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Abusers Beware: Legislators Up Penalty for Violating a Protective or Stay-Away Order Involving Elder or Dependent Adults

Derrick Thomas

Code Section Affected

Penal Code § 166 (amended).

AB 1424 (Davis); 2008 STAT. Ch. 152.

I. INTRODUCTION

Elder and dependent adult abuse occurs in numerous forms, affects millions nationwide, and is severely underreported.¹ A common form of abuse occurs when an adult child moves back in with an elderly parent to serve as a caretaker,² but ends up financially exploiting the aging parent.³ Such was the case for one seventy-three year old female resident of Merced, California, whose forty-nine year-old daughter, along with her thirty-five year-old boyfriend, moved back home from Washington in 2006 to care for her.⁴ The systematic theft went unnoticed until the elderly woman's landlord reported a series of bounced checks to other members of the woman's family, who immediately contacted the Merced County Sheriff's Department.⁵ During the ensuing investigation, the department determined that the daughter and her boyfriend had stolen \$30,000 in property, \$5,000 in cash, \$9,600 in unauthorized credit-bank transactions, and had opened \$7,000 in new accounts without authorization.⁶ The Merced County District Attorney wound up prosecuting the two culprits for embezzlement, forgery, identity theft, and financial elder abuse.⁷

Unfortunately, criminal mistreatment of elders and dependent adults is on the rise in California.⁸ In response to this growing problem, the California Legislature

1. See SafeState.org, Facts, <http://safestate.org/index.cfm?navid=58> (last visited June 20, 2008) (on file with the *McGeorge Law Review*) (stating that elder abuse manifests itself in many ways, affects approximately two million elders each year, and that only one in fourteen cases of abuse are reported).

2. A "caretaker" is "any person who has the care, custody, or control of, or who stands in a position of trust with, an elder or dependent adult." CAL. PENAL CODE § 368(i) (West 1999).

3. See Doane Yawger, *Two Charged with Elder Abuse*, ELDER ABUSE, July 18, 2007, <http://elder-abuse-cyberarray.blogspot.com/2007/07/two-charged-with-elder-abuse.html> (on file with the *McGeorge Law Review*) (discussing an instance of elder abuse).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. See Letter from Rockard Delgadillo, City Att'y, City of L.A., to Gloria Romero, Senator, Cal. State Senate (June 11, 2007) [hereinafter Delgadillo letter] (on file with the *McGeorge Law Review*) (stating that elder abuse in California is increasing).

enacted Chapter 152 in an effort to distance abusers from elders and dependent adults so that they may enjoy healthy lives.⁹

II. BACKGROUND

A. Defining “Elder” and “Dependent Adult”

Section 368 of the Penal Code (section 368) governs crimes against elders and dependent adults.¹⁰ This section defines “elder” as “any person who is 65 years of age or older.”¹¹ “Dependent adult” is defined as:

[A]ny person . . . between the ages of 18 and 64, who has physical or mental limitations which restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age. “Dependent adult” includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility¹²

The key distinction between these two classes is age. To illustrate, a sixty-three year old woman with physical and mental limitations that restrict her ability to carry out normal activities is legally classified as a dependent adult because she is too young under the definition of “elder” as set forth in section 368.¹³ However, a sixty-five year-old woman with the same physical and mental limitations is considered an “elder” under section 368 because she meets the age threshold.¹⁴

B. What Is Elder or Dependent Adult Abuse?

According to the U.S. Department of Health and Human Services, elder or dependent adult abuse occurs when the caregiver or any other person knowingly, intentionally, or negligently commits an act that “causes harm or a serious risk of harm to a vulnerable adult.”¹⁵ State laws defining abuse vary, but generally encompass abuse that is physical, emotional, or sexual, or abuse that involves

9. *Id.*

10. *See* CAL. PENAL CODE § 368 (West 1999) (criminalizes specific conduct perpetrated against elders or dependent adults and attaches corresponding prison sentences and fines).

11. *Id.* § 368(g).

12. *Id.* § 368(h).

13. *See id.* (classifying a dependent as a person between the ages of 18 and 64).

14. *See id.* § 368(g) (classifying an elder as a person 65 years or older).

15. U.S. Department of Health & Human Services, How Can I Recognize Elder Abuse?, <http://www.hhs.gov/faq/aging/911.html> (last visited June 18, 2008) (on file with the *McGeorge Law Review*).

financial exploitation, neglect, or abandonment, or a combination of the above.¹⁶ Elder and dependent adult abuse affects men and women of all ethnic backgrounds, and occurs in poor, middle-class, and upper-income households.¹⁷

C. Who Are the Abusers?

Elder abuse victims often live with their abusers, two-thirds of which are family members who are usually either adult children or spouses.¹⁸ Because family members comprise the bulk of offenders, the abuse is difficult to detect and hard for victims to accept.¹⁹ “Other offenders may include other family and old friends, newly developed ‘friends’ who intentionally prey on older adults, and service providers in positions of trust.”²⁰ Abuse also occurs at long-term care facilities, such as nursing homes.²¹ At these sites “[e]mployees and temporary staff who have direct contact with residents are the most frequent perpetrators.”²²

Abusers often share similar characteristics.²³ These include alcohol or drug dependence, a history of domestic violence, mental illness, familial dysfunction, economic pressure, and personal stress.²⁴ Also, abusers often have longstanding personality traits such as a volatile temper and a tendency to blame others.²⁵ As this expansive list demonstrates, there is no “one profile” of an abuser.²⁶

D. A Statistical Perspective

“Statistics uncover a frightening picture of elder and dependent adult abuse in California.”²⁷ Estimates show that one out of every twenty elders is a victim of

16. *Id.* Physical abuse is defined as “inflicting, or threatening to inflict, physical pain or injury on a vulnerable elder, or depriving the elder of a basic need”; emotional abuse is defined as “inflicting mental pain, anguish, or distress on an elder through verbal or nonverbal acts”; sexual abuse is defined as “non-consensual sexual contact of any kind; exploitation as the illegal taking, misuse, or concealment of funds, property, or assets of a vulnerable elder”; neglect is defined as the “refusal or failure by those responsible to provide food, shelter, health care or protection for a vulnerable elder”; and abandonment is defined as “the desertion of a vulnerable elder by anyone who has assumed the responsibility for care or custody of that person.” *Id.*

17. *Id.*; Los Angeles County District Attorney’s Office, What Is Elder Abuse?, <http://da.lacounty.gov/seniors/abuse.htm> (last visited Oct. 30, 2008) [hereinafter What Is Elder Abuse?] (on file with the *McGeorge Law Review*).

18. SafeState.org, Facts, *supra* note 1; see also NAT’L CTR. ON ELDER ABUSE, 15 QUESTIONS & ANSWERS ABOUT ELDER ABUSE 7 (2005), available at http://www.ncea.aoa.gov/NCEAroot/Main_Site/publication/FINAL%206-06-05%203-18-0512-10-04qa.pdf (on file with the *McGeorge Law Review*).

19. NAT’L CTR. ON ELDER ABUSE, *supra* note 18, at 7.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. SafeState.org, Elder & Dependent Adult Abuse, <http://safestate.org/index.cfm?navid=11&show>

neglect or physical, psychological or financial abuse.”²⁸ It is also estimated that only one in five cases of abuse is reported statewide.²⁹ This ratio sheds light on the number of *actual* incidents of abuse. For instance, in 2000-2001, 75,843 cases of elder abuse were reported in California.³⁰ By 2005-2006, that figure grew to 93,517.³¹ Accordingly, approximately 380,000 and 468,000 *actual* incidents of elder abuse occurred in 2000-2001 and 2005-2006, respectively.³²

California’s booming senior population raises additional concerns.³³ Presently, California has more than 3.7 million people age sixty-five or older—the largest senior population in the nation, and a figure that is expected to double by 2020.³⁴ As this state’s elder population soars, incidents of abuse will likely grow as well.³⁵

In the nursing home context, “it is estimated that 43 percent of all 65-year-old people will use a nursing home at some time in their lives.”³⁶ Each year in California, approximately 132,000 elders are abused in nursing facilities; however, this figure is likely to be significantly higher as only one in fourteen cases is reported to authorities.³⁷ In sum, these statistics indicate that elder abuse is a serious problem in California, and that it is likely to persist considering the rapidly expanding senior population and the overwhelming degree of underreporting.

E. Existing California Law

Under Penal Code section 166, the willful disobedience of a court order constitutes a misdemeanor punishable by up to six months in county jail and a fine not more than \$1,000.³⁸ However, in domestic violence cases, the violation of a court order may carry an elevated one year sentence in a county jail given the gravity of the protected interest.³⁹

Printable=1 (last visited Nov. 9, 2008) [hereinafter Elder & Dependent Adult Abuse] (on file with the *McGeorge Law Review*).

28. SafeState.org, Facts, *supra* note 1.

29. Elder & Dependent Adult Abuse, *supra* note 27.

30. *Id.*

31. *Id.*

32. These figures were obtained by multiplying the 75,843 reported cases of abuse in 2000-2001 and the 93,517 reported cases of abuse in 2005-2006, respectively, by five. *See id.*

33. *See* Delgadillo letter, *supra* note 8 (expressing concern that as the senior population grows in California, that incidence of elder abuse will also increase).

34. *Id.*

35. *See id.* (noting that dependent adult abuse will likely grow if no action is taken).

36. Elder & Dependent Adult Abuse, *supra* note 27.

37. SafeState.org, Facts, *supra* note 1.

38. CAL. PENAL CODE § 166(a)(4) (West 1999); *see also id.* § 19 (proscribing the punishment for a misdemeanor not otherwise prescribed).

39. *See id.* § 166(c)(1) (“[A]ny willful and knowing violation of a protective order or stay-away court order . . . in a pending criminal proceeding involving domestic violence . . . shall constitute contempt of a court, a misdemeanor, punishable by imprisonment in a county jail for not more than one year”); *see generally id.*

III. CHAPTER 152

Chapter 152 adds the crime of elder and dependent adult abuse to a list of specified crimes under section 166(c)(1) of the Penal Code.⁴⁰ This provision now states that the knowing and willful violation of any protective or stay-away court order in a criminal proceeding involving domestic violence, or elder or domestic dependent adult abuse constitutes contempt of court, a misdemeanor punishable by imprisonment in a county jail up to one year, by a fine not exceeding \$1,000, or both.⁴¹

IV. ANALYSIS

A. *Syncing the Law*

The Legislature has determined that elder and dependent adult abuse and domestic violence are similarly situated crimes in that they disproportionately impact vulnerable, female victims.⁴² By enacting Chapter 152, the Legislature has brought the law governing crimes against elders and dependent adults in line with existing law covering domestic violence.⁴³ Now, the violation of a protective or stay-away order in cases involving elders and dependent adults carries the elevated one year jail term just like in domestic violence cases.⁴⁴

B. *Better Think Twice*

In misdemeanor abuse cases, courts may issue protective or stay-away orders to establish legally enforceable distance between offenders and victims for the latter's safety and wellbeing.⁴⁵ The possibility of jail time for violating these orders is what makes them effective barriers between abusers and victims.⁴⁶ A harsher penalty, of course, provides a greater disincentive to violate such orders, and therein lies the force

§ 136.2 (authorizing courts to issue protective or stay-away orders "upon a good cause belief that harm to, or intimidation or dissuasion of, a victim . . . has occurred or is reasonably likely to occur").

40. See *id.* § 166(c)(1) (amended by Chapter 152) ("[A]ny willful and knowing violation of any protective order or stay-away court order . . . in a pending criminal proceeding involving domestic violence . . . or elder or dependent adult abuse . . . shall constitute contempt of court, a misdemeanor, punishable by imprisonment in a county jail for not more than one year, by a fine of not more than one thousand dollars (\$1,000), or by both that imprisonment and fine." (emphasis added)).

41. *Id.*

42. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1424, at G (Apr. 29, 2008).

43. *Id.*

44. CAL. PENAL CODE § 166 (amended by Chapter 152).

45. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1424, at G (Apr. 29, 2008); see also Letter from Harriet Salarno, Chair, Crime Victims United of Cal., to Gloria Romero, Senator, Cal. State Senate (Apr. 18, 2008) (on file with the *McGeorge Law Review*) (noting that creating distance between the abuser and the victim is the primary purpose of protective or stay-away orders).

46. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1424, at G (Apr. 29, 2008) ("[T]he court can use the threat of jail (up to one year) to monitor and hopefully control the defendant's conduct.").

of Chapter 152.⁴⁷ By adding six months of jail time for violating court orders involving elders and dependent adults, the intended and likely result will be a decline in the number of violations. The idea is that most defendants will appreciate the difference between six months and a year behind bars, and therefore think twice before disobeying the stay-away orders.

C. Potential Impact on California's Overcrowded Jails and Prisons

One of the Legislature's concerns in passing Chapter 152 was its potential impact on the overcrowding crisis currently afflicting California's prisons and jails.⁴⁸ Over the past two decades, county jail inmate populations have increased by about sixty-six percent, despite court-ordered caps.⁴⁹ California's prison population has tripled during this period.⁵⁰

It is "extremely unlikely" that Chapter 152 will have any impact on the overcrowding crisis.⁵¹ In cases where protective or stay-away orders are violated, courts will likely impose probation in lieu of jail time due to the misdemeanor status of the crime.⁵² If other charges accompany this misdemeanor, Chapter 152 will have minimal impact, if any, on the prison system because sentencing will likely be based on those other offenses.⁵³ In rare cases where abusers repeatedly violate stay-away orders, jail time will be warranted.⁵⁴ These few cases, however, will have a negligible impact on California's overcrowded jails and prisons.⁵⁵

V. CONCLUSION

Elder and dependent adult abuse is a serious problem in California due to the booming senior population, underreporting, and the fact that it is difficult to detect.⁵⁶ Chapter 152 helps address the problem by increasing the penalty from six months to one year in county jail for violating a protective or stay-away order involving elders or dependent adults.⁵⁷ The hope is that this stiffer sentence will deter abusers from violating such orders.⁵⁸ Chapter 152 will likely be effective in this goal.

47. *Id.*

48. *See id.* at C-G (discussing California's overcrowded prisons and jails and this legislation's potential impact).

49. *Id.* at D.

50. *Id.*

51. *Id.* at G.

52. *Id.*; *see also* CAL. PENAL CODE § 166 (amended by Chapter 152) (stating that a violation of section 166 is a misdemeanor punishable by fine, imprisonment, or both).

53. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1424, at G (Apr. 29, 2008).

54. *Id.*

55. *Id.*

56. *See* SafeState.org, Facts, *supra* note 1.

57. *See supra* notes 46-48 and accompanying text.

58. *See* SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1424, at G (Apr. 29, 2008) (stating that the court can use the threat of jail as a way to control defendants' conduct).