

RESOLUTION 6-04-2010

DIGEST

Elder Abuse: Double Damages

Amends Probate Code section 859 to make double damages available when the court has found that undue influence or elder/dependent adult abuse has occurred.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 859 to make double damages available when the court has found undue influence or elder/dependent adult abuse has occurred. This resolution should be approved in principle because it applies the intent of the legislature to include double damages as a remedy in all elder abuse actions involving a wrongful taking.

By including the phrase “undue influence and elder/dependent abuse” in the statute, the Code would end the current ambiguity that exists between the Probate Code and Welfare & Institutions Code as to whether double damages are available against someone who has exerted undue influence or engaged in elder/dependent adult abuse. This resolution only applies to actions brought under Probate Code section 850.

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 or by the use of undue influence or the
- 3 commission of elder or dependent adult abuse as defined by Welfare & Institutions Code
- 4 §15600, et seq. wrongfully taken, concealed, or disposed of property belonging to the
- 5 estate of a decedent, conservatee, minor, or trust, the person shall be liable for twice the
- 6 value of the property recovered by an action under this part. The remedy provided in this
- 7 section shall be in addition to any other remedies available in law to a trustee, guardian or
- 8 conservator, or personal representative or other successor in interest of a decedent.

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

PROPONENTS: Beverly Hills Bar Association
Los Angeles County Bar Association

STATEMENT OF REASONS

Existing Law: A person who acts in bad faith and wrongfully takes or conceals or disposes estate or trust assets is liable for twice the value of the property in an action by the trustee or the personal representative of the estate of a ward or conservatee or of the estate.

This Resolution: Would end any ambiguity that double damages would be available if the person used undue influence or committed elder abuse in taking, concealing, or disposing trust assets or the estate assets of a ward or conservatee or other estate assets. Further, this remedy would be available if the action was made by a beneficiary or the trustee.

The Problem: This provision was originally enacted in one form in 1850. The purpose was to allow double damages if there was a wrongful taking, concealing or disposing of the estate assets of a ward or conservatee. Prior provisions in the Probate Code prescribed double damages as to trust, conservatorship, and estate matters.

There are no reported cases interpreting this provision. There has been at least one unreported appellate opinion that holds that the bad faith action of an individual, using undue influence on an elderly parent, is not sufficient to allow a trial court to award double damages. The Court of Appeal's analysis disregards the essential nature of undue influence. (See, e.g., *Estate of Sarabia* (1990) 221 Cal.App.3d 599, 607 ["to know what influence was 'undue' requires knowledge of what influence, if any, would qualify for a more benign interpretation"]; see also 12 Witkin, *Summary of Cal. Law* (9th ed. 1990) Wills and Probate, §187, pp. 216-217.) It has long been held that property taken by undue influence is property "wrongfully obtained" (*Grey v. Brennan* (1905) 147 Cal. 355, 358). Applying the notion of property "wrongfully taken" used in statutes such as section 16249, subdivision (b) to any taking of property through undue influence seems most faithful to available indicia of legislative intent.

Elder abuse, as defined in the Welfare and Institutions Code includes physical abuse, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering. (Welf. & Inst. Code, §15610.07.) Financial abuse is defined as a situation where a person has the care or custody or stands in the position of trust and takes property for wrongful use or with the intent to defraud or, as a third party, refuses to release the property in bad faith. (Welf. & Inst. Code, §15610.30.)

If the appellate court's view is embraced in other cases, it would threaten to undercut the broad protections the Legislature patently intended when it enacted no fewer than three statutes that served to put potential wrongdoers on notice of their exposure to double liability for bad faith taking of trust or estate property in all trust, guardianship, and conservatorship cases.

Nevertheless, one way to cure the situation is to amend the provision to include both undue influence and elder abuse so that the Courts would not be placed in a dilemma over when this statute applies.

IMPACT STATEMENT

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

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COUNTER ARGUMENTS

TRUSTS AND ESTATES SECTION

RECOMMENDATION: DISAPPROVE

The Executive Committee of the Trusts & Estates Section recommends disapproval of this resolution because it proposes creation of a punitive remedy of double damages where the only thing proven is undue influence. Due to the nature of undue influence, it is possible that undue influence might occur by negligent acts on the part of the person accused of undue influence. Such negligent acts should not be punishable with double damages. The current provisions of the Probate Code provide for double damages where there is bad faith shown in connection with a wrongful taking, conversion, etc. and there is no need for additional language not tied to a showing of bad faith.

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 Governors 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.