

## **RESOLUTION 04-02-2008**

### **DIGEST**

#### Probate: Jurisdiction for Elder Abuse Actions

Amends Welfare & Institutions Code section 15657.3 to give the probate departments of trial courts initial jurisdiction of elder abuse cases.

### **RESOLUTION COMMITTEE RECOMMENDATION DISAPPROVE**

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Welfare & Institutions Code section 15657.3 to give the probate departments of trial courts initial jurisdiction of elder abuse cases. This resolution should be disapproved because sending cases to a “probate department” versus a “civil department” is ambiguous and an inappropriate legislative management of the judiciary.

The essence of the proposed change is to allow probate departments, versus civil departments, to have initial jurisdiction of elder abuse cases under Welfare & Institutions Code section 15600, et seq. The nature of the department in which a case is heard depends on the nature of the case itself. There is no hard division under the law for probate departments and civil departments. Accordingly, this determination is better left to the trial court to be made on a case-by-case basis. Another proposed change by this resolution would purport to transfer jurisdiction to “probate departments” if a “conservator of the person and/or estate has been appointed for the plaintiff and has qualified prior to the initiation of the action for abuse...” It is unclear why such a conservator must have been appointed previously or what “qualification” they must have had.

### **SECTION/COMMITTEE REPORTS**

#### **TRUSTS AND ESTATES SECTION DISAPPROVE**

This resolution would modify Welfare & Institutions Code §15657.3 to provide that the Probate Court has concurrent jurisdiction over all elder abuse actions and that such actions “shall” be transferred to the Probate Court where there is a pending conservatorship, where the conservator has been appointed prior the elder abuse action, or where no good cause is shown to keep the matter in civil court.

This resolution should be disapproved, because as written there could be significant unintended consequences in terms of assignments between courts. The designation “Probate Court” is more a matter of form than substance; legally, it is simply part of the Civil Court, so the presiding judge in a court has authority to decide where a case is assigned. In addition, the direction that the matter “shall” be transferred to the Probate Court is too restrictive as there are times when, even with the existence of a conservatorship, it may be desirable to have the action outside of the

probate court and the plaintiff should have the option to stay in civil court. Specifying concurrent jurisdiction in the probate court would enable the action to remain in probate, should that be the more appropriate venue, even if there is not a currently pending conservatorship. If the resolution were considered, it should at a minimum, delete new section (b), thus allowing permissive filing in probate court but not mandating it.

**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**

RESOLVED, that the Conference of Delegates recommends that Welfare & Institutions Code section 15657.3 be amended as follows:

1 §15657.3.

2 (a) The department of the superior court having jurisdiction over probate  
3 conservatorships shall also have concurrent jurisdiction over civil all actions and  
4 proceedings involving a claim for relief arising out of the abduction, as defined in Section  
5 15610.06, or the abuse of an elderly or dependent adult, ~~if a conservator has been~~  
6 ~~appointed for plaintiff prior to the initiation of the action for abuse.~~ under the "Elder Abuse  
7 and Dependent Adult Civil Protection Act" (EADACPA), pursuant to Welfare &  
8 Institutions Code section 15600 et seq.

9 (b) When a civil action has been filed which cites EADACPA, that action shall be  
10 transferred to the department of the superior court having jurisdiction over probate  
11 conservatorships for litigation if either of the following apply:

12 (1) A conservator of the person and/or estate has been appointed for the plaintiff  
13 and has qualified prior to the initiation of the action for abuse, or

14 (2) No good cause is shown to retain the action in the Civil Court.

15 ~~(b)~~ (c) The department of the superior court having jurisdiction over probate  
16 conservatorships shall not grant relief under this article if the court determines that the  
17 matter should be determined in a civil action, but shall instead transfer the matter to the  
18 general civil calendar of the superior court. The court need not abate any proceeding for  
19 relief pursuant to this article if the court determines that the civil action was filed for the  
20 purpose of delay.

21 ~~(e)~~ (d) The death of the elder or dependent adult does not cause the court to lose  
22 jurisdiction of any claim for relief for abuse of an elder or dependent adult.

23 ~~(d)~~ (e) Upon petition, after the death of the elder or dependent adult, the right to  
24 maintain an action shall be transferred to the personal representative of the decedent, or if  
25 none, to the person or persons entitled to succeed to the decedent's estate.

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

**PROPONENT:** Bar Association of Northern San Diego County

**STATEMENT OF REASONS:**

Existing Law: Provides that the Probate Division has concurrent jurisdiction for purposes of actions brought under the Elder Abuse statutes shall be in the Probate Division only where a conservatorship has been filed.

This Resolution: Would clarify that any action brought pursuant to EADACPA, shall be filed and heard in the Probate Department of the Superior Court, unless good cause exists to transfer the action to the civil division.

The Problem: Actions brought under EADACPA come in a variety of forms including, abduction, physical abuse, and financial abuse. Under existing statutes such actions may be brought in the Probate Division only where there is a current conservatorship action on file. Where no such conservatorship action is on file, abuse actions are typically brought in the civil court. However, there are a large number of EADACPA actions which involve claims for elder abuse which also involve claims under the Probate Code for return of a deceased elder's property or in connection with elder abuse in connection with a Trust. Decedent's claims and Trust claims come under the exclusive jurisdiction of the Probate Department, but do not appear to be permitted in the Probate Department under this section of EADACPA. The clarification would permit all EADACPA actions to be brought or transferred to the Probate Division, which is uniquely suited to dealing with matters relating to Elder Abuse.

**IMPACT STATEMENT:**

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

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**RESPONSIBLE FLOOR DELEGATE:** Mary Cataldo

**COUNTERARGUMENT**

**WOMEN LAWYERS OF SACRAMENTO**

Most elder abuse and dependent adult cases arise from physical injuries and financial fraud inflicted on the elder and/or dependent adult. The Civil Division of the Superior Court has long been used to determine personal injury actions and fraud and is as suited, if not more suited, than the Probate Division to deal with such matters.

By forcing all EADACPA claims into the Probate Division, the proposed amendment to Welfare & Institutions Code § 15657.3 will deprive elders and dependent adults of their right to a jury

trial. In probate proceedings, there is no right to a jury trial absent an express provision in the code. Instead, the Probate Court decides, in its discretion, whether a particular case or issues in a case should be permitted to go to a jury. [*Estate of Beach* (1975) 15 Cal.3d 623; *Heiser v. Superior Court* (1979) 88 Cal.App.3d 276.]

Moreover, many civil attorneys are not familiar with probate procedures and rules and, in the interests of avoiding potential legal malpractice, may not be willing to pursue EADACPA cases in the Probate Division. These civil attorneys provide a valuable resource to elders and dependent adults, working on a contingency fee basis and advancing the costs necessary to litigate EADACPA cases. The proposed amendment could deprive elders and dependent adults of the services of these attorneys.

Those cases which are more suited to the Probate Division will most likely be directed there in any event by the court or the attorney handling the case, since a trust and estates attorney will be more comfortable in that forum and a civil attorney may not risk handling probate issues which are outside his or her area of expertise.