

RESOLUTION 03-06-05

DIGEST

Elder Abuse: Recovery of Attorney's Fees

Amends Welfare & Institutions Code section 15657 to allow a defendant or cross-defendant to be awarded attorney's fees and costs in specific circumstances.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Welfare & Institutions Code section 15657 to allow a defendant or cross-defendant to be awarded attorney's fees and costs in specific circumstances. This resolution should be disapproved because it is contrary to the legislative intent for the code section and would act as a deterrent to filing elder abuse claims.

Prior to the enactment of Welfare & Institutions Code section 15657, many elder abuse cases were not filed because the dependent adults had been defrauded of their assets and could not afford legal representation to seek the return of these assets. The code section encourages counsel to represent elders in these cases when the alleged victim is without sufficient assets to fund the litigation. Many times these claims arise in conjunction with a conservatorship, probate, trust or breach of fiduciary relationship proceeding. Most courts require approval to retain counsel for the proposed claim and would not give such approval if the court did not consider the action appropriate. Elder abuse cases are difficult to prove because the victim either does not make a good witness or is deceased, making elder abuse cases difficult to assess. This resolution would only be a setback for the public policy of preventing and deterring elder abuse. In will and trust contests defendants have other alternatives by which they can seek attorney's fees and costs.

SECTION/COMMITTEE REPORTS

TRUSTS & ESTATES COMMITTEE RECOMMENDATION

APPROVE AS AMENDED

The Trusts and Estates Section supports this proposed legislative change as elder abuse allegations are increasingly used in even garden variety will and trust disputes, often with little or no foundation, and it would be equitable in those circumstances to allow fees on both plaintiff's and defendant's side. However, the Section believes that the direction that "probable cause" be determined by an objective standard at the conclusion of the litigation virtually mandates fees in the event of a loss by the plaintiff. The Section suggests that the resolution be amended to insert the words, "at the time of filing the claim" at the end of the proposed new language in §15657(b) and would support the proposal if so amended.

This position is only that of the Trusts and Estates Section of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the Trusts and Estates Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

TEXT OF RESOLUTION

Recovery of Attorney's Fees in Elder Abuse Cases

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that

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legislation be sponsored to amend Welfare and Institutions Code section 15657 to read as follows:

1 § 15657
2 In any action in which it is alleged ~~Where it is proven by clear and convincing evidence that a~~
3 defendant or cross-defendant is liable for physical abuse as defined in Section 15610.63, or neglect
4 as defined in Section 15610.57, ~~and that the defendant has been guilty of recklessness, oppression,~~
5 fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other
6 remedies otherwise provided by law:
7 (a) Where it is proven by clear and convincing evidence that the accused party has committed such
8 abuse or neglect, and that the party has been guilty of recklessness, oppression, fraud, or malice in
9 the commission of this abuse, ~~the~~ court shall award to the plaintiff reasonable attorney's fees and
10 costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a
11 conservator, if any, devoted to the litigation of a claim brought under this article.
12 (b) Where the court finds that a plaintiff or cross-complainant has asserted or maintained a claim for
13 such elder abuse or neglect without having probable cause for doing so, the accused party shall be
14 entitled to recover its reasonable attorneys' fees and costs incurred in connection with the defense of
15 such claim. As used herein, the term "probable cause" shall mean a reasonable belief that the claim
16 is legally viable based upon an objective assessment of all facts and law available.
17 ~~(b)(c)~~ The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages
18 recoverable shall not apply. However, the damages recovered shall not exceed the damages
19 permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.
20 ~~(c)(d)~~ The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the
21 imposition of punitive damages on an employer based upon the acts of an employee shall be
22 satisfied before any damages or attorney's fees permitted under this section may be imposed
23 against an employer.

(Proposed new language underlined; language to be deleted stricken.)

PROPOSER: Santa Barbara County Bar Association

STATEMENT OF REASONS

Existing Law: Permits a claimant asserting claims for elder abuse or neglect to recover attorneys fees and costs if such claims are proven by clear and convincing evidence. However, there is no reciprocal provision for an individual who is wrongfully accused of elder abuse or neglect to recover attorneys fees.

This Resolution: Would enable a litigant wrongfully accused of elder abuse or neglect to recover the costs and attorneys fees incurred in defending an action under this section where there was no probable cause to believe that such abuse or neglect had occurred. Would also correct an error in the reference to Code of Civil Procedure section 337.34 (which should be 377.34).

The Problem: The intent of the current statute is to encourage the reporting of potential elder abuse or neglect and to provide an incentive for individuals to assert such claims where there is a reasonable basis for believing that abuse or neglect has occurred. However, the elder abuse laws have become abused since they permit any contestant in a will or trust contest to challenge a bequest on the basis of elder abuse/undue influence, or to accuse another beneficiary of elder abuse or neglect, in order to acquire a greater interest in the deceased person's estate. Claims for elder abuse and neglect have become ubiquitous in will and trust contests, whether or not there is any evidence that such abuse or neglect has occurred, in order to gain an advantage through the threat of an adverse award of attorneys' fees. The current statute rewards one who successfully asserts a claim of elder abuse or neglect, but does not contain any sanctions for an unfounded accusation of abuse or neglect. Reciprocal provisions for the recovery of attorneys' fees by the prevailing party, if the claim is brought without a reasonable belief in its merits, will reduce the likelihood of false accusations of elder abuse or neglect since the accuser will have to bear the risk of a claim which he or she did not reasonably believe to be viable. There is currently no recourse by an individual falsely accused of elder abuse since the accuser bears no risk of loss if the

accusation is unwarranted.

With regard to the reference to Code of Civil Procedure section 337.34, in existing subparagraph (b), the section intended is 377.34, as indicated in the footnote. This Resolution would correct this error.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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RESPONSIBLE DELEGATE: Melissa Fassett

COUNTERARGUMENT

ORANGE COUNTY BAR ASSOCIATION

As drafted, a party who fails to prove they had “probable cause” to bring an elder abuse or neglect case may be responsible for the attorneys' fees and costs of the accused. It would be preferable to limit recovery of attorneys' fees and costs where the court determines the matter was brought in “bad faith”. These matters are often difficult to determine initially. However, due to the rampant abuse of elders in our society we should error on the side of caution, particularly where emergency action is typically necessary to protect our vulnerable adults. OCBA proposes that subsection (b) be amended to read as follows:

(b) Where the court determines that a plaintiff or cross-complainant filed an action for ~~fails to prove that the accused has committed such~~ elder abuse or neglect in bad faith, the accused party shall be entitled to recover its reasonable attorney’s fees and costs incurred in connection with the defense of such claim. (Proposed amended language bold; language to be deleted stricken bold.)

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

The purpose of Welfare and Institutions section 15657 is to enable elderly victims to seek redress for abuse. When an elderly person reports care giver abuse to his or her adult child, that child must be allowed to take immediate action to protect the elderly parent without risking exposure to an award for the defendant’s attorney’s fees and cost. The existing standard of “clear and convincing evidence” already provides a disincentive to bring such an action, and this resolution would exacerbate the problem. A truly aggrieved defendant already has a remedy in a malicious prosecution action where “probable cause” is defined by a substantial body of law.