Who's on first? Legislative review currently underway of California's 1993 statutory protections for the elderly from financial abuse.

Common sense requires that the Prohibited Transfers statutory scheme be repealed in its entirety and that California's common law rules governing questioned transfers be codified.

By Daniel D. Murphy

The Law Revision Commission was recently engaged in a substantive review of the 1993 Prohibited Transfers statute, located at Probate Code §§21350, *et seq*. (hereinafter *Prohibited Transfers* statute). These statutes were originally enacted in response to a series of media reports on an Orange County attorney who was alleged to be actively relieving his clients, residents of a large retirement community, of their assets by various fraudulent methods.

Notwithstanding the laudable 1993 legislative effort to address financial abuse of the elderly, these statutes have in large part failed to protect the elderly due to a blanket exemption provided under the statutes to family members (of the victim).

Now it appears that, for reasons that remain unclear, new exceptions are being considered for inclusion into this statutory scheme enacted to protect the elderly. Perhaps another look at the issue is in order.

The problem as presented in 1993

In a series of articles that appeared in the Los Angeles Times in the early 1990's, the conduct of Orange County attorney James Gunderson came to light. Gunderson represented potentially thousands of seniors residing at the Leisure World retirement center, and was alleged to have engaged in a variety of questionable, if not illegal, acts. Attorney Gunderson's conduct consisted of the following[1]:

- Drafting wills which name Gunderson as a major (or exclusive) beneficiary of large estates to the exclusion of family members;
- Drafting trust documents in which Gunderson is named the exclusive trustee of large, discretionary trusts;
- As Trustee, authorizing payment of large sums of money to his law partners for legal services;
- As Trustee, expending money in a manner contrary to the instructions of the settlor and in a manner that benefited businesses or charities in which Gunderson had significant or controlling interest;
- Having himself named as conservator of a client, and subsequently authorizing payment of large sums of money to his law partners for legal services; and,
- Having himself named as conservator of a client, and subsequently drafting wills naming himself as a primary (or exclusive) beneficiary.

In response, the *Prohibited Transfers* statutory scheme was enacted in 1993 to prohibit transfers to certain categories of

The face of elder financial abuse

Elenore Wills was educated at Berkeley and went on to a long teaching career in the Bay Area. According to a lawsuit filed on her behalf, she was a victim of financial abuse and was unable to protect herself from her abuser.

Wills

Recently released statistics on cases reviewed by the Alameda County FAST team in 2006-2007, of the 31 financial abuse cases, 28 were found to be meritorious. Of those meritorious cases, half (14 out of 28) identified the elder's family member(s) as the perpetrators.

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persons engaged in confidential relations with the elder. Without clear explanation, the *Prohibited Transfers* statutes were enacted with an express exception for family members and spouses.

What is "domestic financial abuse" of the elderly and how does it arise?

Termed "domestic financial abuse" to distinguish this conduct from commercial schemes to part the elderly from their assets such as annuity scams, domestic financial abuse claims commonly revolve around one or more questioned transfers of assets obtained from the elder.

These transfers commonly take place in secret during a decline in the elder's health and/or near the end of his or her life. "Therefore, the timing of these questioned transfers raise questions of whether the elder was able to understand the transfer and the effect of the transfer upon an existing estate plan created at an earlier time when the elder's ability to understand these types of decisions was not at issue."

Furthermore, these questioned transfers are usually in the nature of gift transfers, meaning transfers made without consideration for value. These gift transfers similarly raise questions as to whether the gift was the product of the elder's wishes or, as is commonly found, the gift by the elder was, at least in part, to ensure the continued assistance of the recipient.

While each financial abuse case is unique, the facts in these types of cases commonly reveal that the elder made the questioned transfer in order to avoid being stranded and to ensure the loyalty of the abuser, and that the abuser uses the threat of abandonment, either explicitly or implicitly, as a method of getting the elder to sign the questioned document(s).

Recent California Supreme Court review of the *Prohibited Transfers* statute

In its August 2006 decision in *Bernard v Foley*[2] the California Supreme Court reaffirmed a trial court ruling that the defendants who admitted to providing care to the elder at the end of her life, during which time the elder executed amendments to her estate plan making these defendants her beneficiaries, were caregivers within the purview of the 1993 *Prohibited Transfers* statutory scheme, and, therefore, the questioned transfers failed. Justice Werdegar, writing for the majority of the Court, affirmed the trial court's finding that the defendants had failed to satisfactorily rebut the statutory presumption that the transfer had been obtained by the exercise of undue influence and fraud.

"Several members of the Court, however, also expressed concern that the Prohibited Transfers statute could conceivably operate to inhibit old friends and acquaintances of the elder from assisting the elder for fear of losing any transfers the elder may make to the old friend or acquaintance."

How the *Prohibited Transfers* statute fails to protect the elderly.

While advocates for the elderly applaud the *Bernard v Foley*[3] decision, significant problems with the *Prohibited Transfers* statute remain. The central problem with the 1993 statutes is that they exempt the class of persons[4] whom statistics on financial elder abuse cases reveal are most commonly the predator in financial abuse disputes (See discussion below).

In contrast to the protections afforded to victims under California's common law, the *Prohibited Transfers* statute fails to acknowledge the existence of questionable transfers to blood relations or to persons married to the elder. To many that are familiar with the epidemic elder financial abuse and fraud claims clogging our courts, it is common to find family members committing financial abuse upon their own elders. Furthermore, it is not uncommon for predatory strangers committing financial elder abuse to end up married to the victim.

Despite an existing legislative finding that the elderly are a disadvantaged class of persons deserving of special protection[5], today across California in cases where family members are the perpetrators of financial abuse, the *Prohibited Transfers* statute fails to provide any protection for the victim.

To better understand how the *Prohibited Transfers* statutes are flawed, we will need to look carefully at the existing California common law addressing confidential relations.

California's existing common law on confidential relations

Over the last century, California courts have developed a comprehensive approach to disputes over questioned transfers to persons in confidential relations. The result of a long line of these disputes tried before California judges is a clear and unambiguous bright line for the determination of disputes that arise over these questioned transfers.

The common law view is that transfers to persons engaged in confidential relations to the elder are voidable. Where a sufficient prima facie evidentiary showing is made to the Court, a rebuttable presumption will arise shifting the burden of proof to the recipient of the gift to prove that the gift was fair and perfectly understood by the elder. This procedure of shifting the burden of proof to the recipient is intended to ensure that the questioned transfer was not the product of fraud and undue influence.

> Where the evidence shows a relationship of trust and confidence between the asserted donor and donee, and that the person claiming as a donee, and in whom the asserted

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donor had placed his or her trust, obtained an advantage, the claimant has a burden to show the absence of undue influence.

Campbell v Genshlea (1919) 180 Cal.213, 180 P 336.

Where a confidential relation existed and one of the parties had been active in procuring the execution of an instrument by which he benefited greatly, his activity was an important factor for the trial court to consider in determining whether the transaction was free of undue influence, and the burden of showing that no undue advantage was taken shifted to the party gaining the benefit.

Herbert v Lankershim (1937) 9 Cal.2d 409, 71 P.2d 220.

The principle which requires one benefiting from a confidential relation to bear the burden of establishing that the benefit did not result from undue influence extends to every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on the one side and the resulting superiority and influence on the other. The relation and the duties involved need not be legal. They may be moral, social, domestic, or merely personal. Hence, the rule embraces both technical fiduciary relations and those informal relations that exist wherever one person trusts in and relies on another.

Bolander v Thompson (1943) 57 Cal.App.2d 444, 134 P.2d 924.

In order to raise the common law presumption of undue influence and fraud, the moving party must make an evidentiary showing to the court[6]. Unlike the *Prohibited Transfers* statute which raises the presumption automatically upon a transfer to identified persons in confidential relations to the elder, the common law rebuttable presumption will only arise where:

(1) a confidential relation exists between the elder (or transferor) and the recipient (or donee) of the transfer,

(2) the recipient was actively involved in obtaining the transfer, and

(3) the questioned transfer results in undue benefit.

Once such a showing has been made to the satisfaction of the Court, a rebuttable presumption that the transfer was obtained by fraud and undue influence arises. The burden of proof then shifts to the recipient to prove by clear and convincing evidence that the subject transaction was fair and perfectly understood by the elder.

Presumptive invalidation of transactions to persons in confidential relations is necessary and appropriate to protect those who cannot protect themselves.

The common law mechanism of presumptive invalidation of a questioned transfer is important in financial abuse cases because proof of authentic donative intent (or lack thereof) by the elder is also complicated by his or her mortality. Age and disease process figure prominently in these complicating factors. Even if the elderly victim has survived to the time of trial, elders can make poor witnesses due to otherwise age-appropriate problems with memory and communication. Furthermore, the interactions by the elderly victim with the recipients of these questioned transfers are often complicated by matters not directly related to the transfer, such as the elder worrying that he or she will qualify for various public benefits during their golden years.

There is sound public policy reasoning underlying the approach of the California common law to these questioned transfers and the use of a rebuttable presumption shifting the burden of proof to the recipient. This presumptive invalidation of transfers to persons engaged in a confidential relations to the elder (transferor) effectively achieves the public policy objective of providing "…security (to) those who entrust themselves or their property to the administration of others." Evidence Code '605.

Furthermore, the evidentiary showing that is required to raise the common law presumption also serves to identify only those elders (or dependent adults) that are most at risk for fraud and trickery in these types of transfers. At the heart of a fiduciary or confidential relationship lies reliance, and de facto control and dominance. *U S v Kim* (2002) 184 F Supp 2d 1006. Frequently, too, a presumption that affects the burden of proof will have an underlying basis in probability and logical inference. 7 Cal. L. Rev. Comm Reports 1 (1965).

California's existing common law adequately protects the elderly from financial abuse, including abuse by family members.

Over the past century, the California Supreme Court has consistently upheld the public policy objective of providing security to those who entrust themselves or their property to the administration of others. California's common law and its prohibitions governing questioned transactions are equally applicable to family members.

In its 1936 opinion in *Johnson v. Clark*[7], a dispute involving a questioned transfer between sisters during an admitted confidential relationship, the California Supreme Court found that a presumption of undue influence arises from any transaction by which the person in a superior position gains an advantage over the other. The Court held that any transfers or gifts to a person engaged in confidential relations to the transferor are held to be presumptively fraudulent and appropriately shift the burden of proof to the recipient to prove that the transfer was fair and perfectly understood, stating,

It is readily apparent plaintiff must have reposed great confidence in defendant to have been willing to transfer her business to defendant, and thus

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> leave herself without means of support, in reliance on this qualified promise of defendant.
>
> ...
>
> The transaction set forth in the complaint is governed by the rules pertaining to persons occupying confidential relations, and is presumed to be fraudulent without other allegations of fraud in the complaint.

Interestingly, there is no corollary in the common law to the exemption provided to family members under the *Prohibited Transfers* statute. California courts have found that the requisite special relations between family members can be of a confidential or fiduciary nature, where one family member places trust in another to handle their assets or their healthcare.

> [W]here the relationship between the parties is that of parent and child and the parent relies on the child for advice in business matters, a gift inter vivos...which is without consideration and where the parent did not have independent advice is presumed to be fraudulent and made under undue influence.

Estate of Stephens (2002) 28 Cal4th 665, at 677.

> In cases where a gift is made by a parent to a child with whom a confidential relationship exists to the exclusion of another, the courts have also held that the burden is on the donee to show that the transaction was fair and free from undue influence or fraud.

Solon v. Lichtenstein (1952) 39 Cal2d 75.

Thus, California's common law view is that no one in a position of trust to the elder, even someone related to the elder, should be able to profit at the expense of the elder by virtue of their relationship of trust. Where invoked, the common law also provides the recipient with the opportunity to prove the transaction was fair and perfectly understood by the elder at a time when the elder was relying upon the recipient's good faith.

It appears that California's common law provides a reasoned response to the significant problem of financial abuse of the elderly, effectively identifying specific factual situations where elders are vulnerable to questionable transfers to the same people that the elder is relying on. In those specific factual situations, California's public policy objectives come into play and operate to shift the burden of proof to the recipient. Where the recipient thereafter fails to present sufficient evidence to prove that the transaction was fair and that the elder perfectly understood the transaction, the transfer or gift must fail in order to protect those who cannot protect themselves.

Financial elder abuse case statistics reveal that family member predators predominate the field of financial elder abuse.

Statistics on the types of abuse and the perpetrators reveal an alarming picture. Recently released statistics from Alameda County appear to show that family members (of the victim) make up the largest percentage of financial abuse perpetrators.

In the Fall of 2007, the Alameda County Counsel's office issued a report on the cases that were reviewed during the years 2006 and 2007 by the Alameda County FAST (Financial Abuse Specialist Team). Participants of the team included Adult Protective Services, the Alameda County Public Guardian's office, the Alameda County District Attorney's Office, Alameda County Counsel's office, the Alameda County Sheriff's Office, and local police departments.

Of the 31 financial abuse cases reviewed, 3 cases were ultimately determined to be unfounded. Of the 28 valid claims, one-half of the cases (14 of 28) identified family members of the elder as the perpetrators. Five of those 28 cases identified caregivers to the elder as perpetrators, three cases identified lenders as perpetrators, two cases identified individuals employed by the elder as perpetrators, one case identified the elder's apartment manager as the perpetrator, one case identified a neighbor of the elder as the perpetrator, and 2 cases involved scams perpetrated by strangers.

The significant role family members are currently playing in financial abuse of the elderly in Alameda County is corroborated by a 1998 Report prepared for the Administration of Children and Families and the Administration on Aging at the U.S. Department of Health and Human Services[8]. Based upon an estimated 59,218 substantiated incidents of elder abuse, the Report found that perpetrators of financial abuse were most likely to be the elder's adult children (60.4% of all financial abuse incidents), with other relatives of the victim (other relatives, grandchild, friends/neighbors) were the next most likely (9.7%, 9.2% and 8.7%, respectively) to be perpetrators of financial abuse.

Even if we are to discount the statistics showing that family members predominate the field of financial elder abuse, the unavoidable fact remains that the *Prohibited Transfers* statute is not protecting those identified Alameda County victims and families.

Public policy concerns and common sense would seem to require that the prohibition against financial abuse of the elderly should apply to all people, whether or not they are related to the victim. This duality of purpose between California's well-developed common law and the 1993 statutory protections under the *Prohibited Transfers* statute is not helping the elderly victims of financial abuse.

California already has a substantial statutory scheme addressing elder abuse

The current discussion of how to amend the *Prohibited Transfers* statutes appears to overlook the fact that California has already enacted a comprehensive statutory scheme to address the problem of elder abuse. Enacted in the mid-1980's

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and evolving since that time by legislative process, the *Elder and Dependent Adult Civil Protection Act* is a private attorney general statutory scheme which mandates reporting by many of those who care for, or come into contact with, the elderly and infirm. Most recently, banks and financial institutions became mandated reporters of known or suspected elder abuse. These statutes also provide the statutory basis for the new tort of financial abuse of the elderly, and are used by attorneys for the victims in civil courts.

The very first words of the *Elder and Dependent Adult Civil Protection Act* make crystal clear the legislature's findings of fact and intention to stop elder abuse. The *Act* specifically identifies family members as potential abusers, and these statutes do not exempt anyone from these statutory prohibitions against abuse of the elderly.

Enacted nearly a decade before the *Prohibited Transfers* statute was even considered, Welfare & Institutions Code §15600 states in pertinent part,

> (a) The Legislature recognizes that elders and dependent adults may be subjected to abuse, neglect, or abandonment and that this state has a responsibility to protect these persons.
>
> (b) The Legislature further recognizes that a significant number of these persons are elderly. The Legislature desires to direct special attention to the needs and problems of elderly persons, recognizing that these persons constitute a significant and identifiable segment of the population and that they are more subject to risks of abuse, neglect, and abandonment.
>
> (c) The Legislature further recognizes that a significant number of these persons have developmental disabilities and that mental and verbal limitations often leave them vulnerable to abuse and incapable of asking for help and protection.
>
> (d) The Legislature recognizes that *most elders and dependent adults who are at the greatest risk of abuse, neglect, or abandonment by their families or caretakers suffer physical impairments and other poor health that place them in a dependent and vulnerable position*. (Emphasis provided.)
>
> (e) The Legislature further recognizes that *factors which contribute to abuse, neglect, or abandonment of elders and dependent adults are economic instability of the family, resentment of caretaker responsibilities, stress on the caretaker, and abuse by the caretaker of drugs or alcohol*. (Emphasis provided.)
>
> ...
>
> *(h) The Legislature further finds and declares that infirm elderly persons and dependent adults are a disadvantaged class, that cases of abuse of these persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits.* (Emphasis provided.)
>
> …
>
> (j) 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 persons and dependent adults.

The legislative intent underlying the enactment of the *Elder Abuse Act* are clearly written and exist to assure all of us, especially elderly Californians, of the integrity of a system of laws which acknowledge the need for protection of those unable to protect themselves.

Conclusion

The current *Prohibited Transfers* statute simply fails to protect the elderly by exempting family members. With family members commonly the predators in elder financial abuse disputes, the exemption for family members uniformly obtains a result that is directly contrary to existing statutory protections for the elderly, to the reasoned approach of the common law to the problem, and to existing public policy objectives concerning the elderly which exist to protect those that are unable to protect themselves.

Common sense requires that the *Prohibited Transfers* statutory scheme be repealed in its entirety, and that California's common law rules governing questioned transfers be codified. The 1993 statutory scheme is both unnecessary in view of existing law, is confusing when read in conjunction with existing statutory and common law protections, and it simply fails to protect significant numbers of elderly victims from financial abuse.

Daniel D. Murphy is a San Francisco estate and trust litigation attorney, whose practice primarily focuses on financial elder abuse litigation. Mr. Murphy is one of the authors of the current definition of "financial abuse" under the Elder and Dependent Adult Civil Protection Act [Welfare & Institutions Code §15610.30]. He writes on the subject of financial abuse litigation for CEB [Elder Law Litigation *(3rd Ed.)*], *and is a member of the Estate Planning, Trust and Probate Section of the State Bar of California.*

Endnotes

[1] As set forth in the February 4, 1993 *Assembly Committee on the Judiciary* report on Assembly Bill 21.

[2] *Bernard v Foley* (2006) 39 Cal4th 794, 47 CR3d 248.

[3] *Bernard v Foley*, supra.

[4] Probate Code ‘’21350, *et seq.*

[5] Welfare & Institutions Code ‘15600 (h)-(j).

[6] The common law recognizes that different types of confidential relations between the elder (transferor) and the recipient exist. Where there exists a fiduciary relationship between the parties to a dispute concerning questioned transfers, such as between an attorney and a client, the presumption of fraud and undue influence will arise upon a showing of (1) active participation by the fiduciary and (2) any undue benefit. *Estate of Auen* 30 CA4th 300.

[7] *Johnson v. Clark* (1936) 7 Cal2d 579.

[8] *The National Incidence of Elder Abuse Study - Final Report September 1998*, prepared by the National Center of Elder Abuse at the American Public Human Services Association (formerly the American Public Welfare Association) in collaboration with Westat Inc. The Report can be accessed at: http://www.aoa.gov/eldfam/Elder_Rights/Elder_Abuse/ABuse Report_Full.pdf

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