

# Guide to Elder Abuse in California Probate Court



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Trust and Estates | Elder Law

## What kinds of Elder Abuse are prosecuted in California Probate Court?

The Probate court is the court that handles all trust, estate, and Conservatorship matters. Therefore, the Probate court handles elder abuse matters that fall within the context of a Trust, Probate, or Conservatorship.

Many elder abuse cases seen in the probate court are cases of *financial elder abuse*. This is because when allegations of elder financial abuse are made against a family member, it is often in the context of a trust, estate, or conservatorship matter.

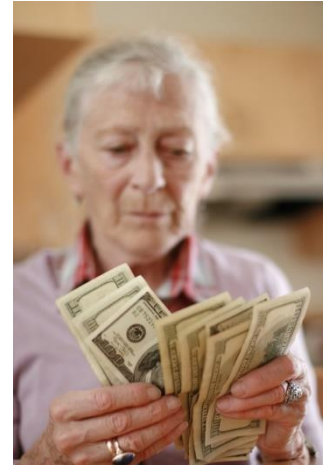
However, sometimes family members will seek Conservatorship of an elder because abuse (physical or financial) is occurring. All [Conservatorship](#) proceedings are handled in the Probate Court.

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# Elder Abuse and *Financial Elder Abuse* in the California Probate Courts

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## *How does California define elder abuse?*

Elder abuse can include physical abuse, isolation, financial abuse, emotional abuse, malnourishment, abandonment, and any other actions or *inactions* that cause harm to an elder.

## *Is the Probate Court the right court to file an action?*

The following kinds of elder abuse are dealt with in the Probate court only when they fall within the context of a Trust, Estate, Probate, or Conservatorship:

- Abuse by strangers
- Frauds and scams
- Self-neglect

## *What can the probate court do to remedy elder abuse?*

### **1. Conservatorship of the Person and/or Estate**

In cases of *physical* elder abuse where the elder is not capable of providing for their own healthcare, the Court can grant a Conservatorship of the Person. A Conservatorship of the Person grants an individual (the Conservator) the ability to make health and medical decisions for another person (the Conservatee). The court thoroughly investigates each Conservatorship action prior to granting Conservatorship and also oversees compliance reviews once a Conservatorship has been granted. The court also assigns the Conservatee his or her own attorney. Each case is fully assessed by a Court Investigator, and is overseen by the Probate Judge.

In cases of *financial elder abuse* where the victim is not capable of handling his or her own finances, the Court can appoint a Conservator of the Estate who

makes all financial decisions on behalf of the Conservatee. The probate court works with families and their respective attorneys to come to a solution that will protect the interests of the elder.

For more information about Conservatorships, refer to our [Guide to Conservatorships in California](#).

## 2. Restitution and Return of Property

If 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. When dealing with restitution and return of property in the context of elder financial abuse cases, it is important to choose an experienced probate attorney who specializes in probate litigation and has a solid history of maximizing restitution while working to *minimize* litigation, attorney's fees, and emotional stress.

## Financial Elder Abuse & Undue Influence FAQ

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### *How is Financial Elder Abuse defined?*

Elder financial abuse is defined as the taking of property of an elder to a wrongful use or with intent to defraud. Most cases of elder financial abuse seen in the Probate Courts are alleged to have been perpetrated by close family members.

Financial Elder Abuse, specifically, is defined by California Welfare & Institutions Code [15610.30](#) as:

- (1) 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 both.
- (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
- (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by **undue influence**, as defined in Section 15610.70.

## What is "undue influence"?

Undue influence means *excessive persuasion* that overcomes another person's free will and causes the person to do something or to *not do* something that causes an unfair result.



An example of undue influence might be an adult child who is a caregiver for an elderly parent applying pressure to the parent to change his or her estate plan in favor of that child. However, it is important to note that there must be evidence of such actions. For further details, refer to page 8: *Undue Influence and Flipping the burden of proof*.

What kinds of factors does the court use to determine if *Undue Influence* was applied?

- The plaintiff's vulnerability and whether the defendant knew or *should have known* of the plaintiff's vulnerability
- The defendant's apparent authority (how much control he/she has)
- The actions or tactics that the defendant used
- The unfairness of the result (ex: *was a will changed in favor of one child?*)

## What are 6 Common Ways Financial Elder Abuse Can Occur?

- Family/caregivers take advantage of tenuous mental capacity
- Trust funds are not used for the care of an elder
- Undue influence is applied to change a trust or will
- Personal belongings are taken
- Family/caregiver/friend uses bank funds
- Power of Attorney documents are signed when mental capacity is questionable and/or undue influence is present.

## *Can you file a financial elder abuse claim after the death of the victim?*

Yes. A significant number of Financial Elder Abuse cases heard by the Probate court take place after the alleged victim has passed. An attorney who specializes in Elder Financial Abuse can help you determine if you have *legal standing* to initiate an elder abuse action.

## Financial Elder Abuse Fact Patterns

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While each case is unique, often they share similar fact patterns.

Here are facts I frequently see in cases of alleged financial elder abuse. It is important to note that some of these actions can occur without being elder abuse.

- 1. Adult child is placed on bank accounts*
- 2. Estate Planning changes are made with tenuous Mental Capacity*
- 3. Adult child performs actions of “Trustee” while Parent is still living*
- 4. Property is transferred to another person late in life*
- 5. Adult child resides with Elderly Parent(s)*
- 6. Adult child acts as Caregiver to Elderly Parent(s)*
- 7. Multiple Estate Plan changes are made in a short amount of time*

## Evidence in a Financial Elder Abuse Claim

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To pursue a claim for financial elder abuse, *you need to have evidence*. Often, a case can be started even if hard evidence has not yet been obtained. Once a case has been filed with the probate court, effective ways to gather evidence include the use of subpoenas, discovery, depositions, and affidavits.

## **What kinds of evidence are useful in a Financial Elder Abuse claim?**

## 1. Medical Records

Medical records can be invaluable in providing evidence of elder abuse. Hospitals and other caregiving institutions often keep very detailed records of patient activity, including doctors' notes, notes on visitors, conversations with nurses and doctors, diagnosis, test results, etc. If there are any questions regarding one's mental capacity or state of health during a given period, medical records often shed light on the facts. A medical record may also offer direct evidence of undue influence occurring. In the context of a lawsuit, an *attorney can use subpoenas to gain access to medical records.*

## 2. Bank Statements

Bank statements, credit card statements, or other financial records are generally extremely important pieces of evidence in a financial elder abuse lawsuit. Once an elder abuse lawsuit has been filed with the probate court, *an attorney can use subpoenas to gain access to bank statements and other records kept by the bank such as notes or communications.* In certain circumstances, access to records may be blocked.

## 3. Affidavits

Affidavits are legal statements filed with the court by an individual. Affidavits provide the court with valuable context and information in a lawsuit. An affidavit is essentially a written statement, given under affirmation, by a person familiar with the matter at hand. For example, family members or friends may be able to provide corroboration on what occurred (or did not occur).

## 4. Discovery

Discovery is a legal proceeding used to formally gather information from another party within a lawsuit. That information may provide useful evidence. One purpose of discovery is to document all information/evidence should the parties proceed to trial. Additionally, discovery is meant to provide a clear picture of each party's



merits and that party's chances of success at trial. Thus, discovery can assist in reaching a settlement and avoiding trial.

In the context of an elder abuse proceeding, it is often possible to obtain information informally without the need for discovery. I work with clients to avoid discovery when possible as it has been criticized for driving up attorney fees.

## 5. Depositions

Like discovery, depositions are a more formal way of obtaining information from a party or witness. The purpose of depositions is to gather information necessary for proceeding to trial and establishing the strength of each side's case. Depositions are generally long days of questioning by an attorney. While they certainly have their place in the course of a lawsuit, I work with my clients and other parties to avoid depositions when possible.

## The Probate Court, Mental Capacity, & Standing



In an Elder Abuse action, you need a Judge who has a clear understanding of the issues within an Elder Abuse Lawsuit, including mental capacity. You also need to have the appropriate standing in order to successfully prosecute an elder abuse claim.

### The Probate Court's Understanding of Mental Incapacity

*How is an understanding of Alzheimer's, dementia and other mentally debilitating conditions important to the court?*

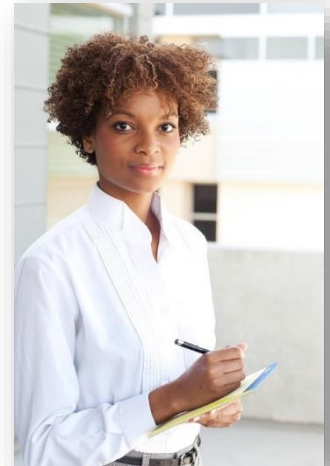
In most cases the Probate Court and the presiding Judge will have a good understanding of medical conditions that leave one unable to properly care for themselves. Probate Court Judges typically see a wide range of issues relating to

mental incapacity or disability. However, it is the duty of the attorneys and family members to bring forth any relevant medical documentation that can help inform the court in its decisions. It is also important for attorneys to schedule important hearings only on days when the appropriate judge is present. If there is a Judge Substitute Judge, he or she may not be

## The Importance of *Standing* in an Elder Abuse Action

### *Why is "standing" important in an elder abuse action filed in Probate Court?*

Standing is defined as **the capacity of a person or organization to bring a lawsuit** in court. An action or lawsuit filed by a party who lacks standing may be dismissed, and may also waste valuable time if a statute of limitations exists.



If an elder abuse action is filed in the probate court, one must have adequate standing to bring the case. Standing is based on the context in which the elder abuse action is brought. For example,

- *Is the action being brought within the context of a Trust or Estate? For example, an elder financial abuse action might be brought because an adult child used parents' trust funds for his or her personal expenses.*
- *Or, does the action involve financial abuse that caused injury to not only a person but also property?*
- *Or, does the elder abuse action involve the death of an elder?*

Standing is often complicated by situations that involve a combination of the above. In addition, Standing in the context of probate lawsuits also involves consideration of one's "interest" in a property as opposed to actual ownership.



**Speak with an attorney to determine if you have legal standing to bring an elder abuse lawsuit.**

## Undue Influence and Flipping the Burden of Proof

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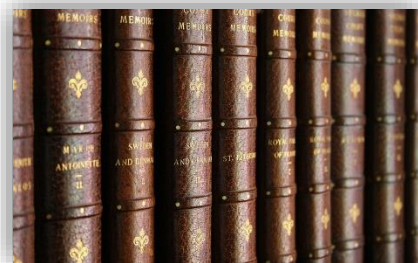


Financial Elder Abuse Cases involving allegations of undue influence can seem extremely complicated to one not familiar with the technicalities of the law. In practice, undue influence can also be difficult to prove.

Nevertheless, this is an extremely important topic in elder abuse cases because of the following: If, for example, there is someone trying to say that a document such as a will or trust is invalid due to the undue influence of another (the abuser), then the person who is making those allegations must *prove* undue influence. Proving undue influence can be difficult because undue influence typically occurs behind closed doors. Because evidence can be difficult to obtain, one tool in the arsenal of someone who is trying to prove undue influence is “flipping the burden of proof.” Instead of the person making the allegations having to prove undue influence the alleged abuser has to *disprove* undue influence and show that (for example) a will or trust was signed with the free will of the person who executed the document. This can be tough for the alleged abuser to do, so *flipping the burden is huge*.

### CASE LAW: Flipping the Burden

Case law regarding flipping the burden comes out of a case called the [Estate of Mann](#). There is a 3 factor test that you have to look at to whether or not someone can flip the burden.



**Factor 1** - Was the alleged abuser in a confidential relationship with the alleged victim? A confidential relationship can be hard to define, but has to do with whether or not they were in a fiduciary relationship. If they were in a

caregiving relationship, or if they were close family members, this can be a part of a confidential relationship.

*Factor 2 - Did the alleged abuser actively assist in the securing and drafting of the document in question?* In other words, did the alleged abuser draft the document for the victim or help draft the document for the victim? The second factor is tricky, and depends how active the abuser was in organizing, drafting, and procuring the controversial document.

*Factor 3 - How unfair was the result?* The last factor is the inequity of the result. Essentially, this means how fair or unfair was the result, and did someone *unduly* benefit? For instance, if there are four kids in a family and one of the kids drafted a will for mom or took mom to a lawyer leaving the entire estate to that kid - that could be viewed as inequitable. Now of course it may not be inequitable, depending on the circumstances in which it occurred, so you really have to look at the evidence to determine if this is indeed an *undue* benefit.

Essentially, if the person alleging undue influence can prove these factors then the burden of proof is flipped and the alleged abuser has to disprove undue influence. This is very complicated and difficult process with complex case law behind it, but if employed skillfully is a critical tool for prosecuting financial elder abuse. If you believe someone is being subjected to undue influence, or a trust or will was changed because of undue influence, always consult an attorney to ensure your rights are fully protected.

## How to Choose the Right Attorney for Your Elder Abuse Lawsuit or Matter

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- 1. Experience.** When choosing an attorney to represent you, the first and most important thing is to choose someone with significant experience not only in the practice area, but also in the courtroom where your case will be heard. A good working relationship with the judge, other attorneys in the county, and

a familiarity with the court can make a big difference in the outcome of the case.

2. **Personal Connection.** Working through an elder abuse lawsuit can be an emotional and stressful experience. Cases of elder abuse are also very personal in nature, often involving close family relationships and bringing up difficult past experiences. Thus, you will want an attorney you can trust. You'll also want someone you feel comfortable going to with questions and concerns about your case.
3. **Representation.** Will the attorney who does your consultation be the attorney who works with you? Often, a partner will bring in a client and hand it directly to an associate, with little further involvement.
4. **Price.** Don't be afraid to ask the attorney how they bill for time. You might also ask if associates draft documents, and what their rates are. Ask the attorney if you can come to them directly if you have questions about the billing.
5. **M.O. "Modus Operandi"** Attorneys are just people, and people are different. That said, in general when you are choosing between a handful of attorneys who are highly regarded in their field, it's important to choose one whose approach makes sense to You. Some attorneys thrive off the excitement (and stress) of going to trial, while others are more prone toward finding a global resolution before one gets to trial. Here are some questions to consider when looking for a probate elder abuse attorney:
  - How does the attorney like to litigate?
  - What is his or her approach?
  - Does he or she believe discovery and depositions are a must, or do they try to gather information more informally?
  - How quickly can you expect responses to questions during the course of your case?
  - Do they come recommended by other attorneys in the field?

- How often do they appear in front of the Judge that would see your case?
- How often do they settle cases vs. going to trial?
- What do the costs look like if you do go to trial?
- Does he or she strike you as an honest individual who you can trust to look out for your best interest?
- What is their fee structure? Hourly, contingency, or both?

## About Talbot Law Group, P.C.

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**We believe in honesty, integrity, and straightforward legal guidance.** At Talbot Law Group, our clients can expect the full support and skill set of our entire team. Tasks are optimized between attorneys to minimize client billing while maximizing results.

We also believe our client's best interest comes first. We work hand in hand with clients to resolve litigated matters and proceed toward trial only when absolutely warranted. We prioritize communicating with our clients in a timely manner. Work is always discussed with our clients prior to being performed. Bills are issued on a monthly basis and fees are never charged if you have questions or concerns about your bill.

## Meet our Team

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Matthew Talbot, Esq.



Matthew is a top rated Elder Law and Trust Attorney in Walnut Creek, CA. Matthew specializes in [Trust Law](#), [Conservatorships](#), [Financial Elder Abuse](#) and related [Probate](#) matters including [Estate Planning](#). Matthew began his career in the field of trusts and estates, and expanded into elder law, becoming a specialist in complex conservatorship and trust issues.

## Emily Nashban, Esq.



Emily is a California attorney with over a decade of professional legal experience. Prior to joining the Talbot Law Group, Emily worked for the prestigious San Francisco Law Firm Bartko Zankel Bunzel & Miller. Emily's outstanding work in the area of Trust and Estate Law have earned her the prestigious Superlawyers Rising Star Designation for 2018.

## Kurt Rifbjerg, Esq.



Kurt is a litigation specialist who brings to our firm a wealth of expertise in the probate field. His experience includes litigating trust and estate disputes in multiple California courts, Conservatorships in multiple counties, as well as filing and advising clients at the federal court level.

## Lena A. Van Leeuwen, Esq.



Lena is a California attorney with over fifteen years of professional legal experience. Lena specializes in drafting complex petitions and objections for litigated matters. Prior to joining our firm in 2016, Lena devoted her career to passionately advocating for client's rights in the immigration and family law fields, gaining extensive litigation experience not just in within the California courts, but Federal Courts as well.

Contact us at 925-322-1795 to set up a consultation or email our Client Intake Coordinator at: [elizabeth@talbotlawpc.com](mailto:elizabeth@talbotlawpc.com)