Date of Hearing: April 23, 2013

ASSEMBLY COMMITTEE ON AGING AND LONG-TERM CARE
Mariko Yamada, Chair
AB 140 (Dickinson) – As Amended: April 10, 2013

SUBJECT: Definitions: "Undue Influence" and "Financial Abuse of an Elder or Dependent Adult."

SUMMARY: Proposes a modernized definition for undue influence. Specifically, this bill:

1) Proposes an enhanced definition for "undue influence" within the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA).

2) Applies the definition to that of undue influence with regard to financial abuse of an elder or dependent adult within the Welfare and Institutions Code.

3) Proposes to supplement the definition of undue influence, without superseding or interfering with, the operation of common law of undue influence, within the Probate Code.

EXISTING LAW

1) Establishes the Probate Code.

2) Establishes EADACPA recognizing that persons aged 65 and older, and younger persons between the ages of 18 and 64 who are living with physical or mental limitations that restrict their ability to carry out activities or to protect their rights, may be subjected to abuse, neglect, or abandonment and that the state has a responsibility to protect them.

3) Additional findings of EADACPA state that cases of elder and dependent adult abuse 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.

4) Requires certain professional classifications, and encourages the general public, to report elder or dependent adult abuse; provides for the collection of elder abuse data; and offers protections under the law for all those persons who report suspected abuse, provided the report is not made with malicious intent.

5) Requires mandated reporting of suspected elder and dependent adult financial abuse by all officers and employees of certain financial institutions, when they observe or have knowledge of behavior or unusual circumstances or transactions, or a pattern of behavior or unusual circumstances or transactions, that would lead to a reasonable belief that an elder or dependent adult is the victim of financial abuse, and provides civil penalties for failing to report elder and dependent adult financial abuse.

6) Defines "financial abuse of and elder or dependent adult" as occurring when one "takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating,

obtaining, or retaining, real, or personal property of an elder or dependent adult for wrongful use, intent to defraud, or both, or does so by undue influence, as defined in Civil Code §1575.

7) Establishes a definition for "Undue Influence" within the Civil Code (CIV 1575) as:

   a) The use, by one in whom a confidence is reposed by another, or who holds real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;

   b) In taking an unfair advantage of another's weakness of mind; and,

   c) In taking a grossly oppressive and unfair advantage of another's necessities or distress.

8) Provides civil remedies where financial abuse has been proven and damages when property is not returned, and the victim lacks capacity.

9) Establishes a four-year period of limitations within which to file an action

FISCAL EFFECT: Unknown

PURPOSE OF THE BILL: According to the author, "(T)he current definition of undue influence has not been revised since it was enacted in 1872. AB 140 would modernize and add clarity to the definition of elder financial abuse that recognizes contemporary knowledge of how elders are unduly influenced. Elder financial abuse is a growing problem in California and can have devastating effects on victims. A population as vulnerable as elders and dependent adults deserve statutory protection to ensure that when an elder is unduly influenced, that elder has an ability to recover what has been lost." According to the author, "AB 140 would not change the definition of undue influence for contracts, but only for elder financial abuse and related probate matters."

BACKGROUND: Financial elder and/or dependent adult abuse can be both a civil wrong and a crime. Within California law, civil remedies help victims recover compensation or lost property, and criminal punishments help deter abuse.

Since the 1970's when the Legislature began addressing evidence of elder and dependent abuse reports, statutes have been revised to encompass the growing knowledge of abuse as data and research confirmed its presence and extent. In1982 the Legislature passed and the Governor signed the EADACPA into law. In 2005, with enactment of SB 1018 the Legislature and Governor defined and mandated reports by employees of financial institutions on "elder financial abuse." In 2009 with the Enactment of SB 1140, undue influence as defined in Civil Code section 1575, was incorporated into the definition of financial abuse of an elder or dependent adult.

Currently, the only definition in statute for undue influence is found in a chapter of the Civil Code addressing contracts, and was written in 1872. A range of probate and civil codes that impact: persons for whom a conservator may be appointed, taking property of a deceased person's estate, the definition of "involuntary trustee," and "testamentary proceedings and transfers," refer to "undue influence." Common law derived from a series of court findings guide contemporary understanding of undue influence as well. The author states: "Civil Code section

1575 was enacted in 1872 and has never been revised. However, since the 19th Century, the concept of undue influence has played an increasingly important legal role with regard to the protection of elders and incapacitated adults.

The current definition of undue influence in California has been described as ambiguous and excessively narrow, not to mention out-of-step with contemporary psychological principles. Under Civil Code 1575, undue influence occurs when a confidential relationship exists, a victim suffers from "weakness of mind," or the abuse is grossly oppressive and "arises out the victims necessities or distress." This definition fails to account for pressure tactics and other forms of psychological manipulation to exploit elders. Though the legislature has made progress addressing definitions of "capacity" (Probate Code sections 811, 812), the definition of undue influence still relies upon outdated and confusing terms such as "weakness of mind." Victims, caregivers, family members and others are left to uncertainty when such rights are violated. Many victims of financial abuse have liquid assets readily available, so the factors surrounding "necessities or distress" in the current definition have an ambiguous application in those cases, though abuse through undue influence is clearly present.

The University of California Irvine's Center of Excellence on Elder Abuse and Neglect cites the World Health Organization which has defined elder abuse as a violation of human rights and a significant cause of illness, injury, loss of productivity, isolation, and despair. According to the California Welfare Directors Association, as of 2011, financial abuse allegations have increased 32% since 2001. A range of reports show abuse victims are more likely to impact public social service systems (like police, APS, healthcare), and ultimately become dependent upon them. A recent JAMA article chronicled elders in the Chicago area and found that abuse of any kind increased the likelihood of hospitalization 2.59-fold. California's 65+ population is expected to increase 44% in the decade between 2010 and 2020, and by 2035, the 65+ population will comprise 20% of the population in California. By 2035 the 85+ population in California will have grown by 125% to 2,713,000 people, according to the California Department of Finance.

According to a report to the Superior Court of California, County of San Francisco, claims of undue influence can be difficult to understand and prove, both because of the lack of a definition in the Probate Code and because it occurs behind closed doors without witnesses. Increasingly, though, probate courts have staff such as investigators or visitors who go out and interview proposed conservatees and determine their circumstances, including the presence of apparent undue influence. Probate courts are also receiving more information from community practitioners such as Adult Protective Services (APS), social workers, physicians, and hospital discharge planners. Establishing a modern definition of "undue influence" will assist APS staff, Ombudsman, public guardians, and others who may be required to respond to reports of such incidents during the course of their work. Incidents of undue influence often go undetected, the results of which are impoverishment, homelessness, dependency upon others or public social services, and inadequate care for the elderly victims.

ARGUMENTS IN SUPPORT: The California Advocates for Nursing Home Reform states that "(M)odernizing California's definition of undue influence so that it is consistent with contemporary views of vulnerability, mental health, and fairness would bring greater clarity to the determination of when excessive persuasion becomes exploitative."

The California Commission on Aging cites data from the California Department of Social Services that shows "…as many as 1600 reports of financial abuse are under investigation in any given month statewide…" and that "(E)lders and dependent adults are often isolated and vulnerable, building trust in caregivers, sales representatives or others who use their influence to obtain access to the victims' financial resources, often depleting them of a life's savings, an income stream, or even a home."

The Older Women's League states that "(O)lder women are more likely to be the victims of elder financial abuse. It is a horrible crime that has reached epidemic proportions in California."

Daniel Murphy, an elder law attorney based in San Francisco states that "AB 140 would modernize this definition by providing courts with a practical, reasonable, and workable definition that balances the vulnerability of the victim, the apparent authority of the influences, the tactics employed, and the fairness of the result."

Steven Riess, a San Francisco attorney specializing in representing victims of elder financial abuse, states that "…predators have become increasingly sophisticated in the tactics they employ to manipulate and exploit seniors. While there are many instances of outright fraud, elders are equally often victimized through grossly unfair tactics and strategies through which the predator exploits the vulnerability and isolation of the senior without telling outright lies or forging signatures. Currently, the law does not protect seniors who are callously manipulated unless the senior had a confidential relationship with the predator, the senior suffered from weakness of mind (1872's CIVIL CODE 1575), or the senior was in distress. The new definition provided by AB140 would not tell judges and juries when undue influence has occurred; rather, it would provide them with guidelines for determining if the senior has been unduly influenced. Thus the new definition would instruct them to consider the interplay between the victim's vulnerability, the exploiter's authority, the tactics used, and the unfairness of the outcome in deciding whether undue influence occurred. The ultimate decision, however, as to whether all of these circumstances considered together constitutes undue influence is left up to the sound judgment of the trier-of-fact."

ARGUMENTS IN OPPOSITION: The California Association of Health Facilities and the California Chamber of Commerce, along with five other entities state that AB 140 would "…broadly expand the definition of undue influence to any excessive persuasion by an expert that results in inequity which could lead to such cases where a 65-year-old in mid-life crisis buys a car, a house, stocks, electronics or a boat" and that "Under AB 140, businesses may need to ask a person's age, education or emotional state before engaging in a sales transaction in order to limit its liability." The author notes that he is working with the opposition to address their concerns. On April 10, Assemblymember Dickinson amended AB 140 to include language that declares transactions that do not result in equitable results alone is not enough to establish the element of undue influence. Although this amendment responds to the concerns expressed by opponent, as of the date of this analysis, no letter withdrawing opposition has been received.

The California Judges Association writes that AB 140, as amended, restricts judicial discretion and should be amended to provide greater latitude when considering: if property had been taken, secreted, appropriated, obtained or retained for wrongful use; the proposed four-pronged test of undue influence proposed for WIC 15610.70; and whether inequitable results of transactions establish an element of undue influence. However, these issues are best addressed by the Judiciary Committee (AB 140 passed the Assembly Judiciary Committee 7-2 on April 2, 2013).

CONCERNS: The Executive Committee of the Trusts and Estates Section of the State Bar of California (TEXCOM) writes that AB 140, though well-meaning is a flawed attempt to reduce elder abuse. According to TEXCOM, AB 140 broadens the law defining undue influence for purposes of both civil disputes regarding elder abuse and all matters governed by the Probate Code, including those not impacting elder or dependent adults. TEXCOM's greatest concerns are with the application of AB 140 to the Probate Code. They assert that AB 140 expands the parameters of what can be considered undue influence in order to capture a vast range of transactions that may be quite normal. For instance, according to TEXCOM, a disgruntled sibling may be allowed to bring an action against another if they did not inherit equal assets upon the death of a parent. If the results of a testamentary gift results in inequity, undue influence may be asserted. Conversely, the sponsor insists that AB 140 is applicable within the probate context only for the trier of fact. The sponsor asserts that AB 140 would not be triggered unless a court, or jury were to find the inequity unreasonable, based upon reasonable judgement.

RELATED LEGISLATION:

SB 1018 (Simitian), Chapter 140, Statutes of 2005, enacted the Elder and Dependent Adult Financial Abuse Reporting Act, with a sunset date of January 1, 2013.

SB 1140 (Steinberg), Chapter 475, Statutes of 2008, established undue influence as a third standard to define when financial abuse of an elder or dependent adult occurred (along with taking etc.) property for wrongful use, or intent to defraud, or both, among other things.

AB 2611 (Simitian), Chapter 886, Statutes of 2004, reduced the standard of proof for financial abuse to preponderance of the evidence, but allowed punitive damages upon clear and convincing evidence of recklessness, oppression, fraud, or malice.

SB 611 (Steinberg), Chapter 45, Statutes of 2007, passed the Senate Floor with a vote of 27-6 on 7/2/07.

This bill passed out of Assembly Judiciary on April 2nd with a vote of 7-2.

REGISTERED SUPPORT / OPPOSITION:

Support

California Advocates for Nursing Home Reform (CANHR) - **Sponsor**

Alzheimer's Association
California Alliance for Retired Americans (CARA)
California Association for Health Services at Home (CAHSAH)
California Commission on Aging (CCoA)
California Police Chiefs Association
Consumer Federation of California
East Bay OWL
Institute on Aging
Older Women's League (OWL) of California

6 Individuals

Opposition

California Chamber of Commerce
California Association of Health Facilities
California Building Industry Association
California Business Properties Association
California Manufacturers and Technology Association
Civil Justice Association of California
Western Electrical Contractors Association

Oppose Unless Amended

California Judges Association

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