1992).
3. A clause authorizing the attorney-in-fact to commence and prosecute any civil action or proceeding against any person who fails or refuses to honor the instructions and directions of the attorney-in-fact; and to charge all costs and expenses thereof, including the attorney-in-fact's attorneys' fees to the assets and estate of the principal.

The problems with the *immediate* durable power are many:

A. Most—probably nearly all—clients want an agent to act only from and

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The Elder Abuse and Dependent Adult Civil Protection Act (Chap. 774, Stats. 1991)

The Elder Abuse and Dependent Adult Civil Protection Act ("EADACPA" pronounced *ee-dak-pa*)[1] was signed into law by Governor Pete Wilson on October 10, 1991. Co-authored by Senators Henry Mello (D) and Ed Davis (R), and lobbied for extensively by Senator Herschel Rosenthal, the new law is likely to have more impact on the quality of life for elders and dependent adults than any civil rights legislation within the last decade.[2] Its importance as a California attorneys fees statute was greatly enhanced by the United States Supreme Court decision of *City of Burlingame v. Dogue* (92 Daily Journal DAR 8664 (6/24/92)), holding that a contingency risk may not be considered as a lodestar factor under certain federal attorneys fees statutes.

EADACPA was the outgrowth of the perception of the author of this article that elderly people are often frail, and therefore (i) are particularly vulnerable to physical and financial abuse, (ii) gravitate into situations in which they are easily abused, such as mortgage swindles due to cash flow problems, and nursing home abuses due to health care problems, (iii) are sought out by a growing army of people who prey on them, and (iv) are unable to benefit from the protections which the criminal and civil tort systems currently purport to afford them.

For example, ill elderly nursing home patients often have been over-drugged and tied up for the convenience of the staff. Unable to care for themselves, they voluntarily or involuntarily have moved into facilities where the health care industry has often neglected their hygiene and bedsores. Too demented by their illnesses or the drugs they are fed, they cannot testify about the wrongs inflicted on them. The criminal system rarely intervenes because the burden of proving criminal malice and responsibility *beyond a reasonable doubt* is usually an insurmountable burden.

The civil tort system also has largely abandoned the elderly to health care facility abuse. Too frail to survive long enough for a lawsuit to come to the judgement phase *before their death, even with a special trial setting*, the elderly have often been unable to attract plaintiffs' counsel, even when the facility's abuse is obvious and egregious. Lawyers know that the victim's pain and suffering, the main damages in these cases, is *not* recoverable under existing law if the victim dies before the judgement is entered, and elderly victims of facility abuse often die quickly.

Plaintiffs' personal injury lawyers typically get their fees out of a recovery for the victim's pain and suffering. But if the victim dies before the judgment is entered, the lawyer gets no pay for the work and money invested in representing the client. The lawyers therefore have had little financial incentive to take cases involving abuse of the frail elderly. Moreover, such cases are expensive to litigate inasmuch as they are characterizable as medical malpractice and require extensive discovery and expert witnesses. Thus, the contingent fee system, which was designed to enable the little person to hire a lawyer he or she could otherwise not afford, has failed to serve the frail elderly.

Financial abuse of the elderly has been growing, largely unimpeded by the tort system. Phony contractors and other vendors find declining elders and sell them substandard services or an unneeded mortgage at usurious interest rates. Then, there is also the new "friend" who cuts the declining victim off from family and the rest of the world "because they don't really care about you anyway." The new friend often gets a durable power of attorney, a new will, and hurries things along by using the durable power of attorney to move the money from the elder's account into the new friend's account "for safekeeping." Sometimes the money goes to the new friend as "compensation" for the friend's self-sacrifice in providing so much service to the progressively disoriented elder or dependent adult. It is not uncommon for the frail elder to then "forget" to take his or her medication, to "refuse" to see a doctor, and to die of a treatable condition aggravated by malnutrition. "She refused to eat anything. There was nothing I could do."

Criminal suits are rarely filed against such abusers because it is usually not possible to prove beyond a reasonable doubt that the old lady was incompetent when she gave away her money and that the "friend" knew it. Civil tort cases, brought by a conservator for the victim, are often unsuccessful because the abuser uses the victim's own money to pay for a vicious war of litigation attrition. Abusers know that the most they have to fear is a court order to give the money back, and they tend to fight long and hard. Conservators and their attorneys know that the Probate Court is uneasy about awarding big fees to the conservator and the conservator's attorney for protracted litigation if the conservatee may be left without enough to pay for the care he or she needs. Accordingly, blatant cases often settle for a relative pittance.

I. Purpose

EADACPA proclaims that it is intended to protect elders[3] and dependent adults.[4]

EADACPA sets forth the Legislature's finding that:

1. "elders and dependent adults are a disadvantaged class,"

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2. criminal prosecutions against abusers of elders and dependent adults are rare; and
3. few civil suits are filed due to problems of proof and court delays.[5]

EADACPA's purpose is "to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults."[6] EADACPA attracts attorneys by broadening the remedies available to elders and dependent adults who have suffered egregious abuse. EADACPA (i) requires courts to award attorneys fees and costs to a successful plaintiff, and (ii) allows post-mortem recoveries for the victim's pain and suffering. No less important, EADACPA also gives victims of abuse a more expeditious and expert forum by giving the Probate Court *general jurisdiction to hear and decide all aspects of* claims for relief from abuse to an elderly or dependent adult. These new developments give plaintiff's attorneys incentives to file civil suits to enforce the rights of abused elders and dependent adults through injunctive relief, and to obtain damages for violations of those rights. These incentives reach across the board to private, public interest and governmental attorneys.

The impact EADACPA may have on the business world should not be underestimated. This is true even though EADACPA's broadened employer liability is limited to cases where (i) the wrong was perpetrated with recklessness, oppression, fraud or malice and (ii) the employer knowingly either participated in or ratified the wrong.[7]

The new law targets a *broadly* defined class of people called *dependent adults* and all people over age 65. The term dependent adult includes "any person between the ages of 18 and 64 who has physical or mental limitations which restrict his or her ability to ... protect his or her rights." It remains to be seen whether a fairly normal person's neuroses or emotional handicaps are sufficient "physical or mental limitations" to entitle that person to protection as a "dependent adult" within the meaning of EADACPA. A person may be more entitled to membership in the protected class in some situations, such as the purchase of a complicated third mortgage, than in other situations, such as an automobile accident.

EADACPA protects elders and dependent adults from, among other things, a vaguely defined wrong called *fiduciary abuse*. The definition of fiduciary abuse mercifully appears to be a codification of existing law.[8] But the term may apply to just about any business deal in which a person owes a fiduciary duty to an elder or dependent adult.

II. EADACPA Targets the Most Common Forms of Abuse

EADACPA *requires* the court to award attorneys fees and costs if the plaintiff proves by *clear and convincing* evidence that the defendant was guilty of recklessness, oppression, fraud or malice in the commission of physical abuse,[9] neglect or fiduciary abuse.

"Physical abuse" is defined in Welfare & Institutions Code § 15610(c), and includes among other things (i) assault and (ii) battery, as defined in § 240 of the Penal Code. "Physical abuse" also includes the prolonged or continual deprivation of food or water, and

"the (iv) *use of a physical or chemical restraint or psychotropic medication* under any of the following conditions:

A. For punishment.

B. For a period significantly *beyond* that for which the restraint or medication was *authorized* pursuant to the *instructions of a physician* licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given.

C. For any purpose not consistent with that authorized by the physician." (Emphasis added.)

The italicized language above targets the over-medication of patients and the over-use of "passive restraints" in nursing homes or other health care facilities, *i.e.*, tying patients to their beds or wheelchairs.

"Neglect," as defined in Welf. & Inst. Code § 15610(d), means:

> "the negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care which a reasonable person in a like position would exercise. 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*. (Emphasis added.)"

Among other things, the definition of "neglect" targets bedsores, malnutrition and other illnesses that are the product of simple neglect by a person or health care facility responsible for providing the "care which a reasonable person in a like position would exercise."

"Fiduciary abuse," as defined in Welf. & Inst. Code § 15610(f), "means a situation in which a person who has the care and custody of, or who stands in a position of trust to, an elder or a dependent adult, takes, secretes, or appropriates their money or property, to any use or purpose not in the due and lawful execution of his or her trust."

Fiduciary abuse is broadly defined and far reaching, but presumably is limited to fiduciary abuses that are currently actionable. But the term fiduciary abuse could apply to any type of business relationship in which the wrongdoer "stands in a position of trust to an elder or a dependent adult." The defendant may be an employer, a co-worker, colleague, or vendor of goods or services.

The wrongdoer may be liable for the victim's attorneys fees and costs and for the victim's pain and suffering, if the business person intentionally or recklessly "takes [the victim's] property" or "sets [it] aside or assigns [it] to a particular purpose"[10] which is "not in the due and lawful execution of the [elder's or dependent adult's] trust."[11]

Banks, trust companies, lenders, insurance companies, C.P.A.'s and others, who serve as financial planners, and any other fiduciaries may have to reassess their operating practices in light of their new exposure under EADACPA. Lest these new incentives for lawsuits arouse unnecessary anxiety, it should be noted that an employer is in no way liable for a wrong under EADACPA unless (i) an actionable tort took place, (ii) the tort was committed by an

agent of the employer with recklessness, oppression, fraud or malice, (iii) both (i) and (ii) are proven to a judge's satisfaction, and not merely a jury's satisfaction, by clear and convincing evidence, and (iv) a managerial agent of the employer knowingly participated in the wrong or ratified it within the meaning of Civil Code § 3294(b), or committed some other wrong sufficiently bad to bring it within the punitive damages provisions of § 3294(b).

"Fiduciary abuse" obviously targets the growing cottage industry of new "friends" who cut the impaired elders and dependent adults off from friends and family, and then take the victim's property away. Fiduciary abuse may also target *businesses* which "stand in a position of trust" with respect to elders and dependent adults, and who use that trust to appropriate personal or real property from the victim "to any use or purpose not in the due and lawful execution of [that] trust." The usurious loan broker, the phony contractor and the dishonest investment counselor or financial manager will clearly find themselves within the ambit of this definition.

> "A typical come-on offers homeowners a 'special' on roofing, carpeting or drapes where the homeowner gets 25% off or free lottery tickets if he signs a contract right away... What the potential victim doesn't know is that the unscrupulous contractor is working hand-in-hand with the lender [who convinces the elders] to take out loans they can never realistically repay."[12]

Most civil complaints for damages arising from disputes over money include an allegation that the defendant breached a fiduciary duty to the plaintiff. It thus appears likely that most lawsuit complaints brought by elders or dependent adults over a financial dispute will now include a request for attorneys fees and costs under EADACPA.

For example, this could include will contests and trust abuses, power of attorney abuses, swindles by contractors or lenders, including trust deed holders, rental abuses by landlords, abusive condo conversions, real estate frauds, consumer frauds, investor and securities fraud as in the Lincoln Savings case, and many employment disputes. EADACPA counts may also be raised in cases where elders or dependent adults are swindled out of title to their homes, where powers of attorney are misused for the benefit of the agent, and where institutions fail to make appropriate referrals and/or fail to respond to requests for services in a timely manner.

III. Attorneys Fee Awards

EADACPA rewards the victorious plaintiff with attorneys fees and "costs," and says that the term "costs" includes reasonable fees for a conservator's services devoted to the lawsuit. Knowing that the conservator's and the plaintiff's attorney's timeclocks are ticking, abusers have an incentive to resolve disputes promptly under the new law, rather than wage the time honored war of legal attrition.

EADACPA's attorneys fee provisions are not mere window dressing. EADACPA requires the court to consider three factors when awarding attorneys fees, the first two of which are designed to *reward* plaintiff's attorneys for standing up to litigious abusers. The third encourages both sides to settle promptly, and penalizes unreasonable litigation. Specifically, EADACPA provides that in determining the amount of attorneys fees, the court must consider[13] all relevant factors *specifically including* the following three:[14]

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, and
c. The reasonableness and timeliness of any written offer in compromise made by a party.

In light of EADACPA's overriding statement of purpose, factor (a) should be interpreted as a factor that can only *enhance* the plaintiff's attorneys fee award, and *may not* be used to *limit* attorneys fees. Thus, factor (a) would be irrelevant in cases where the victim dies before a remedy is obtained, or where a suit is filed after the victim's death, requesting damages newly allowable under Welf. & Inst. Code § 15657(c) for the victim's pain and suffering.

> "It is the further intent of the Legislature in adding Article 8.5 (commencing with Section 15657) to this chapter to enable interested persons to engage attorneys to take up the cause of abused elderly and dependent adults."[16]

EADACPA's purpose is to extend *additional* rewards to lawyers to entice them to take elder and dependent adult abuse cases. The goal of this *Civil Protection Act* is to encourage potential champions to use the civil tort system as a means of protecting the rights of a frequently victimized group of people who have not been adequately protected by the criminal system. EADACPA therefore explicitly provides that the attorneys fee awards are cumulative and supplemental to any damage awards.[17]

Fees should be awarded under EADACPA in an amount great enough to sufficiently reward the attorney for the litigation and the risks he or she assumes. Under EADACPA, the heirs and the attorney should not be compelled to enter into a contingency agreement under which they would share the damages recovered. In many cases, the pain and suffering of the victim may be unascertainable.

> "The intent of this bill is to discourage the commission of elder abuse by creating *additional* incentives for attorneys to represent the victims of abuse.
>
> Under existing law, the limitations on a victim's recovery, particularly if the victim dies before judgment, discourage attorneys from representing victims because the recovery is so little. Also, complex damage questions arise in cases of neglect where it may be argued that the neglected victim suffered little, if any, harm or injury, because he or she was so disoriented, ill, or infirm. What are the damages if the victim is alive, but not sentient?"[18]

The goal of EADACPA is to make the abuser pay for the full cost of the legal proceedings that the abuse made necessary. The abuser should pay the full cost of vindicating the victim's rights. The fees should be enough to entice the attorney to take such a case again, without being compelled to do so merely because of charitable motivation.[19] If there happen to be ascertainable damages for pain and suffering, the abuser should also make the victim or the victim's heirs whole by providing compensation for the actual harm caused.

The abuser may complain that an award of significant attorneys fees is inappropriate when there is also a post-mortem award for the victim's pain and suffering. The abuser would contend that the damage award provides more than enough reward for both the

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heirs and their attorney to share; but a pitifully small sum of unreimbursed medical expenses may be the only damages other than the pain and suffering. The abuser might retort: "So what? The victim is deceased and cannot be made whole. The idea of compensation no longer applies." But EADACPA tells us that, if the court has found *clear and convincing evidence* that the abuse was inflicted *intentionally or recklessly*, public policy disfavors allowing the abuser to evade paying (i) full compensation for the amount of the harm he or she caused, *plus* (ii) the cost of the legal proceedings which he or she made necessary. "The sponsor argues that existing limitations on damages, and fees, should not apply in such extreme cases."[20]

The legislative history indicates that attorneys fees for the plaintiff's lawyers are to be given financial incentives to cut down on the frequency of unpunished abuse:

> "In 1988, counties reported 31,004 cases of abuse within the meaning of the Act. In 1989, the total number of reports rose to 42,053. SB 679 creates a private enforcement mechanism that will augment the resources of counties in this regard."[21]

A. The Paragraph (a) Enhancement Factor: Impact on Quality of Life.

If the victim is still living, paragraph (a)[22] may be the basis for the award of significant attorneys' fees. For example, if a conservator successfully seeks an injunction requiring a nursing home to clean the beds of incontinent people more frequently to prevent bedsores, the value of such successful litigation will have a great impact on the quality of the plaintiffs' lives, and the reward should reflect that. Similarly, an order requiring a facility to adhere to minimum staffing obligations required by law may have a significant impact on the frequency with which disabled people are given assistance with feeding, and therefore a large impact on their quality of life. The successful attorney's fee award should be large enough to reflect the importance of the feeding in terms of the victim's quality of life.

Although OBRA and other laws[23] purport to give nursing home residents a private right of action, few attorneys in private practice have found courts to be sufficiently liberal in awarding fees to be attracted into the field of nursing home litigation. The new provision, paragraph (a) above, which bases an attorneys fee award on the effect of the litigation upon the victim's "quality of life," will put teeth into the law by enticing lawyers to take abuse cases. Successful suits for damages and injunctive relief in the nursing home context will induce remedial changes in the industry, and thereby give a practical meaning to many of the grandiose rights codified in various places.

In the context of *consumer fraud* or *fiduciary abuse*, litigation to recover an elderly person's home or life savings from a con artist comes squarely within paragraph (a) due to the importance of an elder's home and life savings with respect to his or her quality of life. It's usually too late for the elder to earn it again. Attorneys fee awards for the successful recovery of property should now reflect (i) that importance and (ii) the fact that rewards under paragraph (a) are subject to the risk and contingency that the plaintiff's attorney can prove his or her case by clear and convincing evidence. Litigation that prevents flagrant financial abusers from profiting from their wrong may deter prospective abusers from starting down the wrong path.

Rewards for successful public interest litigation may be enhanced by these new attorneys fee award factors, but that is yet to be seen. Attorneys fee applications under the private attorney general statute, Code of Civil Procedure § 1021.5, "need not represent a tangible asset or a concrete gain but, in some cases, may be recognized simply from the effectuation of a fundamental constitutional or statutory policy."[24] It is unclear whether the fees awarded for the effectuation of a fundamental constitutional or statutory policy are generally expected to be in an amount that reflects the value of the litigation in terms of the quality of life of the plaintiff.

Most public interest litigation will not fall squarely within the gambit of Welf. & Inst. Code § 15657, and therefore attorneys fee awards for most public interest litigation will be computed under authority prescribed by other statutes. However, the Legislature's approval of the new attorneys fee factors set out in Welf. & Inst. Code § 15657.1 suggests that those factors may be appropriate ones for a court to consider in making awards for successful public interest litigation. Attorneys who apply for fees may wish to emphasize these new factors which may be supportive in public interest litigation. The recent U.S. Supreme Court decision of *City of Burlingame v. Dogue*, 92 Daily Journal DAR 8664 (6/24/92), tells us that attorneys fee awards under federal statutes may not compensate the attorney for the risk of undertaking the matter. The "lodestar" fee is limited to the product of reasonable hours times a reasonable rate. However, EADACPA reduces the crippling effect of that ruling by allowing a court to award greater awards in consumer fraud actions, class actions, and other litigation where a person or institution "stands in a position of trust" and takes or appropriates the victim's property. Such new factors: "impact on quality of life" and the defendant's dilatory tactics may be factored into the attorneys fee award.

B. The Paragraph (b) Enhancement Factor: Defendant Employer Fails to Act Quickly To Find Out Whether Its Agent Committed the Alleged Wrong, and the Extent of the Employer's Obligations to the Victim.

Paragraph (b) of Welf. & Inst. Code § 15657.1[25] provides a defendant with an incentive to promptly take "reasonable and timely steps to determine the likelihood and extent of liability," because the plaintiff's attorneys fees will be enhanced if the defendant does not do so. But paragraph (b) may seem unnecessary since EADACPA applies only when the abuser committed the abuse intentionally or recklessly. A person who inflicted the abuse maliciously does not need to take *any* steps to determine the likelihood and extent of his or her own liability; the liability is obvious.

But an *employer* whose employee may have committed the abuse *does need* to promptly take "reasonable and timely steps to determine the likelihood and extent of liability," and paragraph (b) encourages the employer to do so. The employer's failure to take those steps may later be cited by the plaintiff's attorney as the basis for an enhanced fee award. This will be particularly true where the guilty employer did not initiate the timely settlement efforts required by paragraph (c). On the other hand, if the defendant employer promptly does what paragraph (b) requires, the employer's compliance will not prevent an attorneys fee award that is significant, but neither will paragraph (a) enhance it.

Paragraph (b) is important also because employers are *not ipso*

facto subjected to EADACPA's special liability for attorneys' fees and costs *whenever* an employee misbehaves. To be liable, the employer must either ratify the employee's misconduct or otherwise bring itself within the standards of Civil Code § 3294(b) for the assessment of punitive damages against an employer.[26] Query whether an employer's failure to obey Welf. & Inst. Code § 15657.1(b)'s mandate to take "reasonable and timely steps to determine the likelihood and extent of liability" constitutes a ratification within Civil Code § 3294(b)?

C. The Paragraph (c) Factor: The Legislative Policy Favoring Settlement Applies to All Parties, Even the Innocent. A Close Approximation of Justice May Be Good Enough.

Paragraph (c)[27] is the sole factor in Welf. & Inst. Code § 15657 which can serve not only as a possible enhancer of the plaintiff's attorneys fee award, but also as the basis for a reduction of the award. Assume, for example, that a defendant employer determines that it is liable for an employee's wrong, and makes a prompt and reasonable settlement offer which the plaintiff rejects without making a reasonable and timely counter-proposal. In this case, the plaintiff's attorneys fee award should be *reduced* in order to reflect the waste of the court's and the defendant's time and money caused by the plaintiff's inappropriate response to the offer.

But if the plaintiff makes a reasonable settlement offer and the defendant fails to timely respond with a reasonable counter-proposal, the defendant should be required to pay for the unnecessary waste of time and money imposed on the victim, and pursuant to paragraph (c), the court should enhance the plaintiff's attorneys fee award. After all, once the plaintiff has proven, by clear and convincing evidence, that the defendant committed the tort recklessly or intentionally, the defendant *should* be forced to pay for all the legal proceedings that were the foreseeable result of that tort. The Legislature has now determined that it is good public policy to make blatantly malicious evildoers pay the cost of all the lawyers and experts that the evil made necessary, and particularly for dragging out the proceedings.

From a purely administrative standpoint, paragraph (c) puts all cases on a sort of "fast track," by encouraging prompt and reasonable settlement offers from either side as discovery progresses. The sanctions embodied in paragraph (c) are merely a logical extension of the approach to settlements already embodied in Code of Civil Procedure § 998.

IV. Notice of Violations

Relatives of nursing home residents may wish to provide a nursing home administrator with notice of conditions that need correction. If the condition can be corrected, the administrator may be pleased to correct it, and may appreciate being alerted to the problem. Contrary to what may be the popular perception, most of the people who work in nursing homes actually do want to provide good services to nursing home residents.

On the other hand, too many health care providers focus more on the profit ratio than a concern for providing good quality care. Written notice may seem appropriate as a method of (i) frightening the provider, who may fear legal action, and as a method of (ii) building the evidentiary basis for the recovery of a remedy, in case the facility continues to misbehave. However, written notice may be counter-productive. It could irreparably damage the family's and the resident's relationship with the nursing home staff. Fearing legal action, the staff could make the plaintiff's case harder by "doctoring" the medical records and making retaliatory "transfers" of the patient to a hospital.

One alternative approach is for a family member to (i) informally tell the administrator about problems that need correction, (ii) in the presence of a witness who (iii) will make a *file memo* right after they go home. This "informal" approach would alert the conscientious administrator to a problem that needs correction. If the administrator allows the abuse to continue, such notice would prevent the employer from escaping liability because "We had no idea" that the abuse was occurring.

Another approach is to file a complaint with the local Department of Health office. An on-site investigation must generally be made within 10 business days[28] of the filing of the complaint. Investigations are typically carried out in a way that prevents the facility operator from learning the identity of the person who filed the complaint. If the investigators find violations, the operator is cited and the agency reports its findings. The administrative staff is put on notice that a serious problem needs attention. The facility administration's failure to address the known abuses thereafter may constitute acceptance or "ratification" of them within Civil Code § 3294 and Welf. & Inst. Code § 15657(c).

Businesses preying on gullible declining elders in a purely financial context may be treated in a similar manner. Bogus contractors, securities fraud artists, dishonest trustees and consumer fraud practitioners should all beware. Plaintiff's counsel may find it advisable to have the victim or a relative of the victim ask a managerial agent of the business to remedy the misconduct. The failure to do so may bring the employer within Civil Code § 3294(b).

V. Post-Mortem Recoveries

Frail abused elders and dependent adults often die before the damages are awarded, and the possibility of recovering anything for their pain and suffering dies with them under existing law.[29] Attorneys have often declined to handle contingency cases involving obvious and severe abuse merely because the victim had been rendered so frail by the abuse that death might come before the damage award, ending the chance for a truly significant recovery. Damages for pain and suffering could n*ot* be awarded under pre-EADACPA law after the victim's death.[30]

In many cases, the amount misappropriated by an abuser from an impoverished victim is small in comparison to the amount of attorneys fees required to recover it. The disparity is due in part to the fact that the cost of carrying on litigation is so substantial for attorneys and their clients alike. Abusers have taken advantage of this disparity between the amount taken and the cost of recovering it by misappropriating *relatively* "small" amounts with little fear of any meaningful exposure to a lawsuit. Unfortunately, the impact of the theft or embezzlement of the victim's small life savings or home and on his or her life and emotional well being is substantial. Therefore, the possibility that the plaintiff might die before the entry of judgment and thereby make the damages for the suffering disappear, has given defendants every incentive to delay the trial.[31]

No longer. Damages for pain and suffering *will* be recoverable *even after the victim's death*, up to a limit of $250,000, if the plaintiff satisfies the tests for the recovery of attorneys fees under EADACPA.[32] Contingency cases proving, by clear and convincing evidence, a reckless or intentional infliction of financial or physical harm on the elderly or the frail are now viable. Armed with these incentives, many elders and dependent adults will be able to enforce their own rights, knowing that they will have meaningful access to counsel and to the courthouse door. The possibility for a meaningful post-death recovery means that it is no longer categori-

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cally true that the defendant will have less exposure if the abuse was so severe that the victim died from it.

> "After all, your mother was suffering from Alzheimer's disease and, although we regret those bedsores and how she died, you must admit that you're both better off now. She's out of her misery [*i.e.*, WE DO NOT HAVE TO PAY YOU DAMAGES FOR HER PAIN AND SUFFERING] and you are spared having to visit that virtually comatose woman who really didn't know you anymore [*i.e.* WE DO NOT HAVE TO PAY YOU FOR "WRONGFUL DEATH" BECAUSE YOU DID NOT LOSE MUCH "SOCIETY AND COMFORT"]. It's better to get on with your life, and forget it all now [AND WE'LL CONTINUE TO CARRY ON OUR BUSINESS AS WE HAVE]."

Similarly, people who have perpetrated fiduciary abuses, swindles or other financial harms on the frail and the elderly have had little to fear beyond an order to repay part or all of the booty. The suffering that they caused had little impact on the settlement value of a case.

But now conservators will be able to engage litigation counsel to vindicate the rights of flagrantly abused victims who have lost the ability to hire counsel themselves.

If the victim of abuse dies before the lawsuit ends, the suit may be maintained by the executor or administrator, if there is one, and, if not, by those entitled to the decedent's estate.

VI. Probate Court: A Friendly Forum

EADACPA encourages the filing of complaints in Probate Court *even while the victim is alive*. This legislative approach was based on the reasoning that the court which appoints conservators sees itself as the protector of the disabled, and is likely to be a friendly forum for abuse victims, and may have greater expertise in handling controversies about whether someone is taking advantage of an incompetent. EADACPA's legislative history recognizes that the Probate Court may also have a greater sensitivity to the problems of the aged and incapacitated.[33] Controversies to recover property misappropriated from conservatees are typically heard more expeditiously in Probate Court than on the general civil calendar.

Unfortunately, in connection with conservatorships and guardianships, the Probate Court is still a court whose powers "extend only to those matters *expressly conferred by statute* and certain 'incidental powers' necessary to enable probate courts to carry out their express statutory authority."[34] Thus, for example, the Probate Court has had no authority to join indispensable third parties in conservatorships.

Although the notion of the Probate department as a court of limited jurisdiction is not yet dead and buried, EADACPA puts another nail in the coffin.[35] Under EADACPA, the Probate Court is a court of general jurisdiction over civil actions and proceedings "involving a claim for relief arising out of the abuse of an elderly or dependent adult, *if* a conservator has been appointed for plaintiff prior to the initiation of the action for abuse."[36] Thus, if a defendant has committed an abuse against a married conservatee, the conservatee's spouse may bring a suit in Probate Court for the damages suffered by the spouse as a result of the abuse.

The statute limits this broadened jurisdiction to situations in which a conservator was appointed before the "action for abuse" was "initiated." Query when "an action for abuse" has been "initiated?" Must the *general* conservator be appointed prior to the "initiation" of the "action for abuse," or will the appointment of a *temporary* conservator suffice? Three issues must be addressed by counsel seeking Probate Court jurisdiction.

First, does the temporary conservator have the *authority* to commence an action? Unless there is an emergency or the Probate Court specifically grants the temporary conservator the authority to file the action, the answer is clearly no.

Second, competent defense counsel will contend that the Legislature intended to not invest the Probate Court inappropriately with the burden of resolving civil controversies until the Probate Court has come to a firm decision that an ongoing general conservatorship is warranted. The author believes that such an argument is not reasonable and that the Probate Court judge who sees the need for a temporary conservatorship *can* specifically authorize the temporary conservator to file an action. There is no discernable reason to conclude that the Legislature intended to deprive the Probate Court of elder abuse general jurisdiction in cases where the need for protection is so severe that a temporary conservator was appointed on little or no notice, and a general conservator was thereafter appointed.

Third, is an "action for abuse" *initiated* by a request for injunctive relief? Typically a person petitioning for a temporary conservatorship will simultaneously seek a temporary restraining order ("TRO") to prevent the alienation of property obtained from the prospective conservatee. Would that request deprive the Probate Court of general jurisdiction, *i.e.*, deprive the court of the power to assess damage awards and attorneys fees against the defendant, or the power to issue remedial injunctive relief against third parties?

If injunctive relief is the gist of or central to the action, then the answer is clearly *yes* that the action was *initiated* by the request for a temporary restraining order filed *simultaneously* with the request for the appointment of a temporary conservator. The Probate Court would thereafter lack *general* jurisdiction over the controversy because the "action for abuse"[37] was initiated by the request for the TRO, which request was *filed* before the temporary conservator was *appointed*.

In emergency cases, experienced counsel may therefore simultaneously prepare (i) a petition for appointment of a temporary conservator, (ii) a request for permission for the temporary conservator to file the request for the TRO, and (iii) a request for the TRO. Assume hypothetically that a victim's situation warrants an *ex parte* appointment of a temporary conservator. Plaintiff's counsel will get the temporary conservator appointed in the morning, and obtain the authority for the temporary conservator to file a request for the TRO. Immediately *after* the temporary conservator is appointed that morning, the attorney will file the request for the TRO application with the Probate Court and potentially have the TRO granted in the afternoon. Under the Los Angeles Superior Court Probate Policy Memorandum, Paragraph 6:2.03, only 4 hours notice of the TRO hearing must be given.

As a court of general jurisdiction, the Probate Court may hear and decide a complaint for relief from any wrong which is both (i) actionable and (ii) listed in Welf. & Inst. Code § 15610. Fiduciary misconduct[38] and even *physical* abuses, such as neglect in a nursing home or elsewhere, are now the province of the Probate Court.

Like Samson unleashed, the Probate Court is no longer partially

handcuffed when confronted by financial or physical abuse of its conservatees. Damages,[39] attorneys' fees, jurisdiction to join indispensable third parties, and injunctive relief are tools which the Probate Court, in its sound discretion, may now employ to protect its conservatees if the action arises out of the abuse of an elder or dependent adult.[40]

The breadth of the Probate Court's new jurisdiction defies imagination and will come as a surprise to many. For example, the following abusive practices may now be litigated in a *Probate Court conservatorship* proceeding as *unfair trade practices*[41] for which damages, injunctive relief and attorneys fees enhanced by the new factors[42] are sought:

1. swindles by con artists masquerading as reverse home equity mortgage brokers,
2. phony contractors who prey on the elderly,
3. individuals who take senescent elders' assets, cut the victims off from the rest of the world, and then neglect their health,
4. understaffing, and institutionalized neglectful care in those "bad apple" nursing homes which put the rest of the industry in a bad light,
5. trustee embezzlement or other misconduct,[43]
6. misuse of a durable power of attorney for property or for health care.[44]

VI. Conclusion and the Future

The Legislature's hope is that by providing elders and dependent adults with the means to vindicate their rights in a tort context in the Probate and general civil courts, EADACPA will eventually make litigation unnecessary. It is the hope of the author of this article that EADACPA will be copied in other states, and will serve as a quality control device over the furnishing of services and goods to elders and dependent adults. If abusers know they must pay for the harm they inflict, they may be deterred from wrongdoing. Only time will tell.

EADACPA does nothing to address the problem of intra-family abuse of elders or dependant adults, which abuse is due primarily to caregiver overload in the opinion of the author. The author hopes that the same coalition of lawyers and social service activists, whose efforts are responsible for the enactment of EADACPA, will be successful in their efforts to generate legislation which will create a day care respite center industry. Medicare, Medicaid, tax and other incentives are being considered. The greater availability of good quality day-care respite-center services should reduce the pressure on caregiver family members and thereby reduce the frequency of intra-family abuse. Such supportive services would make it unnecessary for family caregivers to miss work as often, and obviate at least one of the causes of premature institutionalizations.

If a day-care respite-center industry ultimately arises, EADACPA will hopefully be a part of a network of federal laws ensuring that the quality of the care provided will never drop to the levels that have soiled the image of the nursing home industry.

Endnotes

1. Senate Bill 679 renames Chapter 11 (commencing with § 15600) of Part 3 of Division 9 of the Welfare and Institutions Code as the "Elder Abuse and Dependent Adult Civil Protection Act." Article 8.5 (§§ 15657 through 15657.3) is added to Chapter 11 and entitled "Civil Actions for Abuse of Elderly or Dependent Adults."
2. EADACPA was a Beverly Hills Bar Association resolution conceived and drafted by the author of this article. The resolution was adopted at the 1989 State Bar Conference of Delegates after having been proposed twice, and was enacted in its third trip through the Legislature. It was formally sponsored by the Beverly Hills Bar Association with principal lobbying support provided by California Advocates for Nursing Home Reform, the L.A. Caregiver Resource Center, the Alzheimer's Disease Association, Catholic Charities and, of course, the Beverly Hills Bar Association. Significant support was also provided by Lieutenant Governor Leo McCarthy, the Executive Committee of the State Bar's Estate Planning, Trust and Probate Section, the District Attorneys Association, the Crippled Children's Society, the Multiple Sclerosis Society, Senior Alliance, the California Society for Clinical Social Work, the Organization for the Needs of the Elderly, the L.A. District Attorney's Office, AARP, the Mental Health Association in California, and the Long Beach Frail Elderly Task Force, etc.

   The author wishes to thank Senator Mello's Administrative Assistants, Paul Minacucci and Brenda Klutz, and the following persons for their behind the scenes lobbying and organizational support without which this legislation would not have been enacted: Wayne Friedlander of the L.A. Caregiver Resource Center, Patricia McGinnis of California Advocates for Nursing Home Reform, and F. Burns Vick, Esq., Public Policy Consultant.
3. Welf. & Inst. Code § 15610(a) provides that anyone over the age of 65 who resides in California is an "elder."
4. "Dependent adult" means "any person between the ages of 18 and 64 who has physical or mental limitations which 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. Welf. & Inst. Code § 15610(b)(1). The term "dependent adult" also includes "any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour healthcare facility, as defined in §§ 1250, 1250.2 and 1250.3 of the Health and Safety Code. Welf. & Inst. Code § 15610(b)(2).
5. Welf. & Inst. Code § 15600(h).
6. Welf. & Inst. Code § 15600(j).
7. Welf. & Inst. Code § 15657. *See* the text following footnote 11.
8. As proposed by its proponents, EADACPA was *explicitly* limited to wrongs which are both currently actionable and committed with malice. Sen. Bill 679, as amended on April 30, 1991. As a result of a compromise with critics of the Bill, who claimed that EADACPA created new causes of action, Welf. & Inst. Code § 15610(f), which defines "fiduciary abuse," became a statutorily defined tort in the chaptered version of the Bill. The newly codified tort seems to add nothing new to existing case law, but only time will tell.
9. Physical abuse is defined in Welf. & Inst. Code § 15610(c) and "means all of the following:

   (1) Assault, as defined in § 240 of the Penal Code.

   (2) Battery, as defined in § 240 of the Penal Code.

   (3) Assault with a deadly weapon or force likely to produce great bodily injury, as defined by § 245 of the Penal Code.

   (4) Unreasonable physical constraint, or prolonged or continual deprivation of food or water.

   (5) Sexual assault, which means any of the following:

   (A) Sexual battery, as defined in § 243.4 of the Penal Code.

   (B) Rape, as defined in § 261 of the Penal Code.

   (C) Rape in concert, as described in § 264.1 of the Penal Code.

   (D) Incest, as defined in § 285 of the Penal Code.

   (E) Sodomy, as defined in § 286 of the Penal Code.

   (F) Oral copulation, as defined in § 288a of the Penal Code.

   (G) Penetration of a genital or anal opening by a foreign object, as defined in § 289 of the Penal Code.

   (6) Use of a physical or chemical restraint or psychotropic medication under any of the following conditions:

   (A) For punishment.

   (B) For a period of significantly beyond that for which the restraint or medication was authorized pursuant to the instructions of a physician licensed in the State of California, who is providing medical care to the elder or dependent adult at the time the instructions are given.

   (C) For any purpose not consistent with that authorized by the physician."
10. The meaning of the term "appropriate" figures prominently in the definition of "fiduciary abuse." Webster's New Collegiate Dictionary says that "appropriate" means "*to set aside or assign to a particular purpose* or use; or to take or make use of, without authority or right." (Emphasis added.)
11. The quoted language is drawn from the definition of fiduciary abuse set forth in the text accompanying footnote 10 supra.
12. Los Angeles Times, *Misdeeds of Trust*, Real Estate Section, page K9, Sunday, October 20, 1991.
13. Section 15657.1 sets out the factors for the determination of attorneys fees

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allowable under § 15660. It is obvious from the context that the chaptered version of the bill has a typographical error, and that the reference in § 15657.1 should have been to § 15657 rather than § 15660.

14. Welf. & Inst. Code § 15657.1(a), (b) and (c).
15. Due to typographical errors in the chaptered version of the legislation, Chapter 8.5 is erroneously identified as Chapter 6, and § 15657 is erroneously identified as § 15660. These erroneous cross-references will likely be corrected in clean-up legislation in this coming session.
16. Welf. & Inst. Code § 15600(j).
17. Welf. & Inst. Code § 15657.
18. Report for July 16, 1991 hearing by the analyst for the Assembly Subcommittee on the Administration of Justice, Lloyd Connelly, Chairperson, a subcommittee of the Assembly Judiciary Committee.
19. Welf. & Inst. Code § 15600(j).
20. Report for July 16, 1991 hearing by the analyst for the Assembly Subcommittee on the Administration of Justice, Lloyd Connelly, Chairperson, a subcommittee of the Assembly Judiciary Committee.
21. Report for July 16, 1991 hearing by the analyst for the Assembly Subcommittee on the Administration of Justice, Lloyd Connelly, Chairperson, a subcommittee of the Assembly Judiciary Committee.
22. See the text accompanying footnote 14.
23. OBRA is codified within the federal Medicare and Medicaid statutes, i.e., 42 U.S.C. 1395, *et seq.*, and 42 U.S.C. 1396, *et seq.*, respectively. The patients' rights provisions appear at 42 U.S.C. 1395i-3(c), and 42 U.S.C. 1396r(c), respectively. OBRA specifically provides that the remedies it provides are "in addition to those otherwise available under State or Federal law and shall not be construed as limiting such other remedies, including any remedy available to an individual at common law." 42 U.S.C. § 1395i-3(h)(5); 42 U.S.C. § 1396r(h)(8).

    There is a private right of action under the California Health & Safety Code §§ 1430 and 1423 against licensed nursing homes for violation "of any statutory provision or rule or regulation relating to the operation or maintenance" of long term health care facilities.
24. *See Serrano v. Priest*, 20 Cal. 3d 25, 41-42, 141 Cal. Rptr. 315, 569 P.2d 1303 (1977); *Rich v. City of Benicia*, 98 Cal.App. 3d 428, 433, 159 Cal. Rptr. 473 (1979).
25. See the text accompanying footnote 14.
26. See the text following footnote 11.
27. See the text accompanying footnote 14.
28. California Health & Safety Code § 1419 provides that any person may give oral or written notice to the Department of an alleged violation of the requirements of state law. Section 1420 requires the Department to make an onsite inspection within 10 working days of the receipt of the complaint, with specified exceptions.
29. Probate Code § 573.
30. Probate Code § 573.
31. See Probate Code § 573, and Welf. & Inst. Code § 15657(b) which overrides § 573.
32. See the text accompanying footnote 9. *Both* abuse *and* recklessness or intentional misconduct must be proven by clear and convincing evidence.
33. The Senate Judiciary Committee Report noted: "Proponents have suggested that since probate courts are more familiar with elder and dependent adult issues, they would be more understanding in these types of cases." The Committee report was indecisive about the accuracy of the proponents' suggestion that Probate Court judges tend to be more knowledgeable and expert in these matters. Sen. Jud. Com. Rprt., hearing on April 30, 1991.
34. Ross & Moore, CAL. PRAC. GUIDE: PROBATE (TRG 1990); Paragraph 3:52.1.
35. In the context of decedents' estates (Probate Code § 7050) and trust estates (Probate Code § 17200), the Probate Court has become a court of general jurisdiction. Conservatorships and guardianships are the sole remaining areas suffering from a lack of general jurisdiction, and sadly those are the sole areas in which the estate belongs to a yet living person who may really need the economy and promptness that general jurisdiction in the Probate Court could provide.
36. Welf. & Inst. Code § 15657.3(a).
37. Welf. & Inst. Code § 15657.3(a).
38. See the text accompanying footnote 10 for the definition of "fiduciary abuse."
39. The availability of damages in the Probate Court, it must be admitted, is not entirely a new concept. Effective July 1, 1991, new Probate Code § 2619.5 brings into the conservatorship law a double damages provision that has long applied to decedents estate. Section 2619.5 provides: "a person who in bad faith has wrongfully taken, concealed, or disposed of property in the estate of the ward or conservatee is liable for twice the value of the property, recoverable in an action by the guardian or conservator for the benefit of the estate." Unfortunately, the allowability of such double damages is solely in the discretion of the court, and such awards have been extremely rare in the context of decedents estates. The *theoretical* availability of such an award may not provide much fee incentive to the conservatorship litigator. The court may reasonably conclude that the conservatee needs those double damages to pay for his or her medical and custodial care, and that compensating the lawyer is a lower priority. Poor people have accordingly had less access to conservatorships and legal representation, which is a problem that EADACPA seeks to correct.
40. Welf. & Inst. Code § 15657.3.
41. Bus. & Prof. Code § 17200.
42. See the text accompanying footnote 14.
43. Probate Code § 17200.
44. Section 9 of Chapter 1055 of Statutes of 1991, amending Civil Code § 2413. This amendment was initially a Beverly Hills Bar Association resolution conceived and drafted by the author of this article. The resolution was adopted at the 1990 State Bar Conference of Delegates. ■

Committee Interest Form

As a member of the Section, we welcome involvement through our substantive committees. If you are interested in serving on one of these committees, please complete this form and return it to:

Linda Schilling
Section Administrator
Estate Planning, Trust & Probate Law Section
555 Franklin Street
San Francisco, CA 94102-4498

Indicate three areas of interest in order of priority:

	1.	2.	3.
Conservatorship & Guardianship	☐	☐	☐
Elder Care	☐	☐	☐
Estate Planning	☐	☐	☐
Ethics	☐	☐	☐
Health Care	☐	☐	☐
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Legislation	☐	☐	☐
Litigation	☐	☐	☐
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