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Trusts and Estates Section

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## RUMORS OF THEIR DEATH ARE GREATLY EXAGGERATED: THE PRE-DEATH WILL CONTEST AND OTHER STRATEGIES IN CONSERVATORSHIP LITIGATION

By Adam F. Streisand\*

It is an ever increasing phenomenon. Advances in medicine and generally more healthy lifestyles are contributing to the aging of our population. And increasingly, our bodies outpace our minds. More often we confront the Ronald Reagan syndrome: physically able but mentally departed. The phenomenon will no doubt continue exponentially. After all, the baby boomers are turning a young 60. California is already home to the greatest number of elderly in the country. Predictions are that the number of Californians over the age of 65 will double by 2020. Add to this mix that we divorce more, that we may have multiple marriages and children from more than one relationship, as well as a general, societal attitude that makes us more willing to air our grievances publicly in the courtroom. We are more litigious. It is a combustible combination.

So it is that we see in our courts on an ever increasing basis litigation on a new battle front. While I do not mean to suggest that we are wanting for cases over decedents' estates or their trusts, probate litigators find themselves increasingly in court in conservatorship matters. This article discusses various strategies for litigating disputes in conservatorship proceedings, including pre-death will and trust contests, civil actions for fraud and undue influence, proceedings to recover misappropriated assets, enhanced remedies for elder abuse, and litigation over marital property and the rights of non-marital partners in the conservatee's assets.

There is a noble cause in conservatorship litigation. The elderly are among our most vulnerable citizens and conservatorships are often the best means for protecting them. It is equally true that the conservatee's beneficiaries may be innocent victims of avaricious elder abusers. To redress these wrongs is to protect the conservatee and the integrity of her true intentions. Unfortunately, conservatorship law is in its infancy relative to the need for procedural and substantive means to litigate these cases. This article discusses strategies that are at the cutting edge of conservatorship law.

### I. PRE-DEATH WILL CONTESTS

Generally, a will may not be contested until the testator's death. A will is not operative until death. The will cannot be offered for probate and no probate of the estate is possible while

the testator remains alive. But to invoke again the circumstances of our 40th President, the testator may live many years after she loses mental capacity. While we wait for the testator to pass away, we may lose critical evidence. Witnesses may die or become unavailable (the California courts have no power to subpoena a witness outside of California to appear for trial). Witnesses' memories may fade over time. Documents or other tangible evidence may be lost or destroyed. Meanwhile, the elderly and infirm are vulnerable to abuse. The legislature articulated its concern for these vulnerable members of our society in enacting the Elder Abuse and Dependent Adult Civil Protection Act and making available enhanced remedies to those who successfully pursue such abuses.<sup>1</sup> In the same vein, the interests of justice militate heavily in favor of a pre-death contest to a will procured by undue influence or based on lack of capacity.

Neither the legislature nor the courts have clearly articulated whether a contest of a will is possible in a conservatorship proceeding. In this author's view, it is not only possible but entirely appropriate. If a conservatorship is established, an interested person may bring a petition for substituted judgment under Probate Code § 2580(b)(13) seeking an order requiring the conservator to make a new will for the conservatee.<sup>2</sup> Section 2580 provides in pertinent part as follows:

- (a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes: ...
- (b) The action proposed in the petition may include, but is not limited to, the following: ...
- (13) Making a will.

It is not entirely clear that the substituted judgment provisions authorize an interested person to file a petition for an order allowing the conservator to make a new will as a means of contesting an existing will. There is one case that seems to suggest that it may be an appropriate vehicle for such purposes.<sup>3</sup> In *Conservatorship of McDowell*, the court appointed as conservator the public guardian of Santa Clara County. The conservator subsequently filed a substituted judgment petition seeking permission to execute a new will and trust, alleging that the existing will was invalid because the conservatee lacked testamentary capacity at the time she executed it, and that the will was the product of undue influence.<sup>4</sup> After trial, the court sustained the objection of the accused beneficiary concluding that the conservatee was competent to make a will, but overruled the beneficiary's objection as to undue influence.<sup>5</sup> The court granted the petition, reasoning that the beneficiary was a "care custodian" under Probate Code § 21350 and failed to rebut the presumption of undue influence.<sup>6</sup> On appeal, the beneficiary argued that the court erred in finding that she was a care custodian.<sup>7</sup> The Court of Appeal reversed on the grounds that the objector was not, in fact,



a care custodian, and remanded for the trial court to reconsider the petition for substituted judgment while placing the burden of proof of undue influence on the petitioner.<sup>8</sup>

Admittedly, the appeal was limited to the issue of the burden of proof based on whether or not the objector was a care custodian for purposes of Probate Code §§ 21350 and 21351. However, the Court of Appeal appears to have adopted the procedural mechanism of a substituted judgment petition as a pre-death will contest. In considering the issues raised in the petition, the Court of Appeal did not question the fundamental right of the conservator to use that process for purposes of a pre-death will contest. Instead, the court explained the standards for substituting its judgment for that of the conservatee and authorizing the conservator to make a new will:

Under sections 2580 through 2586, a superior court may, upon the petition of any interested person and after consideration of all relevant circumstances, exercise its discretion to authorize or require a conservator to take a variety of different actions affecting the conservatee's estate. "In essence the statute permits the court to substitute its judgment for that of a conservatee." (*Conservatorship of Hart* (1991) 228 Cal.App.3d 1244, 1250, 279 Cal.Rptr. 249 (*Hart*); see *Estate of Christiansen* (1967) 248 Cal.App.2d 398, 56 Cal.Rptr. 505 [discussing the common law doctrine of substituted judgment, later codified in § 2580 et seq.]) "[T]he question in substituted-judgment proceedings is not what the conservatee would do but rather what a reasonably prudent person in the conservatee's position would do." (*Hart, supra*, 228 Cal.App.3d at p. 1270, 279 Cal.Rptr. 249.) We review the trial court's order granting substituted judgment for abuse of discretion. (*Id.* at pp. 1253-1254, 279 Cal.Rptr. 249.)<sup>9</sup>

Notably, the Court of Appeal remanded to the trial court for reconsideration of the petition for substituted judgment.<sup>10</sup> Thus, while reversing on the issue of the burden of proof on undue influence, the appellate court considered it appropriate for the challenge to the will on the grounds of undue influence to proceed in the context of a substituted judgment petition. However, it is important to point out that conclusions or articulations of the law that are not necessary to the decision reached (or not squarely addressed) are dicta and have no precedential value. *Conservatorship of McDowell* would suggest that the courts might agree ultimately with the position advanced in this article, but until the question is put squarely to the Court of Appeal, and decided, it is uncertain.

## II. PRE-DEATH TRUST CONTESTS AND ALTERNATIVE STRATEGIES

### A. The Problem Of Standing

With respect to revocable trusts, beneficiaries have no rights while the person holding the power to revoke is competent (unless

the trust provides otherwise).<sup>11</sup> Thus, beneficiaries have no standing to contest a trust so long as the holder of the power to revoke is competent. If the settlor becomes incompetent, the beneficiaries may remain powerless notwithstanding. Even if the settlor lacks capacity, there may be another who holds the power of revocation. The settlor may vest her attorney in fact with the power of revocation.<sup>12</sup> However, the settlor must expressly state in her power of attorney that she imbues her attorney in fact with the power of revocation; it cannot be construed from broad language or evidence of intent.<sup>13</sup> If a conservator of the estate is appointed for the settlor, the conservator, with the assistance of the superior court, holds the power of revocation (unless the trust provides otherwise).<sup>14</sup>

In *Johnson v. Kotyck*, a beneficiary of an inter vivos trust of a settlor under conservatorship filed a petition under Probate Code § 17200 seeking to compel an accounting.<sup>15</sup> The trial court sustained the trustee's demurrer without leave to amend and the Court of Appeal affirmed, holding that the beneficiary lacked standing.<sup>16</sup> The Court of Appeal held that Probate Code § 15800 postponed the beneficiary's rights while the holder of the power to revoke was competent.<sup>17</sup> Even though the settlor was incapacitated, the court held that the conservator held the power of revocation.<sup>18</sup> The court rejected the beneficiary's argument that Probate Code § 15800 postponed Johnson's rights only so long as the settlor was competent, and that the conservator did not hold the power to revoke.<sup>19</sup> The court's analysis is instructive:

Under the Probate Code, the legal rights of a conservatee—including the right to revoke a trust—pass to the conservator, under the close scrutiny of the superior court. The conservator may petition the court for an order "Exercising the right of the conservatee (i) to revoke a revocable trust or (ii) to surrender the right to revoke a revocable trust ..." (§ 2580, subd. (b)(11).) The court is, in this situation, "the conservatee's decisionmaking surrogate" because "[i]n essence the statute permits the court to substitute its judgment for that of a conservatee." (*Conservatorship of Hart* (1991) 228 Cal.App.3d 1244, 1250, 279 Cal.Rptr. 249.) The court must satisfy itself that it is "fully and fairly informed" about the proposed exercise of the conservatee's legal rights. (*Id.* at p. 1254, 279 Cal.Rptr. 249.)

The conservator may also ask the probate court to authorize the *creation* of a revocable trust "for the benefit of the conservatee or others" which "may extend beyond the conservatee's disability or life." (§ 2580, subd. (b)(5).)

The only limitation on the court's ability to authorize the revocation of a conservatee's revocable trust is if the trust instrument "(i) evidences an intent to reserve the right of revocation exclusively to the conservatee, (ii) provides expressly that a conservator may not revoke the trust, or (iii) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke the trust." (§ 2580, subd.

(b)(11).) We have examined the Trust in this case and all of its amendments. There is nothing in the Trust or its amendments which expressly or impliedly prevents the conservator from revoking the Trust or which reserves the right of revocation exclusively to Frudendorf. Thus, the limitations listed above do not apply here.

Johnson relies primarily on section 15800, which postpones the rights of trust beneficiaries “during the time that a trust is revocable and the person holding the power to revoke the trust is competent.” Contrary to Johnson’s reading of it, this provision does *not* mean that a trust automatically becomes irrevocable when the trustor becomes a conservatee. The Law Revision Commission comment to section 15800 explains: “This section has the effect of postponing the enjoyment of rights of beneficiaries of revocable trusts until the death or incompetence of the settlor *or other person holding the power to revoke the trust.*” (Italics added.) It is clear from section 2580 that a conservator, working together with the superior court as the conservatee’s decision-making surrogate, is a “person holding the power to revoke the trust.”

Sections 2580 and 15800 both became operative on the same day, July 1, 1991, and are both part of the same enactment. (Stats.1990, ch. 79, § 14.) This only underscores the need to read the two sections harmoniously.

The reading of section 15800 proposed by Johnson would undermine the statutory scheme relating to revocable trusts. So long as a trust is revocable, a beneficiary’s rights are merely potential, rather than vested. The beneficiary’s interest could evaporate in a moment at the whim of the trustor or, in the case of a conservatorship, at the discretion of the court. Giving a beneficiary with a contingent, nonvested interest all the rights of a vested beneficiary is untenable. We cannot confer on the contingent beneficiary rights that are illusory, which the beneficiary only *hopes* to have upon the death of the trustor, but only if the trust has not been previously revoked and the beneficiary has outlived the trustor. For this reason, we conclude that section 15800 does not give a beneficiary such as Johnson any right to a trust accounting so long as a conservator retains authority under section 2580 to have the trust revoked and to abrogate Johnson’s interest in the trust proceeds.<sup>20</sup>

Again, the Court of Appeal held that the beneficiary lacks standing even after the settlor becomes incompetent if there is a conservator, unless the trust reserves the power of revocation to the settlor.<sup>21</sup> It follows logically from *Johnson v. Kotyck*, however, that if the trust instrument reserves the right of revocation to the conservatee, and thus, the conservator does not enjoy the power to revoke the instrument,<sup>22</sup> that the beneficiary’s rights would be vested

and she would have standing. In such circumstances, there should be no impediment to filing a trust contest even while the settlor is alive.

On the other hand, if the conservator with the court’s supervision holds the power to revoke the conservatee’s trust, as in *Johnson v. Kotyck*, then an interested person may file a substituted judgment petition requiring the conservator to revoke or modify the conservatee’s trust.<sup>23</sup> The same logic would apply if the settlor executed a power of attorney expressly vesting another with the power to revoke, and that person is competent to act.<sup>24</sup>

In order to file a substituted judgment petition to revoke or modify a trust, it will be necessary in the first instance to establish a conservatorship. If the proposed conservatee’s assets are all in trust or a power of attorney authorizes an attorney in fact to exercise broad powers of financial and asset management, an argument may be advanced that no conservatorship is necessary.<sup>25</sup> Unless the petitioner can persuade the court that a conservatorship is necessary, she will never be able to file her substituted judgment petition. There are various arguments which may be made to justify a conservatorship in circumstances where all of the assets are in trust or under the control of an attorney in fact. First, someone responsible to the proposed conservatee and accountable to the court should be in place to monitor the activities of the trustee or the attorney in fact, to receive accountings, and to interpose objections if appropriate.<sup>26</sup> Second, the assets may be under management pursuant to powers granted by instruments procured by undue influence, fraud or when the proposed conservatee lacked capacity. A conservatorship proceeding should exist for the purpose of investigating the validity of the instruments.

## **B. Probate Code § 850 Petition To Recover Assets From Trustee Of Invalid Trust Instrument**

There is some lack of clarity as to whether the substituted judgment procedures provide the appropriate legal framework for pre-death will and trust contests. This is primarily because the statute was no doubt originally conceived to allow a conservator to amend or revoke a trust or make a new will based upon changed circumstances. A court might conclude, erroneously in this author’s view, that a substituted judgment petition would not lie, because it is not an appropriate procedural mechanism for invalidating an instrument procured by fraud or undue influence. A substituted judgment petition might not lie because the trust vests the power of revocation in an attorney-in-fact, but expressly prohibits a conservator from revoking or amending the trust.<sup>27</sup>

But there is another potential avenue of attack. In this author’s view, a conservator or other claimant could file a petition under Probate Code § 850 for a constructive trust over assets in the hands of trustees of a trust that is invalid because it was obtained by undue influence or fraud. A petition under Probate Code § 850 is a powerful, strategic tool in conservatorship litigation to recover assets or resolve adverse claims to real or personal property by filing a petition under Probate Code § 850. The petition would seek to bring assets into the conservatorship estate.



Probate Code § 850(a)(1) applies specifically to conservatorships, and provides, in relevant part:

(a) The following persons may file a petition requesting that the court make an order under this part:

(1) A guardian, conservator, or any claimant, in the following cases:

(D) Where the minor or conservatee has a claim to real or personal property title to or possession of which is held by another.<sup>28</sup>

Sections 850 *et seq.* provide a procedural mechanism for resolving adverse claims to real or personal property; they do not create or supplant substantive law:

Section 850 *et seq.* essentially authorizes an expeditious specific enforcement *proceeding* applicable solely to estates in probate. The procedure avoids the need to commence an independent civil action for specific performance. However, these statutes do *not create* special *substantive law* for the specific enforcement of decedent's contracts: i.e., all of the normal 'equitable' conditions to specific performance (CC §§ 3384-3395, see below) remain applicable ... so that if decedent's contract to convey or transfer would not be specifically enforceable under general law, it is *not* specifically enforceable under Prob.C. § 850 *et seq.*<sup>29</sup>

The substantive basis for the petition can be any cause of action cognizable under civil law, such as conversion, fraud or even undue influence: "An action brought under this part may include claims, causes of action, or matters that are normally raised in a civil action to the extent that the matters are related factually to the subject matter of a petition filed under this part."<sup>30</sup> On behalf of the conservatorship, the petitioner may be able to recover assets in trust under the terms of an invalid instrument by proving that the trustees are exercising improper dominion and control (conversion), or obtained control of the assets as trustees by fraud or undue influence.

It is clearly an indirect attack on the instrument itself to seek to impose a constructive trust over assets held in trust. It will be met with objections on the grounds that the trust, while revocable, cannot be contested. But this is not an attack that invalidates the trust instrument. Indeed, at death, if there is a pourover will, the assets would flow back into the trust. For this reason, it is important to bring concurrently a petition for substituted judgment to make a new will.<sup>31</sup>

### C. Civil Actions For Fraud Or Undue Influence

While the focus of this article is on conservatorship litigation, it is mandatory, in this author's view, that the conservatorship litigator consider a civil action as an alternative or concurrent strategy. These are new and developing strategies, and as yet, the

courts have not addressed whether a civil case based upon the procurement of a trust by fraud or undue influence would be limited to circumstances where the trust is irrevocable in the sense that no competent person holds the power of revocation. While the logic of extending those principles to an attack on a revocable instrument would seem to attain, these are simply untested waters.

The ordinary statutory grounds for contesting a will are lack of capacity, undue influence and fraud.<sup>32</sup> Of course, fraud may also be the basis of a civil complaint. But there is a difference. In a civil case, the plaintiff ordinarily is the person allegedly defrauded. In a contest, the contestant was not ordinarily defrauded. Instead, the contestant claims that the testator was defrauded to the injury of the contestant. In a civil action for fraud, the general rule is that a third party has no standing to sue. But there are two exceptions recognized under common law.

The first exception is sometimes referred to as the doctrine of indirect reliance.<sup>33</sup> In *Grinnell*, a hospital patient sued a drug manufacturer for allegedly making false representations to the patient's doctor.<sup>34</sup> As a result of the drug company's misrepresentations to the doctor, the doctor prescribed medication that injured the patient.<sup>35</sup> The court held that the company was liable to the patient for fraud on the theory that the doctor became the agent or instrument of the company's fraud, and the patient indirectly relied on the false information obtained by the doctor.<sup>36</sup>

It is not an entirely clean fit, but the trust beneficiary might succeed in arguing that the settlor became the instrument of the abuser's fraudulent scheme to injure the beneficiary. The problem is that the beneficiary has not relied on information obtained by the settlor from the abuser. Perhaps it would be persuasive to argue that the beneficiary had a right to rely on the abuser dealing fairly and honestly and refraining from alienating the settlor from the beneficiary based on false representations.

The second exception permits a third person to sue for fraud when the person committing the fraud affirmatively conceals her conduct from the plaintiff.<sup>37</sup> The rationale is that by concealing the fraud, she deprived the plaintiff of the opportunity to intercede and potentially alter the result. The elements of fraudulent concealment are:

- (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.<sup>38</sup>

In *Lovejoy*, AT&T falsely represented to PacBell that plaintiff authorized AT&T to take over plaintiff's 800 service.<sup>39</sup> AT&T concealed its wrongdoing from plaintiff by manipulating the



format of its bills so that plaintiff would be unaware that AT&T had taken over plaintiff's 800 service without plaintiff's knowledge.<sup>40</sup> When plaintiff disputed its AT&T bill for other reasons, AT&T retaliated by disconnecting plaintiff's 800 service.<sup>41</sup> By the time plaintiff discovered that its 800 service was disconnected, its business had dried up and it was in bankruptcy.<sup>42</sup> The Court of Appeal explained that AT&T was under a duty to disclose to plaintiff, as a customer, the change in plaintiff's 800 service.<sup>43</sup> The Court found that plaintiff would have acted differently had it known of AT&T's conduct; plaintiff would have taken action to ensure continuity of its 800 service.<sup>44</sup>

One can easily imagine ways in which a contestant might be able to plead that an unscrupulous beneficiary defrauded the settlor, and concealed the wrongdoing from the beneficiary, so that she had no chance of interceding. It is not clearly decided yet if the defendant in such a case would have a duty to disclose her conduct to the contestant. But in circumstances where the defendant's conduct is aimed directly at injuring the contestant, the courts should, in this author's view, find that such a duty exists.

It is also noteworthy that the remedies available for fraud in a civil action include damages against the defendant for the injury caused to the plaintiff, rescission of the instrument obtained by fraud, the imposition of a constructive trust over the assets, and if the plaintiff proves fraud by clear and convincing evidence, punitive damages.<sup>45</sup>

In addition to pleading fraud, the civil plaintiff may seek relief based upon undue influence.<sup>46</sup> It is not clear whether the principles of standing applicable to fraud would apply in the context of a cause of action for undue influence. It is true that the plaintiff is not the direct victim of the undue influence but the party who is indirectly injured. The elements of a claim for undue influence are as follows:

In essence undue influence involves the use of excessive pressure to persuade one vulnerable to such pressure, pressure applied by a dominant subject to a servient object. In combination, the elements of undue susceptibility in the servient person and excessive pressure by the dominating person make the latter's influence undue, for it results in the apparent will of the servient person being in fact the will of the dominant person.<sup>47</sup>

The evidence necessary to prove a claim of undue influence in the civil courts is in reality the same as in a typical will or trust contest:

Undue influence, in the sense we are concerned with here, is a shorthand legal phrase used to describe persuasion which tends to be coercive in nature, persuasion which overcomes the will without convincing the judgment. (*Estate of Ricks*, 160 Cal. 467, 480-482, 117 P. 539.) The hallmark of such persuasion is high pressure, a pressure

which works on mental, moral, or emotional weakness to such an extent that it approaches the boundaries of coercion. In this sense, undue influence has been called overpersuasion. (*Kelly v. McCarthy*, 6 Cal.2d 347, 364, 57 P.2d 118.) Misrepresentations of law or fact are not essential to the charge, for a person's will may be overcome without misrepresentation. By statutory definition undue influence includes "taking an unfair advantage of another's weakness of mind; or ... taking a grossly oppressive and unfair advantage of another's necessities or distress." (Civ.Code, s 1575.) While most reported cases of undue influence involve persons who bear a confidential relationship to one another, a confidential or authoritative relationship between the parties need not be present when the undue influence involves unfair advantage taken of another's weakness or distress.<sup>48</sup>

We paraphrase the summary of undue influence given the jury by Sir James P. Wilde in *Hall v. Hall*, L.R. 1, P & D 481, 482 (1868): To make a good contract a man must be a free agent. Pressure of whatever sort which overpowers the will without convincing the judgment is a species of restraint under which no valid contract can be made. Importunity or threats, if carried to the degree in which the free play of a man's will is overcome, constitute undue influence, although no force is used or threatened. A party may be led but not driven, and his acts must be the offspring of his own volition and not the record of someone else's.<sup>49</sup>

The same remedies available in a civil action for fraud are available for undue influence. Of course, to obtain punitive damages, the plaintiff will have to demonstrate malice, fraud or oppression.<sup>50</sup> Thus, assuming that the plaintiff can demonstrate standing either on the question of revocability of the trust or the plaintiff's status as the indirect victim, a civil action for fraud or undue influence might be an effective means of redressing abuse of the direct victim, the incapacitated settlor.

### III. ELDER ABUSE AND ENHANCED REMEDIES

In recognition of the increasing occurrences of financial abuse of elders by the persons most responsible for helping them, and the inadequacies of pre-existing statutory and common-law protections, the legislature enacted the Elder Abuse and Dependent Adult Civil Protection Act (the "Elder Abuse Law" or "EAL").<sup>51</sup> The Elder Abuse Law prohibits "financial abuse" of elders and dependent adults.<sup>52</sup> The EAL defines "elders" as persons who are 65 years of age or older.<sup>53</sup> Under the Elder Abuse Law, "financial abuse" is prohibited as follows:

- (a) "Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following:
  - (1) Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.



(2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.

(b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith.<sup>54</sup>

The courts have not squarely addressed the question, but some commentators have suggested that the legislature intended to create an actual cause of action for financial abuse:

Plaintiff may also elect to plead the conduct of the abuser prohibited by [the Elder Law] as the statutory tort of financial abuse of an elder or dependent adult....

Similarly, with the enactment of [the Elder Law], the legislature has stated an intent to protect an articulated class of persons and has proscribed certain conduct with respect to that class. Violation of the statutory prohibitions is the tort of financial abuse of an elder/dependent adult.<sup>55</sup>

In at least one case under the EAL, a conservatorship case, the trial court empaneled a jury, and the Court of Appeal reviewed the jury instructions for sufficiency.<sup>56</sup> It might be inferred from this case that the courts tend to agree that the Elder Abuse Law created an independent cause of action. The elements of a claim under the EAL appear to be easily established. If the defendant takes, secretes or appropriates property with the intent to defraud, the respondent may be liable under the EAL.

The elder abuse cause of action may be asserted in the conservatorship proceeding or by a separate civil action.<sup>57</sup> When the petitioner or plaintiff proves financial elder abuse by a preponderance of evidence, she is entitled to an award of reasonable attorneys' fees.<sup>58</sup> The EAL also provides for pain and suffering damages, and punitive damages if malice, fraud or oppression is shown by clear and convincing evidence.<sup>59</sup>

#### IV. PROBATE CODE § 850 PETITIONS

As discussed in Section II, B. above, Probate Code §§ 850 et seq. can be a formidable mechanism for resolving adverse claims to real or personal property. Probate Code § 850(a)(1) permits claims to be brought on behalf of the conservatee by persons in possession of property belonging to the conservatee, or in behalf of claimants in property in the possession of the conservatee:

(a) The following persons may file a petition requesting that the court make an order under this part:

(1) A guardian, conservator, or any claimant, in the following cases:

(A) Where the conservatee is bound by a contract in writing to convey real property or to transfer personal property, executed by the conservatee while competent or executed by the conservatee's predecessor in interest, and the contract is one that can be specifically enforced.

...

(C) Where the guardian or conservator of the minor or conservatee is in possession of, or holds title to, real or personal property, and the property or some interest therein is claimed to belong to another.

(D) Where the minor or conservatee has a claim to real or personal property title to or possession of which is held by another.<sup>60</sup>

The petition must be filed and served in the manner of a summons and complaint, *i.e.*, generally by personal service on the respondent.<sup>61</sup> While §§ 850 *et seq.* provide an expeditious means of resolving adverse claims to property, they will not be efficacious if a court has obtained jurisdiction over a civil action on the same subject matter.<sup>62</sup> On the other hand, the proceeding may be continued if the conservatee dies during the pendency of the § 850 proceedings.<sup>63</sup> The court's powers to grant relief are broad and include all "appropriate relief":

Except as provided in Sections 853 and 854 [relating to abatement], if the court is satisfied that a conveyance, transfer, or other order should be made, the court shall make an order authorizing and directing the personal representative or other fiduciary, or the person having title to or possession of the property, to execute a conveyance or transfer to the person entitled thereto, or granting other appropriate relief.<sup>64</sup>

As noted above, §§ 850 *et seq.* do not create substantive law. In authorizing the court to make orders if it is "satisfied," the legislature was not creating a new or different standard that would be applicable to the underlying cause of action simply because it was tried under the procedural mechanism of § 850. Thus, if the underlying claim requires proof by a preponderance of the evidence or by clear and convincing evidence, the court must be satisfied in accordance with such burdens of proof before making an order under §§ 850 and 856.

The court is not restricted to equitable remedies or to ordering a conveyance or transfer. The probate court is a court of general jurisdiction, "and the court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court . . . ." <sup>65</sup> "A probate court may exercise the full range of powers available to superior courts generally in deciding civil cases, e.g., ordering *joinder* of parties and actions; *appointing guardians ad litem*; awarding *damages* and *injunctive* relief, and fashioning *equitable* remedies."<sup>66</sup>



Once the court determines the rights of the parties in the property or orders a party to execute a conveyance, the prevailing party has the right to the possession of the property and to hold the property in accordance with the order as though a conveyance had been made.<sup>67</sup> With respect to real property, perfecting title absent an instrument of conveyance can be accomplished generally by recording the court's order with the appropriate county recorder's office.

The Probate Code also authorizes the court to make an award of double damages if the court finds that a person in bad faith wrongfully took, concealed or disposed of property belonging to the estate.<sup>68</sup> The remedy of double damages is in addition to any other remedy available under law to the fiduciary.<sup>69</sup> Thus, it is conceivable that the court could award double damages in addition to punitive damages in an appropriate case.

## V. COMMUNITY PROPERTY AND MARVIN CLAIMS BY PARAMOURS OR OTHER NON-MARITAL PARTNERS

Issues of community property or of the rights of non-marital partners in the conservatee's assets can be a fertile ground for litigation. As a threshold matter, it may be questionable whether a conservatorship is appropriate depending on the character of the assets. When the conservatee's spouse has legal capacity, she has the exclusive right to manage and control the community property, including the exclusive right to dispose of community property, with one important exception discussed below.<sup>70</sup> The conservatee's community property is not part of the conservatorship estate.<sup>71</sup> The litigants may find themselves battling over what assets are subject to a conservatorship, or whether a conservatorship is necessary at all. In order to determine the separate or community property character of assets, the appropriate procedure is to file a petition under Probate Code § 3023.

But even if the spouse with legal capacity is in control of community property assets, a conservatorship may be necessary and appropriate.<sup>72</sup> The only limitation on the right of the spouse with legal capacity to dispose of community property is found in Probate Code § 3071. When the joinder or consent of both spouses is required under Family Code §§ 1100 or 1102, the conservator has the right to consent.<sup>73</sup> Family Code § 1100 provides that generally either spouse may manage, control or dispose of community personal property.<sup>74</sup> However, neither spouse may make a gift of community property, dispose of personal property for less than fair market value, or sell or encumber personal effects, household furniture or furnishings without the written consent of the other.<sup>75</sup> Family Code § 1102 provides that both spouses must consent to the sale, transfer or lease of community real property.<sup>76</sup> Thus, it may be necessary to appoint a conservator even when all of the assets are community property in order to protect the interest of the conservatee and to give or withhold consents as appropriate.

When there is no spouse, or when the conservatee was cohabitating with another person, the battle over the conservatee's

assets may involve "*Marvin*" claims. In *Marvin v. Marvin*,<sup>77</sup> the California Supreme Court held that when a man and woman "cohabit" in a "stable and significant relationship," "they may agree to pool earnings and to hold all property acquired during the relationship in accord with the law governing community property; conversely they may agree that each partner's earnings and the property acquired from those earnings remains the separate property of the earning partner."<sup>78</sup> Cases decided since *Marvin* hold that the plaintiff must allege and prove: (1) that they lived together in essence as husband and wife, in a long, stable and significant relationship, (2) that expressly or impliedly, they agreed that the property acquired by them during their relationship would be treated like community property, and (3) that there was consideration for the agreement that is severable and distinct from the sexual nature of the relationship.<sup>79</sup> The remedy is equitable; the court will impose a constructive trust or otherwise establish the rights of the plaintiff to her share of property.

In *Marvin*, the Court held that Michelle Marvin had a viable cause of action for declaratory relief to establish her interest in property acquired by Lee Marvin during the relationship.<sup>80</sup> The *Marvin* Court noted, however: "We do not pass upon the question whether, in the absence of an express or implied contractual obligation, a party to a nonmarital relationship is entitled to support payments from the other party after the relationship terminates."<sup>81</sup> No case has yet decided that issue.

It is clear from *Marvin* and its progeny that the courts will not find for the plaintiff in the absence of a longterm relationship that looks and feels a lot like a marriage. Michelle Marvin alleged that Lee Marvin and she lived together for seven years, and that Michelle gave up her career to take care of Lee and his household. In finding these allegations sufficient, *Marvin* relied on *Trutalli v. Meraviglia*,<sup>82</sup> in which the unmarried partners lived together for 11 years and raised two children together. Subsequently, the court upheld the viability of such a cause of action in *Cochran v. Cochran*, where Patricia and Johnnie Cochran lived together for 17 years, they held themselves out as husband and wife (Patricia even legally changed her name to Cochran), they jointly owned their home, and they raised a son together.<sup>83</sup>

On the other hand, in *Taylor v. Fields*, a case decided after *Marvin*, the couple had a 42-year relationship, but they never lived together.<sup>84</sup> The Court held the plaintiff had no viable cause of action to assert rights in defendant's assets. And in *Bergen v. Wood*, the court also rejected the plaintiff's cause of action because the parties never lived together and "[b]ecause services as a social companion and hostess are not normally compensated and are inextricably intertwined with the sexual relationship, *Bergen* failed to show any consideration independent of the sexual aspect of the relationship. Therefore, the agreement was unenforceable for lack of consideration."<sup>85</sup> In *Bergen*, the court also commented: "We make the additional observation that if cohabitation were not a prerequisite to recovery, every dating relationship would have the potential for giving rise to such claims, a result no one favors."<sup>86</sup>



A *Marvin* claim may be asserted in a civil complaint or in a petition in the conservatorship proceeding in the form of a Probate Code § 850 petition. In asserting a *Marvin* claim, the plaintiff or petitioner seeks to prove ownership of a community-property type interest in the conservatee's assets. However, the non-marital partner is simply a co-owner, and would not have the exclusive right of management and control that would be applicable if the assets were in fact community property.

## VI. CONCLUSION

While we are experiencing more often that our bodies may last longer than our mental acuity, the law that governs conservatorship proceedings is lagging behind. In many respects, we are forging new paths without the legal infrastructure to guide us. But there are important policy justifications for accommodating this new journey. As the legislature made clear in enacting the EAL, the elderly and infirm are among the most vulnerable of our citizens and abuse of their ever increasing vulnerability is all too common. This article will hopefully assist in providing strategic guidance to my fellow litigators who are fighting the good fight. When the legislature and the Supreme Court take action they should bear in mind these important principles so that the means for bringing disputes to court in the context of a conservatorship are readily available.

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## ENDNOTES

1. Cal. Welf. & Inst. Code § 15600 et seq.
2. Cal. Prob. Code § 2580(b)(13).
3. *Conservatorship of McDowell* (2004) 125 Cal.App.4th 659.
4. *Id.* at 662.
5. *Id.*
6. *Id.* at 663.
7. *Id.*
8. *Id.* at 679.
9. *Id.* at 665.
10. *Id.* at 679.
11. Cal. Prob. Code § 15800.
12. Cal. Prob. Code § 4264(a).
13. Cal. Prob. Code §§ 4264(a), 15401(c).
14. *Johnson v. Kotyck* (1999) 76 Cal.App.4th 83, 87-88.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* (emphasis in original).
21. *Id.*
22. Cal. Prob. Code § 2580(b)(11) reads in full: "(b) The action proposed in the petition may include, but is not limited to, the following: ... (11) Exercising the right of the conservatee (A) to revoke or modify a revocable trust or (B) to surrender the right to revoke or modify a revocable trust, but the court shall not authorize or require the conservator to exercise the right to revoke or modify a revocable trust if the instrument governing the trust (A) evidences an intent to reserve the right of revocation or modification exclusively to the conservatee, (B) provides expressly that a conservator may not revoke or modify the trust, or (C) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke or modify the trust."
23. Cal. Prob. Code § 2580(b)(11).
24. Note, however, that if the trust permits a revocation or modification by the attorney-in-fact, but expressly prevents the conservator from revoking or modifying the trust, then no substituted judgment will lie under Probate Code § 2580(b)(11)(B).
25. *See Johnson, supra*, 76 Cal.App.4th at 90.
26. *See id.*; *see also* 1 California Conservatorship Practice § 14.79 (CEB 2005) ("Another example is the duty of the conservator of the estate to keep informed about the administration of a revocable trust created and funded by the conservatee for his or her own benefit, and to protect the conservatee's interest if the conservator suspects that the assets are being 'frittered away.' 76 CA4th at 89. *See* Prob C §§ 2616-2619. Conservators may be surprised to learn that they are responsible for such close supervision of the conservatee's revocable trust and will be held accountable if they do not closely monitor the actions of the trustee.")
27. *See* Note 24, *infra*.
28. Cal. Prob. Code § 850(a)(1) (Interestingly, while subdivision (A) limits actions to contracts in writing, subdivision (C) opens them wide open to any type of cause of action in which property is claimed to belong to another).
29. Bruce S. Ross, *Cal. Prac. Guide: Probate*, § 13:402.1 (Rutter Group 2005) (emphasis in original); *see also* § 15:342:1 (explaining that § 850(a)(2)(D) "is broad enough to permit the court to adjudicate the estate's claims against persons charged with embezzling, concealing, smuggling or fraudulently disposing of [a] decedent's property").
30. Cal. Prob. Code § 855.
31. Cal. Prob. Code § 2580(b)(13).
32. Cal. Prob. Code § 8252; *see also* § 16061.8.
33. *See Grinnell v. Charles Pfizer Co.* (1969) 274 Cal.App.2d 424, 441.
34. *Id.*
35. *Id.*
36. *Id.*
37. *See Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 97; *Marketing West, Inc. v. Sanyo Fisher (USA), Corp.* (1992) 6 Cal.App.4th 603, 612-14.
38. *Marketing West, Inc., supra*, 6 Cal.App.4th at 612-13.
39. *Lovejoy v. AT&T Corp., supra*, 92 Cal.App.4th at 97.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *See* Cal. Civ. Code § 3294.
46. *See, e.g., Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 130-31; *O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 153.



47. *Odorizzi, supra*, 246 Cal.App.2d at 131.
48. *Wells Fargo Bank & Union Trust Co. v. Brady*, 116 Cal.App.2d 381, 398, 254 P.2d 71; *Buchmayer v. Buchmayer*, 68 Cal.App.2d 462, 467, 157 P.2d 9.
49. *Id.* at 130-31.
50. Cal. Civ. Code § 3294.
51. Cal. Welf. & Inst. Code § 15600 *et seq.* In part, § 15600 declares: “(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.... (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.... (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.”
52. Cal. Welf. & Inst. Code § 15610.07(a).
53. Cal. Welf. & Inst. Code § 15610.27.
54. Cal. Welf. & Inst. Code § 15610.30.
55. 2 *California Elder Law: An Advocate’s Guide* (CEB May 2000) § 14.31.
56. *Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 519-20.
57. *See* Cal. Welf. & Inst. Code § 15657.3.
58. Cal. Welf. & Inst. Code § 15657.5.
59. Cal. Welf. & Inst. Code § 15657.5.
60. Cal. Prob. Code § 850(a)(1) (Interestingly, while subdivision (A) limits actions to contracts in writing, subdivision (C) opens them wide open to any type of cause of action in which property is claimed to belong to another).
61. Cal. Prob. Code § 851(a); Cal. Code of Civ. Proc. § 413.10.
62. Cal. Prob. Code § 854 (“If a civil action is pending with respect to the same subject matter of a petition filed pursuant to this chapter and jurisdiction has been obtained in the court where the civil action is pending prior to the filing of the petition, upon request of any party to the civil action, the court shall abate the petition until the conclusion of the civil action. This section shall not apply if the court finds that the civil action was filed for the purpose of delay.”)
63. Cal. Prob. Code § 858.
64. Cal. Prob. Code § 856.
65. Cal. Prob. Code § 800. Probate Code § 1000 provides that the rules of practice applicable to civil actions apply equally in probate matters, except as specifically modified by the Probate Code. *See* Cal. Prob. Code § 1000 (“Except to the extent that this code provides applicable rules, the rules of practice applicable to civil actions . . . apply to, and constitute the rules of practice in, proceedings under this code. All issues of fact joined in probate proceedings shall be tried in conformity with the rules of practice in civil actions.”).
66. Bruce S. Ross, *Cal. Prac. Guide: Probate*, § 3:60.7 (Rutter Group 2005) (emphasis in original).
67. Cal. Prob. Code § 857(b) (“After entry of an order that the personal representative, other fiduciary, or other person execute a conveyance or transfer, the person entitled thereunder has the right to the possession of the property, and the right to hold the property, according to the terms of the order as if the property had been conveyed or transferred in accordance with the terms of the order.”)
68. Cal. Prob. Code § 859 (“If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to the estate of a decedent, conservatee, minor, or trust, the person shall be liable for twice the value of the property recovered by an action under this part. The remedy provided in this section shall be in addition to any other remedies available to a trustee, guardian or conservator, or personal representative or other successor in interest of a decedent.”)
69. Cal. Prob. Code § 859.
70. Cal. Prob. Code § 3051(b)(1).
71. Cal. Prob. Code § 3051(b)(2). However, the spouse with legal capacity may consent by a writing filed in the conservatorship proceeding that all or part of the community property be included in the conservatorship estate and managed by the conservator. Prob. Code § 3051(c).
72. Cal. Prob. Code § 3057(b) (“If one spouse has a conservator and the other spouse is managing or controlling community property, the conservator has the duty to keep reasonably informed concerning the management and control, including the disposition, of the community property. If the conservator has knowledge or reason to believe that the rights of the conservatee in the community property are being prejudiced, the conservator may bring an action on behalf of the conservatee in to enforce the duty imposed by Sections 721 and 1100 of the Family Code with respect to the management and control of the community property and to obtain such relief as may be appropriate.”); *see also* Cal. Fam. Code §§ 721, 1100.
73. Cal. Prob. Code § 3071(a), (b)(2).
74. Cal. Fam. Code § 1100.
75. Cal. Fam. Code § 1100.
76. Cal. Fam. Code § 1102.
77. (1976) 18 Cal.3d 660.
78. *Id.* at 674.
79. *See Cochran v. Cochran* (2001) 89 Cal.App.4th 283, 291-92; *Taylor v. Fields* (1986) 178 Cal.App.3d 653, 657; *Bergen v. Wood* (1993) 14 Cal.App.4th 854, 859.
80. *Marvin, supra*, 18 Cal.3d at 666.
81. *Id.* at 666, n.26.
82. (1932) 215 Cal. 698, 701-02.
83. *Cochran, supra*, 89 Cal.App.4th at 291-92.
84. *Taylor, supra*, 178 Cal.App.3d at 657.
85. *Bergen, supra*, 14 Cal.App.4th at 859.
86. *Id.* at 858.