

## How Elder Abuse Can Lead To Litigation

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### California Looks Out For Its Elders

Because elder abuse can take on many forms, and because, sadly, millions of families suffer every year from elder abuse, California has enacted laws to protect elders and those who are in a dependent situation.

California passed a law entitled the Elder Abuse and Dependent Adult Civil Protection Act. This law protects elders (ages 65 and older), dependent adults, and developmentally disabled people from various types of abuse so if you feel you are being abused or know someone who may be, the law will protect you. The good news is there are laws and people in place to protect you and your assets, safeguarding what is rightfully yours and providing you with security so you and your legacy are safe from harm.

This article will define types of elder abuse and how to determine when litigation may become necessary.

### What Is Elder Abuse?

Elder abuse is defined by California law as physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment resulting in harm, pain, or mental suffering. It also prohibits a care custodian from depriving goods or services that are necessary to avoid physical harm or mental suffering.

In addition, California law allows an elder or their family member to seek non-economic damages—such as pain and suffering and emotional distress—stemming from the alleged abuse or seek return of property taken from the elder.



### Financial Elder Abuse & Its Effect on Estate Planning

Many elder abuse cases deal with financial elder abuse. This type of abuse exists when a person takes real or personal property from an elder/dependent adult, for a wrongful use, with intent to defraud, or by undue influence (undue influence is excessive persuasion that overcomes someone's free will and results in inequity, as discussed in greater detail below).

Claims of financial elder abuse are often made in the context of a trust, will, or estate matter. Often family members will contest an estate plan document or amendment that affects their inheritance, alleging it was the result of elder abuse. In fact, in some cases, financial elder abuse claims can even be asserted after the elder/dependent adult dies for instance, after the terms of the will or trust are discovered.

Once someone passes, if it is determined elder abuse occurred, and funds or property have been taken from the trust or estate of the alleged victim, the probate court can order the return of those assets. The court can also order that attorney's fees, among other penalties, such as double damages, be paid by the alleged abuser.

## What Is Undue Influence?

California defines undue influence as “excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will, and results in inequity.” A victim of undue influence believes they will suffer if they fail to follow the abuser’s demands or threats; the abuser will use their position of power to take advantage of the victim.

In determining whether a result was caused by undue influence, courts will consider the following:

1. Vulnerability of the victim including incapacity, illness, disability, injury, age, education, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim’s vulnerability
2. The influencer’s apparent authority including one’s status as a fiduciary, family member, care provider, health care professional, legal professional, or spiritual adviser
3. The actions or tactics used by the influencer such as the control of medication, interactions with others, sleep, etc.
4. The fairness of the result such as the economic consequences to the victim, divergence from the victim’s prior intent, and the appropriateness of the change in light of the parties’ length and nature of relationship

Historically, undue influence only applied to situations where influence was exerted over a mentally incapacitated victim. However, as the elderly population continues to grow, California and other states have modified legislation to remove this requirement, thereby allowing litigation if the victim was susceptible to undue influence for other reasons.

Therefore, while victims of undue influence often suffer from mental impairments like dementia, Alzheimer’s, etc., this is not a requirement, and those with sound minds may still be a victim of undue influence.

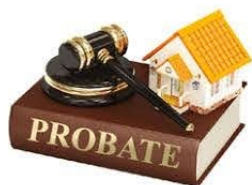


## Examples of Undue Influence

Undue influence can be seen in situations where an abuser exercises undue influence over a victim to secure an inheritance, or a larger inheritance than they otherwise would. For example, if an abusive son tells his elderly mother that she cannot see her grandchildren unless she amends her trust to give her real property to the son, rather than her daughter. Since the son is seeking to obtain a benefit from the abuse, this is undue influence.

On the other hand, if the son merely asks his mother to give him the real property when she dies, this does not rise to the level of undue influence. Even if the son mentions it every time he sees his mom, and regularly bugs her and pesters her about it, he is not overcoming his mom's free will or decision making; she has no reason to believe she will suffer if she fails to comply with her son's wishes.

These types of scenarios are why undue influence is regularly alleged as a basis for contesting a will or trust, as well as seeking a conservatorship for someone who is being subjected to undue influence.



## Automatic Presumption of Undue Influence

There are certain situations in which the law will *automatically* presume undue influence occurred, and it is up to the person being accused of undue influence to rebut the presumption. The Probate Code states that making a donative transfer to certain persons is presumed to be the product of fraud or undue influence. These persons include:

- (1) The person who drafted the instrument, such as an attorney drafting a will or trust
- (2) A care custodian, if the instrument was executed during or around the time of care
- (3) A person who is related by blood or affinity to any person described above

For example, if an elder amends her trust such that her caretaker inherits all assets when the elder dies, and the amendment is done while the caretaker is caring for the trustee, the amendment would be presumed to be the result of undue influence by the caretaker. The same would apply if the elder amended her trust to give all assets to her caretaker's husband or children.

Another example would be if an elder executed a will that left all assets to the attorney that drafted the estate plan. Unsurprisingly, the law would be suspicious of such a transfer.

In order to rebut the presumption of undue influence, the accused person must show, by clear and convincing evidence, that the transfer was not the product of fraud or undue influence. If they are unable to do so, the transfer is voided, and they are required to pay all legal fees and costs of the proceeding.



## Suspect Elder Abuse? Here's What to Do Next...

When families suspect elder abuse or undue influence, it is critical to act quickly and determine whether a conservatorship is necessary. A conservatorship is a legal concept whereby a court appoints a person to manage an incapacitated person or minor's financial and personal affairs. The conservator's duties include:

- Overseeing finances
- Establishing and monitoring the physical care of the elder or dependent
- Managing living arrangements

A court may appoint a conservator only after various documents and evidence

are produced to support claims of abuse. Typically, medical records play an important role in showing the victim's physical or mental limitations, developmental disabilities, or vulnerabilities. Additionally, bank statements or estate planning documents are often critical to show that financial abuse took place. If assets are held in joint accounts, they may need to be moved to prevent further taking. Lastly, affidavits from witnesses are crucial to support claims of abuse, and demonstrate the relationship—or lack thereof—between the victim and the abuser.

If elder abuse or undue influence has resulted in estate planning documents that do not comply with the elder's wishes, a petition should be filed in probate court to contest these documents. It is also possible to commence a civil action against the person who abused the elder.

It is not uncommon for one person to prey on multiple elderly victims and because elder abuse is a crime in California, the police may need to be contacted, particularly if the person is suspected of abusing numerous individuals.

It is a sad but true fact that with America's elderly population increasing, financial exploitation of vulnerable adults has become an epidemic. While police, prosecutors, and adult protective services offer one course of action, many of these cases end up - or should end up - as civil lawsuits. The procedures for pursuing a civil remedy in these cases often crossover between probate processes and civil actions and may involve a variety of legal considerations.

To proceed with such a potential claim, please reach out to any of our experienced civil litigation attorneys who specialize in elder abuse claims, who know the laws, and who have navigated around the civil courts handling such claims.



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