

BILL ANALYSIS

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Date of Hearing: April 2, 2013

ASSEMBLY COMMITTEE ON JUDICIARY

Bob Wieckowski, Chair

AB 140 (Dickinson) - As Introduced:

January 17, 2013

As Proposed to be Amended

SUBJECT : FINANCIAL ABUSE: UNDUE INFLUENCE

KEY ISSUE : IN ORDER TO BETTER PROTECT SENIORS
AND DEPENDENT

ADULTS, SHOULD THE DEFINITION OF "UNDUE
INFLUENCE" BE MODIFIED
TO BETTER REFLECT CURRENT KNOWLEDGE ABOUT ELDER
FINANCIAL ABUSE?

FISCAL EFFECT : As currently in print this
bill is keyed
fiscal.

SYNOPSIS

This bill seeks to modify the existing definition
of "undue
influence" as it applies to the financial abuse
of elders and
dependent adults. Under the Elder and Dependent
Adult Civil

Protection Act (EDACPA), a person is guilty of
financial abuse

of an elder or dependent adult for
misappropriating the property
of an elder or dependent adult by undue
influence, as defined in

Section 1575 of the Civil Code. That section defines undue influence as (1) using a confidence or real or apparent authority for the purpose of obtaining an unfair advantage; (2) taking unfair advantage of another's weakness of mind; or (3) taking a grossly oppressive and unfair advantage of another's necessities or distress. According to the author, the existing definition has not been changed since 1872 and does not take account of contemporary understandings of financial elder abuse.

This bill, therefore, would create a definition of "undue influence" for purposes of EDACPA and relevant sections of the Probate Code; it would not change Civil Code Section 1575, which will still apply to contracts generally. This bill would define "undue influence" in terms of "excessive persuasion," and unlike the strict elements set forth in the existing definition, this bill would set forth a number of factors that the court should consider, including such things as the vulnerability of the victim, the apparent authority and tactics used by the influencer, the equity of the result and the extent to which it diverges from the victim's intent. The bill is sponsored by the

California Advocates for Nursing Home Reform. It is opposed by the Civil Justice Association of California, the California Chamber of Commerce, and other trade associations unless amended to address their concerns that the language of the bill is too broad. In an effort to partially address opposition concerns, the author will amend the bill in this Committee. The bill summary below reflects the bill as proposed to be amended.

SUMMARY : Modifies the definition of undue influence.

Specifically, this bill :

1) For purposes of the Elder and Dependent Adult Civil Protection

Act (EDACPA) and the Probate Code, defines "undue influence"

as excessive persuasion that causes another person to act or

refrain from action and results in inequity. In determining

whether a result was produced by undue influence, requires the

court to consider all of the following:

- a) The vulnerability of the victim;
- b) The influencer's apparent authority;
- c) The actions or tactics used by the influencer;
- d) The equity of the result.

2) Provides that the above definition of undue influence is

intended to supplement common law, without superseding or

interfering with that law.

3)Provides that nothing in this bill shall be construed to imply that an inequitable result, by itself, constitutes undue influence or excessive persuasion.

EXISTING LAW :

1)Defines "undue influence" as:

- a) Using a confidence or a real or apparent authority over another person for the purpose of obtaining an unfair advantage over that person;
 - b) Taking unfair advantage of another's weakness of mind;
 - or
 - c) Taking a grossly oppressive and unfair advantage of another person's necessities or distress.
- (Civil Code Section 1575.)

2)Establishes EDACPA to protect elderly and dependent adults

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from abuse. (Welfare & Institutions Code Section 15600 et seq. Unless stated otherwise, all further statutory references are to that code.)

3) Provides that "financial abuse" occurs when a person takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use, or with intent to defraud, or by undue influence, or when a person assists another in that conduct. (Sections 15610.30(a).)

4) When it is proven by a preponderance of the evidence that the defendant is liable for financial abuse of an elder or dependent adult, requires the court to award compensatory damages and attorney's fees and costs. (Section 15657.5.)

5) Provides that the execution or revocation of a will is ineffective if it was procured by duress, menace, fraud or undue influence. (Probate Code Section 6104.)

COMMENTS : This bill seeks to modify the definition of undue influence and apply that definition to actions brought under EDACPA and the Probate Code. By its own terms, the bill would not alter the common law definition of undue influence, but rather purports to supplement it.

While undue influence is defined under the Civil Code, the author notes that this definition dates back to 1872 and has not been updated since then. Moreover, there is no definition of undue influence in the Probate Code, even though the Probate Code provides that the execution or revocation of a will is

ineffective if it was procured by "undue influence."

Because of the general nature of the definition of "undue influence" in Civil Code Section 1575, a body of California case law has fleshed out the elements of "undue influence." Although it did not deal with an elderly victim, one of the seminal cases on undue influence in California is *Odorizzi v. Bloomfield* (1966) 246 Cal.App.2d 123. The court, in upholding the plaintiff's action, described undue influence as "a shorthand legal phrase used to describe persuasion which tends to be coercive in nature, persuasion which overcomes the will without convincing the judgment. 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

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boundaries of coercion. In this sense, undue influence has been called overpersuasion." (Id. at 130.) The court found that the characteristics of overpersuasion include: "(1) discussion of

the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on untoward consequences of delay, (5) the use of multiple persuaders by the dominant side against a single servient party, (6) absence of third-party advisers to the servient party, (7) statements that there is no time to consult financial advisers or attorneys." (Id. at 133.)

As with elements set forth in *Odorizzi*, the factors set forth in this bill focus on the nature and context of "persuasion." However, where *Odorizzi* speaks in terms of "coercive" or "high pressure" persuasion, especially pressure that works on a person's "mental, moral, or emotional weakness," this bill would define undue influence as any "excessive persuasion" that causes a person "to act or refrain from acting and results in inequity." In short, this bill appears not only to modify but arguably expands the definition of "undue influence" by incorporating considerations of the equity (or fairness) of the result as opposed to only looking to the methods and context of persuasion that overcome the will. An unfair result would not in itself be evidence of excessive persuasion, but it would be something that a court would consider along with the methods and context of persuasion.

Although opponents of this bill (as detailed

below) focus on the potential vagueness and over-breadth of the words "excessive" and "inequity," it should be noted that that is not all that the bill says. The bill lays out several factors that a court shall consider in determining whether the persuasion was "excessive" and whether it led to an "inequity." These factors appear to be more or less consistent with the language in Civil Code Section 1575 and the factors set forth in *Odorizzi*. That is, they look to the vulnerability of the victim (which the 1872 statute more prosaically defines as "weakness of mind;" to the apparent authority of influencer; to the influencer's tactics and the settings in which the persuasion took place; and the equity of the result in light of the victim's intent and the value of the things exchanged.

It is likely true, as opponents contend, that the definition and factors set forth in this bill are potentially more expansive

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than in existing statute and case law. The author contends,

however, that this new definition is needed in order to take account of our contemporary knowledge about how elders are unduly influenced and the nature and extent of financial elder abuse that occurs today - not that which might have occurred in 1872. Indeed, the existing definition of "undue influence" appears in the Civil Code provisions governing contracting generally; it was written well before the Legislature determined that elder financial abuse had become a significant problem and, accordingly, enacted EDACPA. The financial abuse provisions of EDACPA are premised, at least in part, on the view that financial agreements entered into by the elderly should not be subject only to the general rules of contract, but should instead be subject to special scrutiny. Moreover, the author and sponsor contend that the language of the existing definition does not adequately capture the nuances of elder financial abuse. For example, an elderly person's cognitive vulnerability may not rise to the level of "weakness of mind;" persons who take advantage of the elderly are not always persons with real or apparent authority; and an elderly person may have considerable assets and thus not suffer from "necessities or distress" as usually understood.

ARGUMENTS IN SUPPORT : According to the sponsor, the California Advocates for Nursing Home Reform (CANHR), the current definition of "undue influence" does not

adequately take account
of the realities of elder financial abuse.
Specifically, CANHR
notes that "undue influence" under the existing
statute must be
predicated on the existence of a "confidential
relationship,"
the victim's "weakness of mind," and "grossly
oppressive"
conduct that takes unfair advantage of another's
"necessities or
distress." According to CANHR, this terminology
does not
describe the kinds of situations that constitute
elder financial
abuse. For example, the perpetrators of elder
abuse are not
always in a "confidential relationship" with the
elder. In
addition, we would no longer characterize the
recognized
vulnerabilities of the elderly as "weakness of
mind." Finally,
the unfair advantage does not always arise out of
"necessities
or distress," because "predators prefer to target
victims with
readily available liquid assets." In short,
under the current
definition "elders who have capacity and
resources and who are
exploited by persons who are not confidants
cannot recover."

ARGUMENTS IN OPPOSITION UNLESS AMENDED : The
Civil Justice
Association of California, the California Chamber
of Commerce,

and a coalition of other business and trade associations oppose this bill unless amended. Opponents contend that the bill is overbroad, could result in unwarranted liability in many business transactions involving people over the age of 65 years, and further claim that existing law "appropriately encompasses the situation where a person with authority or apparent authority wrongfully takes advantage of a person's weakness of mind." This bill, opponents contend, would "broadly expand the definition of undue influence to any excessive persuasion by an expert that results in an inequity" based on "a long list of factors that are impossible for a business to know" when engaged in a transaction with a person. Opponents also contend that "AB 140 does not require that the person know of the person's weakness, or that the wrongdoer intended to use manipulative tactics in order to take the unfair advantage. This new broadly-structured definition could apply to such cases where a 65-year-old in a mid-life crisis buys a car, a house, stocks, electronics, or a boat. Under AB 140, businesses may need to ask a person's age, education or emotional state before engaging in a sales transaction in order to limit its liability." In sum, opponents believe that this bill is unnecessary and that

its broad definition of "undue influence" will lead to lawsuits in any situation "where a person has significant buyer's remorse."

Opponents write that they would remove their opposition only if the definition of "undue influence," on page 3, lines 18-20 of the bill in print is amended as follows:

"Undue influence" means the use of manipulative and unfair tactics intended to cause ~~excessive persuasion that causes~~ another person to act or refrain from acting and results in inequity.

However, this proposed amendment potentially creates two additional problems. First, the word "manipulative" is arguably just as vague as the words in the bill to which the opponents object. After all, any attempt at persuasion tries to manipulate the target of the persuasion to some extent. Second, the opposition's proposed amendment would require the elderly plaintiff to prove "intent" to cause an inequitable result. As a practical matter, this intent may be very difficult to prove, even where unquestionably coercive and high pressure tactics led to an obvious inequity.

PROPOSED AUTHOR'S AMENDMENT : Opponents' primary contention appears to be that this bill improperly focuses on the equity of the "results" of the persuasion instead of the tactics, conditions, and the overall context in which the persuasion took place. This would be a fair criticism if the bill allowed a court to find undue influence solely on the basis of an inequitable result, even where the result reflected the elderly person's intent and no coercive or oppressive tactics were used. In an effort to address this concern the author will take the following amendment in this Committee.

- On page 4 after line 2 insert a new subdivision which reads:

(e) Nothing in this section shall be construed to imply that an inequitable result, by itself, constitutes undue influence or excessive persuasion.

While this amendment may not satisfy the opposition, the Committee agrees that it addresses much of the opposition's concern without creating the potential pitfalls of the opposition's proposed amendment.

REGISTERED SUPPORT / OPPOSITION :

Support

(sponsor) California Advocates for Nursing Home Reform

Alzheimer's Association
California Alliance for Retired Americans
California Commission on Aging
California Police Chiefs Association
Consumer Federation of California
Institute on Aging
Older Women's League of California (OWL)
Ohlone/East Bay OWL
Three individuals

Opposition

California Association of Health Facilities
California Building Industry Association
California Business Properties Association
California Chamber of Commerce
California Manufacturers and Technology
Association

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Civil Justice Association of California
Western Electoral Contractors Association

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