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Chapter 2: Criminal Background Checks for Recipients of In-Home Supportive Services

Julia Y. Capozzi

Code Sections Affected

Welfare and Institutions Code § 12301.8 (new), § 15660 (amended).
SB 692 (Ashburn); 2008 STAT. Ch. 2.

I. INTRODUCTION

Over 100,000 instances of elder and dependent abuse were reported to California agencies in 2006,¹ and the number is rising, leaving a trail of victims who have experienced financial ruin, grave physical danger, and in some cases, death.² The abuse occurs in private care facilities and in the homes of the elderly alike.³ One victim of neglect and theft advised, “pay attention to avoid becoming a victim. . . . [i]f you’re not alert, you can’t protect yourself.”⁴

The California Legislature responded to elder and dependent abuse by enacting Chapter 2, which allows elderly and dependent persons the opportunity to protect themselves by providing the means to obtain a criminal background check on unlicensed persons who provide in-home supportive services.⁵ This gives the elderly the information they need to make an informed decision about who should provide in-home supportive services.⁶

1. Willie Munroe, *Counties Report Increasing Number of Elder Abuse Cases*, ABC7NEWS.COM, June 4, 2007, http://abclocal.go.com/kgo/story?section=news/focus_on_solutions&id=5365077 (on file with the *McGeorge Law Review*).

2. See generally *Delaney v. Baker*, 20 Cal. 4th 23, 82 Cal. Rptr. 2d 609 (1999) (involving the death of an elderly woman due to severe neglect at a nursing home); Mary Twomey et al., *From Behind Closed Doors: Shedding Light on Elder Abuse and Domestic Violence in Late Life*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 73 (2005) (telling the story of Helen, a victim of domestic violence); Martin Ramey, Comment, *Putting the Cart Before the Horse: The Need to Re-Examine Damage Caps in California’s Elder Abuse Act*, 39 SAN DIEGO L. REV. 599 (2002); Munroe, *supra* note 1 (describing instances of home care abuse).

3. See generally Munroe, *supra* note 1 (describing instances of home care abuse); Jon Burstein, *Be Careful in Hiring Home Care; Licensed Agencies Costlier but Safer, Seniors Are Advised*, SUN-SENTINEL, Apr. 7, 2008, at 1A (describing two instances of home care abuse).

4. Munroe, *supra* note 1.

5. CAL. WELF. & INST. CODE § 12301.8(a) (enacted by Chapter 2).

6. *Id.*; see also SENATE THIRD READING, COMMITTEE ANALYSIS OF SB 692, at 2 (Jan. 17, 2008) (explaining that, according to a 2004 survey, SB 692 addresses instances of elder abuse, neglect, and financial exploitation).

II. BACKGROUND

A. Unlicensed Providers

A mere five percent of California's elderly reside in nursing home facilities, while the remaining ninety-five percent live alone or with relatives.⁷ Those who reside in nursing home facilities tend to have higher incomes than those living alone or with family.⁸ Of those in the lower income brackets, only a limited number qualify for government aid to pay for in-home supportive services,⁹ the rest must find a way to pay for the services themselves.¹⁰

Quality in-home supportive services from licensed providers are costly, and very few people have the financial ability to sustain such care.¹¹ Thus, many elderly and dependent adults are forced to employ unlicensed providers to assist them with their day-to-day activities.¹² However, resorting to unlicensed providers is risky and may lead to financial or physical abuse or neglect.¹³

B. In-Home Supportive Services: Non-Medical Domestic or Personal Care

The California Department of Social Services adopted the In-Home Supportive Services Program (IHSS), which provides eligible recipients in need of home health care with financial support to pay for those services.¹⁴

The California Welfare and Institutions Code, which establishes the guidelines for in-home supportive services, defines supportive services as domestic and non-medical personal care.¹⁵ In-home supportive services providers

7. Twomey et al., *supra* note 2, at 73.

8. *See generally id.*

9. *See generally* Ramey, *supra* note 2.

10. *Id.* at 607.

11. Marshall B. Kapp, *Improving Choices Regarding Home Care Services: Legal Impediments and Empowerments*, 10 ST. LOUIS U. PUB. L. REV. 441, 442 (1991) (stating that many elders resort to public assistant programs to receive home care services).

12. *See* Burstein, *supra* note 3 ("Senior citizens [who] . . . find in-home care through classified ads, fliers or by word of mouth . . . pay[] less for the services, but they are taking a risk with whom they are letting into their homes . . .").

13. *See id.* (telling the story of Lola Salzman, who was killed by her recently-hired home care provider); Munroe, *supra* note 1 (describing instances of elder abuse from home care providers).

14. California Department of Social Services, In-Home Supportive Services, <http://www.dss.cahwnet.gov/cdssweb/PG139.htm> (last visited Feb. 20, 2009) (on file with the *McGeorge Law Review*). A recipient qualifies for this assistance if he or she meets certain requirements. Specifically, the recipient must be a U.S. citizen, be a California resident, have a place to live, and not have personal property valued at more than \$2,000. California Department of Social Services, IHSS Eligibility Information, <http://www.dss.cahwnet.gov/cdssweb/PG135.htm> (last visited Feb. 20, 2009) [hereinafter IHSS Eligibility Information] (on file with the *McGeorge Law Review*).

15. CAL. WELF. & INST. CODE § 12300(b) (West 2001).

provide services ranging from laundry and housework to general hygiene and grooming.¹⁶

IHSS determines which services a recipient needs, and the county specifies how many hours such services require.¹⁷ Funds are then disbursed based on these hours, and the elderly, dependent, or authorized representative then uses these funds to pay for the support services rendered.¹⁸ The recipient of the funds is considered the employer and, as such, is required to “hire, train, supervise, and fire” the selected in-home supportive services provider.¹⁹

C. Existing Law

The Elder Abuse Act, enacted in 1991, authorizes the Department of Justice (DOJ) to conduct criminal background checks on unlicensed providers who supply “nonmedical domestic or personal care to an aged or disabled adult in the adult’s own home.”²⁰ A criminal background check reveals information relating to any felony or attempted felony²¹ involving sex offenses or those required to register as sex offenders.²² A report also reveals information relating to any incarceration within the preceding ten years for crimes involving the “[w]illful harm or injury to [a] child,”²³ “[c]orporal punishment or injury of [a] child,”²⁴ “crimes against elder or dependent adults,”²⁵ or the commission of “a theft, robbery, burglary, or any felony.”²⁶

The DOJ provides the employer with information about the provider’s criminal record or lack thereof.²⁷ If the report indicates that the provider has been convicted of a felony as described in Section 15660 of the Welfare and Institutions Code, the DOJ is required to notify the employer.²⁸ Likewise, the DOJ is required to notify the employer if a background check reveals no

16. *Id.*

17. IHSS Eligibility Information, *supra* note 14.

18. *Id.*

19. *Id.*

20. CAL. WELF. & INST. CODE § 15660(a)(2).

21. *Id.* § 15660(b)(1).

22. *Id.* § 15660(a).

23. *See id.* (stating that the background check will reveal if the person has been convicted of violating or attempting to violate Penal Code section 273a). Penal Code Section 273a punishes those who willfully harm or injure a child. CAL. PENAL CODE § 273a (West 2008).

24. *See* CAL. WELF. & INST. CODE § 15660(a) (stating that the background check will reveal if the person has been convicted of violating or attempting to violate Penal Code section 273d). Penal Code Section 273d punishes anybody who corporally punishes or injures a child. CAL. PENAL CODE § 273d.

25. *See* CAL. WELF. & INST. CODE § 15660(a) (amended by Chapter 2) (stating that the background check will reveal if the person has been convicted of violating or attempting to violate Penal Code section 368(a) or (b)). Section 368(a) and (b) of the Penal Code punishes those who commit crimes against elderly or dependent adults. CAL. PENAL CODE § 368 (West 1999).

26. CAL. WELF. & INST. CODE § 15660(a).

27. *Id.* § 15660(c)(1).

28. *Id.* § 15660(b)(1).

convictions or arrests.²⁹ The content of the report gives the employer the right to deny employment, but does not create an affirmative duty to hire the provider even if it reveals no convictions or arrests.³⁰

The DOJ charges a fee for providing the background check.³¹ If, however, the person requesting the background check is a Medi-Cal recipient, then the fee is divided between the county and the state.³²

III. CHAPTER 2

Chapter 2 allows a public authority or nonprofit consortium to aid an “employer” in obtaining a criminal background check from the DOJ upon request.³³ Under Chapter 2, an “employer” is an “aged or disabled adult,” or an authorized representative, who is ineligible for in-home benefits and receives services in the home by an unlicensed provider for non-medical, domestic, or personal care.³⁴ The person requesting the criminal background check is responsible for incurring the cost of the service and shall pay the costs incurred to the public authority or nonprofit consortium.³⁵

IV. ANALYSIS OF CHAPTER 2

Under the current system, wealthy elderly and dependent adults benefit from private in-home support or live-in nursing care facilities.³⁶ Elderly or dependent adults without the means to pay for services can rely on public programs to provide funds for in-home supportive services.³⁷ Those in between, however, are left with no assistance.³⁸ Chapter 2 remedies this disparity and closes the income gap by providing all elderly and dependent adults with the ability to obtain criminal background checks on unlicensed providers.³⁹

Chapter 2 allows the elderly and dependent adults in the middle income bracket to benefit from the safeguard of obtaining a criminal background check on potential in-home providers who supply non-medical domestic and personal

29. *Id.*

30. *Id.* § 15660(b)(2)-(3).

31. *Id.* § 15660(e) (“It is the intent of the Legislature that the Department of Justice charge a fee to cover its cost in providing services in accordance with this section . . .”).

32. *Id.* § 15660(d)(2)(A).

33. *Id.* § 12301.8(a)(1) (enacted by Chapter 2).

34. *Id.* § 12301.8(a)(2)-(3) (enacted by Chapter 2).

35. *Id.* § 12301.8(b) (enacted by Chapter 2).

36. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 692, at 8 (Feb. 15, 2008).

37. *Id.* at 9.

38. Office of Senator Roy Ashburn, *Ashburn’s Caregiver Background Checks Bill Passes Legislature Now Goes to the Governor*, Mar. 10, 2008, <http://cssrc.us/web/18/news.aspx?id=3886> [hereinafter Office of Senator Ashburn] (on file with the *McGeorge Law Review*).

39. *Id.*

care services.⁴⁰ Chapter 2 does this by redefining “employer” to include the elderly, dependent adults who are ineligible for IHSS benefits, or their authorized representatives.⁴¹

Chapter 2’s supporters agree that protecting elderly and dependent adults is a priority and believe that screening potential in-home caregivers will reduce the number of incidents of abuse and neglect, which have been rising at alarming rates.⁴² Proponents also advocate that finding quality in-home service providers will give elderly and dependent adults a higher quality of life.⁴³

Anecdotal evidence lends support to proponents’ arguments. In one unfortunate case, a woman in Florida hired an unlicensed caregiver from an advertisement, only to lose her life at the hands of this very-same caregiver three days later.⁴⁴ In another case, an elderly woman hired an unlicensed provider who stole nearly half of a million dollars from the woman’s bank accounts.⁴⁵ In the latter case, the caregiver had previously been convicted on fraud charges and for the exploitation of elderly.⁴⁶ An attorney from the Florida state Department of Children and Families stated that “the caregiver never would have been hired by a home health agency because of her criminal background.”⁴⁷ By allowing all elders and dependent adults to obtain criminal background checks on service providers, the tragedies that occurred in Florida can be avoided in California.⁴⁸

While Chapter 2 has enjoyed wide support, several concerns have been raised as to how the background checks would be financed.⁴⁹ Chapter 2’s opponents argue that passing the costs to “those who can least afford it” would be inherently unfair and contrary to public policy.⁵⁰ However, supporters contend that persons who would be requesting a criminal background check under Chapter 2 would not be those least able to afford it because those persons that are unable to afford background checks generally obtain background checks through the IHSS.⁵¹ Rather, Chapter 2 merely expands the definition of employer to include those making too much money to qualify for IHSS benefits.⁵²

40. *Id.*

41. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 692, at 2 (Jan. 23, 2008).

42. *See, e.g.*, Letter from Celia J. Esquivel, Chair, Cal. Comm’n on Aging, to Arnold Schwarzenegger, Governor, Cal. State (Sept. 25, 2007) (on file with the *McGeorge Law Review*); Letter from Thea Gast, President, Area Agency on Aging, to Roy Ashburn, Senator, Cal. State Senate (June 10, 2007) (on file with the *McGeorge Law Review*); Office of Senator Ashburn, *supra* note 38.

43. Letter from Anne M. Mack, Senior Senator, Cal. Senior Legislature, to Roy Ashburn, Senator, Cal. State Senate (June 1, 2007) (on file with the *McGeorge Law Review*).

44. Burstein, *supra* note 3.

45. *Id.*

46. *Id.*

47. *Id.*

48. CAL. WELF. & INST. CODE § 12301.8(b) (enacted by Chapter 2).

49. Letter from Rick Taylor, Assoc. Dir. of Pub. Policy, Aging Servs. of Cal., to Gloria Romero, Senator, Cal. State Senate (Apr. 17, 2007) (on file with the *McGeorge Law Review*).

50. *Id.*

51. *See* Letter from Karen Keesler, CAPA Legislative Advocate, Cal. Ass’n of Pub. Auths. for In-Home

V. CONCLUSION

Chapter 2 bridges the gap between those who do not qualify for IHSS services and those who can afford private care facilities. It allows all elderly and dependent adults, irrespective of income, to obtain criminal background checks on unlicensed domestic and personal care providers seeking employment in their home.⁵³

Chapter 2 seeks to reduce the incidents of elder and dependent abuse and neglect.⁵⁴ Finally, *all* elderly and dependent adults have the means to “pay attention to avoid becoming a victim.”⁵⁵

Supportive Servs., to Senate Appropriations Committee Members (May 4, 2007) (on file with the *McGeorge Law Review*) (stating that persons unable to pay for private care and who are also not eligible for IHSS, “lack the legal authorization to request a background check”).

52. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 692, at 2 (Jan. 23, 2008).

53. Office of Senator Ashburn, *supra* note 38.

54. *Id.*

55. Munroe, *supra* note 1.