

RESOLUTION 04-09-2012

DIGEST

Attorney’s Fees: Remedy for Bad Faith

Amends Probate Code section 859 to allow the Court to hold a person liable for reasonable attorney fees and costs when the Court has found the person has committed financial elder abuse.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 859 to allow the Court to hold a person liable for reasonable attorney fees and costs when the Court has found the person has committed financial elder abuse. This resolution should be approved in principle because it allows the courts to impose reasonable attorney fees and costs, in addition to the remedies already allowed, against a person who has wrongfully acted against an elder or dependent adult.

Presently, the allowable remedy is double damages; however, sometimes double damages do not cover the costs for the attorney and other costs of litigation an elder or dependent adult may incur in trying to recover the property that was wrongfully taken. This amendment seeks to correct the problem that the full amount of the damages to the elderly or dependent adult might not be recovered due to the inherent costs of litigation.

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 859 to read as follows:

- 1 § 859
- 2 If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of
- 3 property belonging to the estate of a decedent, conservatee, minor, or trust, or has taken,
- 4 concealed, or disposed of property by the use of undue influence in bad faith or through the
- 5 commission of elder or dependent adult financial abuse, as defined in Section 15610.30 of the
- 6 Welfare and Institutions Code, the person shall be liable for twice the value of the property
- 7 recovered by an action under this part. Additionally, the court shall order that a person liable
- 8 bear reasonable attorney's fees and costs. ~~The remedy~~ remedies provided in this section shall be
- 9 in addition to any other remedies available in law to a trustee, guardian or conservator, or
- 10 personal representative or other successor in interest of a decedent.

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

Existing Law: Currently Probate Code section 859 provides a remedy of double damages for property that was in bad faith wrongfully taken, concealed, or disposed of, but this section does not take into account the costs involved for the wronged party in recovering the property, particularly when the person wronged is a vulnerable member of society.

This Resolution: Amends Probate Code section 859, to provide vulnerable members of society with an additional remedy against a person who has in bad faith wrongfully taken, concealed, or disposed of property belonging to them, by allowing the court to order attorney's fees and costs against the person or persons that acted wrongfully in bad faith.

The Problem: When property is in bad faith wrongfully taken, concealed, or disposed of, often the best and only person that can seek redress is the attorney. Despite the remedy of double damages, the attorney's fees that are incurred seeking redress often greatly exceed double the value of the property that was in bad faith wrongfully taken, concealed, or disposed of.

The rightful property owners should not have to bear the burden of deciding whether they should attempt to recover property that is rightfully theirs because the attorney fees and costs might exceed the value of the property. People or persons acting wrongfully and/or in bad faith, should not benefit from their behavior because it is too costly for the wronged party to seek redress.

Without changing Probate Code section 859 to provide vulnerable members of society with the potential remedy of attorney's fees and costs, we leave open the possibility that their property will not be recovered, or that they will incur costs that exceed the value of their property. Thus rewarding wrongdoers that take, conceal, or dispose of property that does not belong to them.

IMPACT STATEMENT

This resolution affects Probate Code section 4231.5, subdivision (c), because the language of Probate Code section 859 is mirrored.

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