

BY ALAN D. WEINFELD

# Can Remedying Elder Abuse Be Abusive?

Statutorily mandated nonreciprocal attorney fees and enhanced damages in bad faith cases to a prevailing elder litigant can test the limits of justice in elder abuse cases

**A** 40-YEAR-OLD BUSINESSMAN has an argument with his 65-year-old divorced father over his father's decision to marry a woman who is 20 years younger and very wealthy. At the end of the argument, the businessman announces that he will amend his revocable trust to remove his father as a 25 percent remainder beneficiary, out of spite and because he figures that the wealthy new wife will provide for his father. The businessman signs this trust amendment and dies in a car accident two days later, leaving a \$4 million estate that is now slated to go 100 percent to charity. Does the father have a claim against his son's estate for financial elder abuse? Under the Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act) and current case law, such a claim might be possible.

The California Legislature enacted the Elder Abuse Act to protect persons 65 and older "by providing enhanced remedies to encourage private, civil enforcement of laws against elder abuse and neglect."<sup>1</sup> One of the purposes of the financial abuse provisions is to subject financial agreements with elders to special

scrutiny.<sup>2</sup> The enhanced remedies for financial abuse include 1) attorney's fees, which are mandatory if the elder prevails and are not reciprocal to a prevailing defendant, and 2) double damages in cases of bad faith.<sup>3</sup> The Elder Abuse Act provisions are liberally construed in favor of elders.<sup>4</sup>

Financial elder abuse occurs when a person or entity "[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder...for a wrongful use or with intent to defraud, or...by undue influence."<sup>5</sup> One who assists in the taking of an elder's property also can be liable for financial abuse.<sup>6</sup>

A person takes an elder's property "for a wrongful use" if the person "knew or should have known that [his or her] conduct was likely to be harmful to the elder."<sup>7</sup> A person "[t]akes, secretes, appropriates, obtains, or retains" an elder's property when the elder is "deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of [the] elder."<sup>8</sup> The outer limits of what constitutes a "taking" and an elder's "property right" have been tested in recent

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years, as elders and their attorneys have sought to tap into the enhanced remedies that accompany a financial abuse claim.

### Promises and Prospective Transfers

It is settled that one who misappropriates funds to which an elder is entitled under a contract can be liable for financial elder abuse.<sup>9</sup> However, courts have expansively interpreted the law to support a claim based on an elder's mere entry into a contract that neither side performed.<sup>10</sup>

In *Bounds v. Superior Court*, the defendants manipulated an elder into signing escrow instructions that authorized the sale of real property owned by the elder's trust.<sup>11</sup> Although the elder successfully terminated the escrow and retained the property, she alleged that the mere existence of the escrow instructions significantly impaired the value of the property and her ability to use it as security for a loan.<sup>12</sup> The court found that these allegations sufficiently pleaded a "taking" of her property because the restrictions on alienability "deprived" her and the trust "of one of the incidents of property ownership."<sup>13</sup> The court further held that a "depriv[ation] of [a] property right...by means of an agreement" can occur even if the agreement is not performed.<sup>14</sup>

In reaching this holding, however, the *Bounds* court exceeded the Elder Abuse Act's applicability to unperformed agreements and stated that prospective donative transfers and testamentary bequests could constitute a "taking" for purposes of a financial elder abuse claim.<sup>15</sup> The court explained:

A donative transfer is a gratuitous transaction. It can be inter vivos or testamentary. In regard to an inter vivos gift of personal property, the gift is not complete (or consummated) until the donor has transferred the gift to the donee. [] An inter vivos gift of real property is not complete until the requirements of making a valid conveyance by deed are met. [] A testamentary bequest (which is also a gratuitous transaction absent a contract to make a will) is merely an inchoate expectation on the part of the beneficiary because "[i]n California, a will is generally revocable by the testator at any time and for any reason prior to his or her death."

Thus, in the context of this statute, the phrases "donative transfer" and "testamentary bequest" refer both to transactions that have been performed (the gift has been delivered

and the testamentary bequest has taken effect) and to transactions that have not yet been performed (a promise to make a gift and a testamentary bequest has been made but the testator has not died).<sup>16</sup>

How far does the "taking" provision reach? Does it reach a prospective bequest in a living person's estate planning documents, like the one in the hypothetical above?

*Tepper v. Wilkins* touched on this issue.<sup>17</sup> There a daughter sought to assert an elder abuse claim on behalf of her living elderly mother against her other siblings, who were trustees of the mother's trusts.<sup>18</sup> The court found that the daughter lacked standing to sue on behalf of her living mother because the daughter was not a conservator, trustee, or attorney-in-fact for her mother.<sup>19</sup> The court also suggested that even if the plaintiff daughter were named as a beneficiary in her mother's revocable trust, the daughter still would lack standing to sue for elder abuse: "[Plaintiff] does not claim to have any legally cognizable interest in her mother's revocable living trust; and, even if she were named as a beneficiary, she would not have one."<sup>20</sup> Given that this hypothetical finding is dicta, however, it is not necessarily binding precedent in other cases.

### Harm to Elder's Trust or Corporation

For estate planning and asset protection purposes, people often own real estate or other assets through a corporate entity or trust. In this situation, a wrongdoer's conduct may only damage an asset legally owned by an elder's trust or corporation, and not the elder directly. A few recent cases have addressed this situation, but they are not entirely consistent.

*Bounds* permitted a financial elder abuse claim based on the transfer of an interest in real property owned by the elder's revocable living trust, of which the elder was trustee.<sup>21</sup>

*Pynoos v. Massman*<sup>22</sup> is an unpublished case that followed *Bounds*, which holds that a general partner's failure to make distributions to a limited partnership interest owned by an irrevocable trust of which an elder was trustee and primary beneficiary could constitute financial elder abuse.<sup>23</sup> The *Pynoos* court found that the distributions wrongfully retained by the general partner were the elder's "personal property," even though the limited partnership interest that had the right to them was held in the name of the irrevocable trust.<sup>24</sup> The court explained that elders who are duped into transferring

property from their trust to the wrongdoer (like in *Bounds*) can sue for financial elder abuse and noted that "[i]f this were not the rule, elders who elect to use living trusts as an estate planning tool would forfeit their ability—and the ability of their heirs—to pursue elder abuse claims should the elders be manipulated into transferring property out of the trust and into an abuser's pocket."<sup>25</sup>

The court did note, however, that at some point, an elder's property interest is too speculative to qualify for financial elder abuse:

To be sure, a plaintiff must have a sufficiently definite interest in the property allegedly taken to sue for elder abuse. [] Thus, property rights that spring into existence only upon the happening of an event...or that can be unilaterally divested by another (*Estate of Giraldivin* (2012) 55 Cal.4th 1058, 1065–1066 [expectation of inheritance from fully revocable living trust]) are too speculative to support an elder abuse claim.<sup>26</sup>

Unfortunately, because *Pynoos* is unpublished, its useful guidance generally cannot be cited in other cases.

*Hilliard v. Harbour* refused to allow an elder abuse claim for conduct that harmed corporate entities owned by the elder.<sup>27</sup> The court suggested that the Elder Abuse Act should not provide greater rights to elders than those afforded to non-elders:

It is one thing to say that financial agreements entered into by elders should be "subject to special scrutiny" (*Bounds v. Superior Court, supra*, 229 Cal.App.4th at p. 478, 177 Cal.Rptr.3d 320), but quite another to suggest, as Hilliard does, that a lender has duties to a borrower who resides in this state and is "65 years of age or older" (§ 15610.27) different from those it owes other borrowers. In essence, Hilliard appears to maintain that Wells Fargo's...[conduct], may not *ordinarily* constitute a "taking" or "appropriation" of property "for a wrongful use" and/or "with intent to defraud" within the meaning of the Act, but it does in this case simply because Hilliard is a resident of this state and over 65 years of age.<sup>28</sup>

*Mahan v. Charles W. Chan Insurance Agency, Inc.*, which was decided after *Hilliard*, stretched the financial abuse statutes to cover harm to a trust set up by elders for the benefit of non-elders.<sup>29</sup> There, the elders' estate plan included the

contribution of two life insurance policies to a revocable living trust for the benefit of their children, along with funds to pay the policy premiums.<sup>30</sup> More than two decades later, when the elders were in cognitive decline, the defendant insurance agents manipulated the elders into restructuring the life insurance policies.<sup>31</sup> The restructuring resulted in 1) the draining of cash from the trust, because it had to pay much higher policy premiums and commissions to the defendants, 2) the loss of tax benefits that would have been available under the original structure, and 3) the elders' having to contribute significant amounts of personal funds to the trust to pay the higher policy premiums.<sup>32</sup> The defendants argued that they did not deprive the elders of any "property" because the trust owned the life insurance policies and paid the commissions.<sup>33</sup> The court disagreed, finding that the elders themselves were deprived of "property" in the following ways: 1) damage to their "estate plan"—the defendants' conduct made the elders' unique chosen gift assets in their estate plan (the life insurance policies) more expensive and of lesser value, and 2) the elders "had to reach into their pockets and sell assets to provide more cash to the [ ] Trust than they ever planned to do" to cover the higher premiums and the defendants' commissions.<sup>34</sup>

It is debatable whether the *Mahan* elders could have pursued their claim in their individual capacities had they been under 65, given that the life insurance policies were owned by a trust.<sup>35</sup> The *Mahan* court did not discuss *Hilliard*, which was decided several months earlier.

The *Mahan* court also went to great lengths to justify its results due to the "unique" nature of the life insurance policies at issue.<sup>36</sup> However, elders are not precluded from applying *Mahan's* "damage" to "estate plan" theory to other types of estate plan assets.<sup>37</sup>

### Probate Estates

In *Ring v. Harmon*,<sup>38</sup> the court found that when an elder is a personal representative of an estate, the elder cannot bring a financial abuse claim for harm suffered in his or her capacity as personal representative.<sup>39</sup> The *Ring* court also indicated that a personal representative of a probate estate cannot bring an elder abuse claim on behalf of an elder beneficiary of the estate because the personal representative is not acting as the elder's representative but is instead acting as the estate's representative.<sup>40</sup>

Moreover, the *Ring* court found that when property is held by a probate estate,

and the elder is both the beneficiary and personal representative, the elder may bring a financial abuse claim in his or her beneficiary (individual) capacity based on the defendants' transactions with the probate estate.<sup>41</sup> In the case at hand, the court found that the elder beneficiary had a sufficient interest in the estate's property to be "deprived of a cognizable property right" because the defendants' conduct caused the property to be burdened with additional debt and the beneficiary "may" have to contribute her own funds to service the additional debt.<sup>42</sup>

### Back to The Hypothetical

Returning to the hypothetical, the father could cite *Bounds* to claim that his son committed financial abuse by cutting off the father's prospective right to receive benefits from the son's trust after the son died. The father could assert that the son would or should have known that the trust amendment was likely to be harmful to the father, which could satisfy the "wrongful use" requirement.<sup>43</sup>

The son's estate likely would cite *Tepper* to assert that the father has not been deprived of a "property right," given that the son had the absolute right to revoke or amend his trust during his lifetime.<sup>44</sup> At first glance, this argument is appealing. However, the hypothetical discussed in *Tepper* is not necessarily binding, and *Bounds* might support the father's claim. *Bounds* noted that "a will is generally revocable by the testator at any time and for any reason prior to his or her death" but still proceeded to state that the Elder Abuse Act applies to prospective testamentary bequests and donative transfers that have not yet been performed.<sup>45</sup> The broad application in *Mahan* and *Ring* also might help support the father's financial abuse claim.

Based on current published case law, what appears at first glance to be a meritless claim might be viable, particularly given the liberal construction of the Elder Abuse Act in favor of elders.<sup>46</sup> If the father prevailed, he could recover not only the 25 percent of his son's \$4 million estate initially provided in the trust, but he also could recover 1) attorney's fees and 2) if bad faith were established, double damages, which could bring his recovery to more than 75 percent of the son's estate.<sup>47</sup>

### The Outer Limits

*Hilliard* suggested that the Elder Abuse Act should not provide greater rights to elders than non-elders.<sup>48</sup> Although this suggestion sounds reasonable, other pub-

lished case law, such as *Mahan*, *Bounds*, and *Ring*, obfuscate the suggestion.

If the Elder Abuse Act does, indeed, provide greater rights to elders than non-elders, then cases discussing the nature and limits of "takings" and "property rights" are of no use in financial elder abuse cases and could lead to greater unpredictability. For example, a living debtor who changes his or her will to remove a creditor as a beneficiary cannot be liable for fraudulent transfer because of the debtor's absolute right to amend the will.<sup>49</sup> This begs the question of whether the expansive interpretations in *Bounds*, *Mahan* and *Ring* provide a financial abuse claim if the removed beneficiary happens to be over 65. That issue has yet to be decided.

While the current limits of financial elder abuse law are not fully settled, current case law does provide the following guiding principles:

- 1) If a wrongdoer damages property owned by an elder's revocable trust of which the elder is a beneficiary, the wrongdoer can be liable for financial elder abuse.<sup>50</sup> However, a financial abuse claim also might lie if the elder's trust is irrevocable and the beneficiaries are non-elders.<sup>51</sup>
- 2) In the context of probate estates, an elder who is the personal representative and beneficiary of the estate can probably bring a financial abuse claim for harm to estate property to which the elder is entitled.<sup>52</sup> However, an elder who is a personal representative, but not a beneficiary, cannot bring a financial abuse claim for harm to the estate.<sup>53</sup>
- 3) If a wrongdoer damages assets owned by an elder's corporation, *Hilliard* would appear to preclude a financial abuse claim.<sup>54</sup> However, an astute attorney for the elder can easily frame the corporate ownership as a component of the elder's "estate plan" and use *Mahan's* "damage" to the "estate plan" theory, which was enumerated after *Hilliard* was decided.<sup>55</sup>
- 4) If a person breaches an agreement to provide for an elder in the person's estate plan, the elder would appear to have a claim for financial abuse.<sup>56</sup>

In close cases, the court could very well side with the elder, given that the Elder Abuse Act is liberally construed in favor of elders.<sup>57</sup>

The enhanced remedies for financial abuse can change the whole nature of a case, and potentially convince attorneys

to represent an elder where only a small amount is at issue.<sup>58</sup> The mere possibility of an adverse attorney's fee award can force a defendant to agree to a quick settlement instead of defending even the most meritless case.<sup>59</sup>

Elders also can sue the people who "assisted" the wrongdoer in the "taking," such as a relative who takes a trust amendment to his attorney's office to sign a trust amendment that removes the elder as a beneficiary, and possibly even the drafting attorney himself.<sup>60</sup> This "assistance" provision allows elders to pursue additional "deep pockets" from which to recover the enhanced remedies.<sup>61</sup>

Unless the legislature or California Supreme Court significantly narrows the scope of financial elder abuse law, attorneys with clients over 65 will continue to pursue financial abuse claims in most civil and probate litigation, and eagerly test the limits of the law with the hope of unlocking the bounty of enhanced remedies. ■

<sup>4</sup> Mahan v. Charles W. Chan Ins. Agency, Inc., 14 Cal. App. 5th 841, 860-61 (2017).

<sup>5</sup> WELF. & INST. CODE §§15610.30(a)(1) & (3).

<sup>6</sup> WELF. & INST. CODE §15610.30(a)(2).

<sup>7</sup> WELF. & INST. CODE §15610.30(b).

<sup>8</sup> WELF. & INST. CODE §15610.30(c).

<sup>9</sup> Paslay v. State Farm Gen. Ins. Co., 248 Cal. App. 4th 639, 656 (2016); see O'Brien as Trustee of Raymond F. O'Brien Revocable Trust v. XPO CNW, Inc., 362 F. Supp. 3d 778, 786 (N.D. Cal. 2018).

<sup>10</sup> See Bounds v. Superior Ct., 229 Cal. App. 4th 468, 482 (2014).

<sup>11</sup> Id. at 472.

<sup>12</sup> Id. at 472, 475-76.

<sup>13</sup> Id. at 480.

<sup>14</sup> Id. at 480-482.

<sup>15</sup> See id. at 481 ("the phrases 'donative transfer' and 'testamentary bequest' refer not only to consummated transfers, but also to prospective transfers.").

<sup>16</sup> Id. at 481-82.

<sup>17</sup> Tepper v. Wilkins, 10 Cal. App. 5th 1198 (2017).

<sup>18</sup> Id. at 1202.

<sup>19</sup> Id. at 1207.

<sup>20</sup> Id. at 1206.

<sup>21</sup> Bounds, 229 Cal. App. 4th at 472, 473, 479.

<sup>22</sup> Pynoos v. Massman, No. B249711, 2014 WL 5282153 (Cal. Ct. App., Oct. 16, 2014).

<sup>23</sup> See id. at \*3-4.

<sup>24</sup> Id. at \*3-4.

<sup>25</sup> Id. at \*3.

<sup>26</sup> Id. at \*4.

<sup>27</sup> Hilliard v. Harbour, 12 Cal. App. 5th 1006, 1015 (2017).

<sup>28</sup> Id. at 1015-1016; see Strawn v. Morris, Polich & Purdy, LLP, 30 Cal. App. 5th 1087, 1103 (2019) (elder could not sue insurer's attorney/agent for financial

elder abuse because it would contravene rule that insurer's agents cannot be liable for bad faith denial of coverage (emphasis in original)).

<sup>29</sup> Mahan v. Charles W. Chan Ins. Agency, Inc., 14 Cal. App. 5th 841 (2017).

<sup>30</sup> Id. at 848.

<sup>31</sup> Id. at 849-854.

<sup>32</sup> Id. at 853.

<sup>33</sup> Id. at 857.

<sup>34</sup> Id. at 862-65.

<sup>35</sup> See O'Flaherty v. Belgum, 115 Cal. App. 4th 1044, 1062 (2004) (trustee of a trust is the real party in interest for purposes of bringing a claim on behalf of the trust).

<sup>36</sup> See Mahan, 14 Cal. App. 5th at 862-63 n.21.

<sup>37</sup> See Melcher v. Fried, No. 16-cv-2440-BAS-BGS, 2018 WL 2411747, at \*5 (S.D. Cal., May 29, 2018) (elder sought leave to amend complaint to claim that partnership in which elder was general partner was created for estate planning purposes); see also In Re: AXA Equitable Life Ins. Co. COI Litig., No. 16-CV-740 (JMF), 2022 WL 976266, at \*27 (S.D. N.Y., Mar. 31, 2022) (applying California law) (citing Mahan and Bounds to find that "property held by the Currie Family Trust, of which Mr. Currie was trustee, was Mr. Currie's property for purposes of the [California] Elder Abuse Law").

<sup>38</sup> Ring v. Harmon, 72 Cal. App. 5th 844 (2021).

<sup>39</sup> Id. at 851.

<sup>40</sup> Id.

<sup>41</sup> Id. at 852.

<sup>42</sup> Id. at 855-56.

<sup>43</sup> See WELF. & INST. CODE §15610.30(b).

<sup>44</sup> See Tepper v. Wilkins, 10 Cal. App. 5th 1198, 1206 (2017); Estate of Giralddin, 55 Cal.4th 1058, 1065-66 (2012).

<sup>45</sup> See Bounds v. Superior Ct., 229 Cal. App. 4th 468, 482 (2014).

<sup>46</sup> See Mahan v. Charles W. Chan Ins. Agency, Inc., 14 Cal. App. 5th 841, 860-61 (2017).

<sup>47</sup> See WELF. & INST. CODE §15657.5(a); PROB. CODE §859; Estate of Ashlock, 45 Cal. App. 5th 1066, 1074 (2020).

<sup>48</sup> See Hilliard v. Harbour, 12 Cal. App. 5th 1006, 1015-1016 (2017).

<sup>49</sup> See Cabral v. Soares, 157 Cal. App. 4th 1234, 1240 (2007).

<sup>50</sup> See Bounds, 229 Cal. App. 4th at 472, 479; WELF. & INST. CODE §15610.30(c).

<sup>51</sup> See Mahan, 14 Cal. App. 5th at 862-65; Pynoos v. Massman, No. B249711, 2014 WL 5282153, at \*3-4 (Cal. Ct. App., Oct. 16, 2014).

<sup>52</sup> See Ring v. Harmon, 72 Cal. App. 5th 844, 852 (2021).

<sup>53</sup> Id. at 851.

<sup>54</sup> See Hilliard, 12 Cal. App. 5th at 1015-1016; see also Melcher v. Fried, No. 16-cv-2440-BAS-BGS, 2018 WL 2411747, at \*5 (S.D. Cal., May 29, 2018).

<sup>55</sup> See Melcher, 2018 WL 2411747, at \*5.

<sup>56</sup> See PROB. CODE §21700; Paslay v. State Farm Gen. Ins. Co., 248 Cal. App. 4th 639, 656 (2016)

<sup>57</sup> See Mahan, 14 Cal. App. 5th at 860-61.

<sup>58</sup> See WELF. & INST. CODE §15657.5(a); Bates v. Presbyterian Intercommunity Hosp., Inc., 204 Cal. App. 4th 210, 216 (2012).

<sup>59</sup> See Sen. Comm. on Judiciary, Analysis of S.B. No. 1140 (2007-2008 Reg. Sess.).

<sup>60</sup> See WELF. & INST. CODE §15610.30(a)(2); Raicevic v. Lopez, No. D055002, 2010 WL 3248335, at \*21 (Cal. Ct. App., Aug. 18, 2010) (potential elder abuse claim against attorney).

<sup>61</sup> See, e.g., Makaeff v. Trump University, LLC, 145 F. Supp. 3d 962, 981 (S.D. Cal. 2015) (elder sued Donald Trump personally for financial abuse based on Trump's assistance of Trump University in taking money from the elder).

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