

RESOLUTION 04-08-2012

DIGEST

Powers of Attorney: Attorney Fees as Remedy for Bad Faith

Amends Probate Code section 4231.5 to allow the Court to impose attorney fees and costs whenever a person in bad faith used a power of attorney to commit elder or dependent abuse.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 4231.5 to allow the court to impose attorney fees and costs whenever a person in bad faith used a power of attorney to commit elder or dependent abuse. This resolution should be approved in principle because it would allow the same recovery for the misuse of a power of attorney that is already allowed for decedent’s estates, conservatees, minors and trusts.

In 2011, Probate Code section 859 was amended to provide protection in a decedent’s estate, to conservatees, minors and trusts against the use of undue influence in the commission of elder or dependent adult financial abuse, as defined in section 15610.30 of the Welfare and Institutions Code. Probate Code section 4231.5 does not allow the same protection for the principal of a power of attorney. This proposed amendment would correct that and allow the same protection for the principal of a power of attorney whenever a person in bad faith uses a power of attorney to take, conceal, or dispose of property by undue influence or by financial elder or dependent adult abuse.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 4231.5 to read as follows:

- 1 § 4231.5
- 2 (a) If the attorney-in-fact breaches a duty pursuant to this division, the attorney-in-fact is
- 3 chargeable with any of the following, as appropriate under the circumstances:
- 4 (1) Any loss or depreciation in value of the principal’s property resulting from the breach
- 5 of duty, with interest.
- 6 (2) Any profit made by the attorney-in-fact through the breach of duty, with interest.
- 7 (3) Any profit that would have accrued to the principal if the loss of profit is the result of
- 8 the breach of duty.
- 9 (b) If the attorney-in-fact has acted reasonably and in good faith under the circumstances
- 10 as known to the attorney-in-fact, the court, in its discretion, may excuse the attorney-in-fact in
- 11 whole or in part from liability under subdivision (a) if it would be equitable to do so.

12 (c) If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed
13 of property belonging to a principal under a power of attorney, or has taken, concealed, or
14 disposed of property by the use of undue influence in bad faith or through the commission of
15 elder or dependent adult financial abuse, as defined in Section 15610.30 of the Welfare and
16 Institutions Code, the person shall be liable for twice the value of the property recovered by an
17 action under this part. Additionally, the court shall order that a person liable bear reasonable
18 attorney's fees and costs. ~~The remedy~~ remedies provided in this section shall be in addition to
19 any other remedies available in law to the principal or any successor in interest of the principal.

(Proposed new language underlined, language to be deleted stricken)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

Existing Law: Currently Probate Code section 4231.5 does not reflect the amendment to Probate Code section 859 enacted in 2011, which provides additional protections against the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse, as defined in Section 15610.30 of the Welfare and Institutions Code, as well as currently proposed amendments to Probate Code section 859.

This Resolution: Under the proposed amendment, Probate Code section 4231.5 would reflect the amendment to Probate Code section 859.

The Problem: Principals are not being provided the same protections against the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse, as defined in Section 15610.30 of the Welfare and Institutions Code, as are the estate of a decedent, conservatee, minor, or trust under Probate Code section 859.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

AUTHOR AND/OR PERMANENT CONTACT: Mallory Lass, Goff, Conway-Spatola Law Group, 1601 Response Road, Suite 360, Sacramento, CA 95815, (916) 923-3442; email: mlass@sactrustattorneys.com

RESPONSIBLE FLOOR DELEGATE: Mallory Lass

SECTION COMMENTS TO RESOLUTION 04-08-2012

TRUSTS & ESTATES SECTION OF THE STATE BAR OF CALIFORNIA

DISAPPROVE: The Executive Committee of the Trusts & Estates Section (TEXCOM) takes no position with regards to the portion of this resolution that proposes “Additionally, the court shall order that a person liable bear reasonable attorney’s fees and costs.” However, TEXCOM recommends disapproval of the portion of this resolution that provides for liability under Probate Code section 4231.5 for undue influence and for elder and dependent adult financial abuse. The damages for undue influence and for elder and dependent adult financial abuse are already provided in their respective code sections and there is no restriction for applying those measures of damages against an agent under a power of attorney who is found to have committed those acts. The proposed change adds complication to the power of attorney law by incorporating damages for undue influence in bad faith and elder and dependent adult financial abuse, which are already provided for in other code sections without adding anything substantive.

Disclaimer

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar’s Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.
