



## TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

### ***RECOVERY OF FEES AND COSTS FOR GUARDIAN AD LITEM IN ELDER ABUSE ACTIONS***

#### **LEGISLATIVE PROPOSAL (T&E-2012-05)**

To: Saul Bercovitch, Legislative Counsel, State Bar Office of Governmental Affairs

From: Barry Matulich, Trusts and Estates Section Executive Committee

Date: April 17, 2011

Re: Recovery of fees and costs for guardian ad litem in elder abuse actions  
A proposal to amend §§ 15657 and 15657.5 of the Welfare and Institutions Code

#### **SECTION ACTION AND CONTACTS:**

Date of Approval by Section Executive Committee: April 17, 2011

Approval vote: For: 26 Against: 0 Abstain 2

<b>Contact Information:</b>	<b>Section Legislative Co-Chairs:</b>
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## **PROPOSAL AND REASONS FOR PROPOSAL**

The California Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) (Welfare and Institutions Code, Div. 9, Part 3, Ch.11) currently contains statutory provisions pertaining to fees and costs that arise in financial abuse actions and physical abuse or neglect actions. The existing statutes expressly allow, under the circumstances provided, for the recovery of conservator fees devoted to the litigation of those claims, under the definition of “costs.” The term “costs” is “not limited to” fees for the services of the conservator, but some courts do not permit a court appointed guardian ad litem to recover fees for the services of the guardian ad litem that are devoted to the litigation of such claims, because those fees are not expressly written into the statutes.

Because a conservator and guardian ad litem are essentially performing the same function in such cases, there should be no distinction in providing for the recovery of fees for one but not the other. This proposal would amend the relevant statutes in the Welfare and Institutions Code to provide expressly that the term “costs” includes reasonable fees for the services of both a conservator and a guardian ad litem devoted to the litigation of a claim under those statutes.

**HISTORY**: The Trusts and Estates Section Executive Committee is not aware of any similar bill that has been introduced either in this session or during a previous session.

**IMPACT ON PENDING LITIGATION**: None known.

**LIKELY SUPPORT & OPPOSITION**: There is no known opposition and the Trusts and Estates Section Executive Committee does not anticipate any opposition to this proposal.

**FISCAL IMPACT**: There is no anticipated fiscal impact.

**GERMANENESS**: The proposal relates to the civil prosecution by attorneys on behalf of victims of financial and physical elder abuse by conservators and guardians ad litem, which is a matter involving and requiring the special knowledge, training, experience and technical expertise of the members of the Trusts and Estates Section Executive Committee.

## TEXT OF PROPOSAL

SECTION 1. Section 15657 of the Welfare and Institutions Code is amended to read:

Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse as defined in Section 15610.63, or neglect as defined in Section 15610.57, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, the following shall apply, in addition to all other remedies otherwise provided by law:

(a) The court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of [inserted text begin]both[inserted text end] a conservator [inserted text begin]and a guardian ad litem, or either of them,[inserted text end] devoted to the litigation of a claim brought under this article.

(b) The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney's fees permitted under this section may be imposed against an employer.

SEC. 2. Section 15657.5 of the Welfare and Institutions Code is amended to read:

(a) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to compensatory damages and all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of [inserted text begin]both[inserted text end] a conservator [inserted text begin]and a guardian ad litem, or either of them,[inserted text end] devoted to the litigation of a claim brought under this article.

(b) Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, and where it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, in addition to reasonable attorney's fees and costs set forth in subdivision (a), compensatory damages, and all other remedies otherwise provided by law, the limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply.

(c) The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any punitive damages may be imposed against an employer found liable for

financial abuse as defined in Section 15610.30. This subdivision shall not apply to the recovery of compensatory damages or attorney's fees and costs.

(d) Nothing in this section affects the award of punitive damages under Section 3294 of the Civil Code.

(e) Any money judgment in an action under this section shall include a statement that the damages are awarded based on a claim for financial abuse of an elder or dependent adult, as defined in Section 15610.30. If only part of the judgment is based on that a claim, the judgment shall specify what amount was awarded on that basis.\*

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\* Subdivision (e) of Section 15657.5 becomes operative on January 1, 2012. (AB 2619 (Block), Chapter 64, Statutes of 2010).