RESOLUTION 05-01-2020

DIGEST
Undue Influence: Bad Faith Finding Required for Doubling Damages
Amends Probate Code section 859 to require that a party seeking double damages on a theory of undue influence must prove bad faith.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Probate Code section 859 to require that a party seeking double damages on a theory of undue influence must prove bad faith. This resolution should be approved in principle because it clarifies that for a party to obtain double damages for undue influence, that party must show that the undue influence was in bad faith.

When section 859 was added to the Probate Code, it provided that if a person was found to have wrongfully taken, concealed, or disposed of property in bad faith, then the person would be liable for twice the value of the property recovered. (Stats. 2001, ch. 49, § 1.) Probate Code section 859 was subsequently amended to extend the application of the statute to cases where the property was taken by undue influence, in bad faith, or through elder or dependent adult financial abuse, because courts would not apply the enhanced remedy when there was a showing of undue influence or elder abuse. (Stats. 2011, ch. 55.)

In *Levin v. Winston-Levin* (2019) 39 Cal.App. 5th 1025 (*Levin*), the decedent's daughter filed a petition alleging that trust property was obtained through undue influence and sought an order compelling the return of the trust property pursuant to Probate Code, section 850. The daughter also requested an award for double damages pursuant to Probate Code, section 859. The trial court found that the property was acquired by undue influence and ordered that the property be returned to the trust, but denied the claim for double damages on the grounds that there was no showing that the undue influence was in bad faith. The decedent's daughter appealed, claiming that the court's finding of undue influence compelled a finding of financial elder abuse, which should have compelled an award of double damages under Probate Code, section 859.

In *Levin*, the court found that Probate Code, section 859 provides for an award of damages where the person is found to have: 1) wrongfully taken the property in bad faith, 2) taken the property by use of undue influence in bad faith, or 3) taken the property through financial abuse of an elder or dependent adult. The court considered the plain meaning of the statute as well as the legislative intent for the amendment to Probate Code, section 859, and found that allowing double damages on a showing of undue influence without bad faith, was an absurd result of the legislature's intent, and contrary to the plain meaning of the statute.

The proposed resolution seeks to clarify the law consistent with the legislative intent of Probate Code, section 859, and codify the holding in *Levin*, that when seeking double damages there must be a showing the undue influence was in bad faith.

Therefore, the resolution should be approved in principle.

TEXT OF RESOLUTION

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

§ 859

(a) If a court finds that a person has, in bad faith:

(1) Wrongfully ~~wrongfully~~ taken, concealed, or disposed of property belonging to a conservatee, a minor, an elder, a dependent adult, a trust, or the estate of a decedent, or

(2) Taken ~~or has taken~~, concealed, or disposed of the property by the use of undue influence, or

(3) Taken, concealed, or disposed of property ~~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,

The ~~the~~ person shall be liable for twice the value of the property recovered by an action under this part.

(b) In addition, except as otherwise required by law, including Section 15657.5 of the Welfare and Institutions Code, the person may, in the court's discretion, be liable for reasonable attorney's fees and costs.

(c) The remedies provided in this section shall be in addition to any other remedies available in law to a person authorized to bring an action pursuant to this part.

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

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: Probate Code section 859 permits an award for double damages and attorney's fees in certain types of cases. This Resolution clarifies that in order for the enhanced remedies under Probate Code section 859 to be awarded through the commission of elder or dependent adult financial abuse there must be a finding of bad faith for these damages to apply to an ordinary undue influence case. The recent case of *Levin v. Winston-Levin* (2019) 39 Cal.App.5th 1025, dealt with Probate Code section 859 and clarified that a showing of bad faith was required in order to obtain double damages where the claim is based on a theory of undue influence amounting to financial abuse of an elder. Appellant in that case argued that only the mere showing of undue influence that amounted to financial elder abuse under Welfare and Institutions Code section 15657.5 was required, and that an additional showing of bad faith was not required. The Court disagreed and imposed a finding of bad faith on this prong of the statute as well.

The Solution: This Resolution clarifies, as the *Levin* Court held, that there are three prongs to Probate Code section 859. It separates the Probate Code section 859 into subparagraphs, identifies the three prongs by inserting subparagraph numbers, clarifies that each prong is in the alternative, and provides that a finding of bad faith must support any of the three prongs.

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

CURRENT OR PRIOR RELATED LEGISLATION
Probate Code section 859 was added by Stats.2001, c. 49 (S.B.669), § 1, and amended by Stats.2011, c. 55 (A.B.354), § 1 and Stats.2013, c. 99 (A.B.381), § 1. No current legislation has been proposed.

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RESOLUTION 05-02-2020

DIGEST
Inventory of Estate: Requirements for Inventory and Appraisal of Decedent's Estate
Amends Probate Code section 8802 to clarify that the inventory and appraisal should include each item in the decedent's estate at the time of the decedent's death.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Probate Code section 8802 to clarify that the inventory and appraisal should include each item in the decedent's estate at the time of the decedent's death. This resolution should be disapproved because the Probate Code already provides that the inventory and appraisal shall include all property owned by the decedent at the time of decedent's death to be administered in the decedent's estate.

Under existing law, the Probate Code requires an administrator to file an inventory and appraisal within four months of the issuance of letters to a personal representative. (Prob. Code, § 8800.) The inventory and appraisal must include all property to be administered in the decedent's estate. (Prob. Code, § 8850.). The inventory and appraisal must separately list each item and state the fair market value of each item at the time of the decedent's death. (Prob. Code, § 8802.) The administrator is required to file a supplemental inventory and appraisal if additional estate assets are discovered later. (Prob. Code, § 8801.)

The resolution would amend Probate Code section 8802 to add language to clarify that the inventory and appraisal should include each item in the decedent's estate at the time of death. The resolution states that there is an ambiguity in the existing statute that might permit a personal representative to argue that the personal representative need not list all estate assets that the decedent owned at the time of death.

However, existing law clearly requires that the inventory and appraisal include all property to be administered in the decedent's estate. (Prob. Code, § 8850.) If additional property is found, the personal representative is required to file a supplement listing those assets. Probate Code section 8802 addresses the requirements of drafting an inventory and appraisal and makes it clear that each item must be listed and must include a fair market value as of date of death. It is not necessary to add the suggested language because the law already requires the inventory and appraisal to include all property to be administered in the decedent's estate.

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 8802, to read as follows:

§ 8802

The inventory and appraisal shall separately list each item in the decedent's estate at the time of the decedent's death, and shall state the fair market value of the item at the time of the decedent's death in monetary terms opposite the item.

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

PROPONENT: East Bay Trusts and Estates Lawyers

STATEMENT OF REASONS

The Problem: Existing law requires the personal representative of an estate to file an inventory and appraisal stating the decedent's valued assets as of the time of death. Probate Code section 8802 requires the personal representative to list: (1) each item in the decedent's estate and (2) the fair market value of each item at the time of the decedent's death. As conjoined, the statute is ambiguous as to the timeframe in the first clause. The statute does not clearly state that the personal representative must list each item that was in the decedent's estate at the time of the decedent's death. Thus, a personal representative may argue that they need only list each item in the decedent's estate at the time that the personal representative became responsible for the estate, i.e., after the order of appointment and issuance of letters. By leaving a gap between the time of decedent's death and appointment of the personal representative, the personal representative may attempt to delay, absolve, or excuse their failure to inventory, appraise, and later account for items that the decedent owned as a part of the estate at the time of death.

The Solution: The amendment eliminates the ambiguity that a personal representative need not list in the inventory, and subsequently administer, all estate assets that the decedent owned at their time of death. The inventory and appraisal of a decedent's estate is supposed to include all estate assets that the decedent owned when they died. (See, e.g. *Estate of Downing* (1982) 134 Cal.App.3d 256, 265 ["the word 'inventory' as used in both [former Probate Code sections] must be similarly defined in each as an appraisal *of the items comprising the estate* at their value *as of the date of death*"] (Emphasis added.); see also Prob. Code, § 8850, subd. (a) ["The inventory, including partial and supplemental inventories, shall include all property to be administered in the decedent's estate"].) If, however, a personal representative were to argue that they need not inventory all estate assets since the time of the decedent's death, pursuant to the current statute, the personal representative may abdicate duties to marshal, protect, and account for some assets, thus harming beneficiaries and heirs who may have no knowledge of the assets or a need to seek redress. The amendment will thwart interpretation and abuse divergent from the plain language of the statute.

IMPACT STATEMENT

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

CURRENT OR PRIOR RELATED LEGISLATION
Probate Code section 8802 has not been amended since it was enacted in 1990 by Assembly Bill 759. (1990 Cal. A.B. 759, 1990 Cal. A.L.S. 79, 1990 Cal. Stats. ch. 79 (Enacted May 1, 1990).) It continued Section 8802 of the repealed Probate Code without change. (1988 Cal. A.B. 2841, 1988 Cal. A.L.S. 1199, 1988 Cal. Stats. ch. 1199 (Enacted September 22, 1988).) There is no other current or prior legislation of which we are aware which sought to address the same or a similar problem.

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COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

DISAPPROVE

This Resolution proposes a change to Probate Code section 8802 to specify that the inventory and appraisal shall separately list each item in the decedent's estate at the time of the decedent's death, and shall state the fair market value of the item at the time of the decedent's death.

TEXCOM disapproves this Resolution because the concerns behind this Resolution are already sufficiently addressed by current law, and the statutory language proposed in the Resolution creates a potential ambiguity in the relevant law.

As it exists now, section 8802 does not address what property is or is not to be included in the inventory. It sets forth that each "item" is to be listed separately and that the fair market value of each item at the time of death is to be listed opposite of the item. Accordingly, section 8802 deals with the formatting and overall presentation of the inventory and appraisal.

The nature of the property to be included in the inventory is directly addressed in Probate Code section 8850. Subdivision (a) of section 8850 states: "The inventory, including partial and supplemental inventories, shall include all property to be administered in the decedent's estate." This language identifies that the inventory is to include all of a decedent's property at death subject to administration. (See Probate Code section 7001 ["The decedent's property is subject to administration under this code, except as otherwise provided by law, and is subject to the rights of beneficiaries, creditors, and other persons as provided by law."].)

In addition, the proposed change to section 8802 may cause confusion as it would create two separate statutory provisions addressing what is to be generally included in the inventory. On

one hand, the Resolution would provide that the inventory is to list property "in the decedent's estate at the time of the decedent's death . . . ." On the other hand, section 8850 would state that the inventory is to list "all property to be administered in the decedent's estate." While these two provisions may not necessarily conflict with one another, the better approach—if any change is needed at all—would be to amend the existing language in section 8850 rather than section 8802. This approach would also be consistent with the Judicial Council form inventory and appraisal (DE-160) instructions to reference section 8850 for the items to be included in the inventory.

RESOLUTION 05-03-2020

DIGEST
Wills: Witness Attestation
Amends Probate Code section 6110 to require attesting witnesses to print or type their name, in addition to their signature, on wills.

RESOLUTION COMMITTTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
No similar resolutions found.

Reasons:
This resolution amends Probate Code section 6110 to require attesting witnesses to print or type their name, in addition to their signature, on wills. This resolution should be approved in principle because it provides an additional safeguard so that attesting witnesses can later be accurately identified should a concern arise regarding the validity of a will.

The right to make a will is one of statutory creation. California law generally requires that two witnesses sign the will attesting to having witnessed the testator sign or acknowledge the will. (Prob. Code, § 6110, subd. (c)(1).) This requirement is designed to ensure that the will is indeed signed by the testator as a valid will. (*Estate of Seaman* (1905) 146 Cal. 455.) Current law does not require any additional witness identification, other than their signature.

This resolution seeks to solve a reoccurring problem of identifying witnesses to a will when their signatures are unclear or otherwise illegible. This resolution seeks to solve the problem by requiring the witnesses to also print or type out their name. This resolution avoids a potential adverse effect of requiring witnesses to print or type their name by further providing that the absence of a printed or typed witness's name will not otherwise invalidate the will.

Quite often attesting witnesses will need to be located years after a will was executed when there is a challenge to the validity of a will. Unfortunately, individual signatures are not always legible or recognizable. Individuals who could recognize the witness signatures may have passed away or no longer be unavailable. This places a burden on counsel, and all parties having an interest in the prompt resolution of any challenge to the will, in attempting to ascertain, find and locate the attesting witnesses. The inclusion of a printed or typed name of the witness whose signature may well be illegible will likely aid in determining the location of the witness. While the testimony of a subscribing witness is not required to authenticate a will, and other evidence may be provided for authentication (Evid. Code, §§ 1411, 1412), proof of the genuineness of the subscribing witness' signatures is sufficient to create a presumption of due execution. (*Estate of Ben-Ali* (2013) 216 Cal.App.4th 1026, 1034.) Accordingly, the statutory change proposed in the resolution of a typed or printed name of each witness to a will provides an important tool in determining the location of attesting witnesses.

There are no similar pending bills, nor any known similar legislation found in the last three years.

Therefore, this resolution should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 6110, to read as follows:

§ 6110

(a) Except as provided in this part, a will shall be in writing and satisfy the requirements of this section.

(b) The will shall be signed by one of the following:

(1) By the testator.

(2) In the testator's name by some other person in the testator's presence and by the testator's direction.

(3) By a conservator pursuant to a court order to make a will under Section 2580.

(c) (1) Except as provided in paragraph (2), the will shall be witnessed being signed, during the testator's lifetime, by at least two persons each of whom (A) being present at the same time, witnessed either the signing of the will or the testator's acknowledgement of the signature or of the will and (B) understand that the instrument they sign is the testator's will. Each witness shall sign their name on the will and each witnesses name shall also appear typed or printed on the will.

(2) If a will was not executed in compliance with paragraph (1), the will shall be treated as if it was executed in compliance with that paragraph if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will. The absence of the typed or printed name of a witness on the will shall not invalidate an otherwise validly executed will.

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

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem: It is frequently difficult to ascertain the identity of attesting witnesses to a will due to illegible signatures. This makes it difficult, if not impossible, to locate the witness if there is a challenge to the will or questions regarding its validity. See, *Estate of Ben-Ali*, (2013) 216 Cal.App.4th 1026 [The trial court's admission to probate of a will with an attestation clause bearing the apparent signatures of the testator and two witnesses was reversed on appeal where the signature of one of the witnesses could not be identified. "Proof of the signatures of the decedent and the witnesses makes out a prima facie case of due execution. Proof of the signature of the decedent and only one of the witnesses does not. There was no adequate evidentiary basis for determining the illegible entry on the signature page was in fact a signature by a person

distinct from the testator who was competent, present during the execution, and understood the instrument to be a will."].

The Solution: The legislature has a well-established interest in guarding against false and fraudulent wills as evidenced by the requirement that there are two witnesses to a will. (*In re Estate of Seaman*, (1905) 146 Cal. 455). As further evidence of the legislature's desire to ensure effective witness attestation and the importance of the same, Probate Code section 6240 provides witnesses to statutory wills to provide their address, in addition to printing and signing their name. By requiring an attesting witness to print, in addition to signing their name, increases the likelihood the attesting witness may later be identified and located should a concern arise over the validity of the will. The function of an attesting witness to a will is to take note that those things are done which are required by statute and to subscribe his name to the instrument. (*Estate of La Mont*, (1952) 39 Cal.2d 556.) A will with illegible signatures renders moot the attesting witness requirement the legislature has clearly signified is essential to proper execution.

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

CURRENT OR PRIOR RELATED LEGISLATION
This law does not affect any other law, statute or rule.

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COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

DISAPPROVE

This Resolution proposes to amend Probate Code section 6110 regarding the execution of a will, requiring attesting witnesses to both sign and print or type their name.

TEXCOM disapproves this Resolution. This Resolution is not reflective of the direction of California law regarding the execution and validity of wills. The current trend is to make it easier, rather than more difficult, for a testator to execute a will. Under the Resolution, if both witnesses' names are not printed or typed (even if the witnesses otherwise properly witness the signing of the will), then—for an arbitrary reason having nothing to do with the capacity of the testator or the genuineness of the testator's intentions—the will would be invalid absent a showing by clear and convincing evidence that the testator intended the document to constitute the testator's will. This Resolution would increase the number of wills that could be inappropriately denied validity on hypertechnical grounds.

RESOLUTION 05-04-2020

DIGEST
Automatic Disinheritance: Former Spouse and Relatives of Former Spouse.
Amends Probate Code sections 5040, 6122, and 6122.1 to disinherit not only a former spouse or domestic partner, but also relatives of the former spouse or domestic partner upon dissolution.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Similar to Resolutions 05-11-2005 and 05-12-2005, which were approved in principle.

Reasons:
This resolution amends Probate Code sections 5040, 6122, and 6122.1 to disinherit not only a former spouse or domestic partner, but also relatives of the former spouse or domestic partner upon dissolution. This resolution should be disapproved because it does not define "relative," which could include children of the divorced couple, and could result in automatic unintentional disinheritance.

Probate Code sections 6122 and 6122.1 state that, unless a will provides otherwise, upon dissolution of marriage or domestic partnership, a former spouse or domestic partner is automatically disinherited. Probate Code section 5040 applies this disinheritance to non-probate transfers such as deeds or deposit account agreements. (Prob. Code, § 5000.) It also provides that automatic disinheritance can be overcome by clear and convincing evidence that the transferor intended to preserve the non-probate transfer. The Probate Code does not include a definition of the word "relative," except in unrelated sections.

This resolution would include not only an automatic presumptive disinheritance of a former spouse or domestic partner, but the former spouse or domestic partner's relatives. The proposal cites to the decision in *Estate of Hermon* (1995) 39 Cal.App.4th 1525, 1532, where the court observed that the presumption that a divorcing spouse would no longer wish to leave their estate to a former spouse or domestic partner, applies equally to the family members of that former spouse or domestic partner. As the *Hermon* court put it, "This statute would provide certainty for the courts and would also align the law with the general perception that any interest that an ex-spouse's family might have had in their former relative's estate is terminated after the dissolution." (*Ibid.*) This is not necessarily so. When one divorces, the spouse is only divorcing the other spouse.

The principal problem with the resolution is there is no clear definition of the term "relative," either in this resolution or elsewhere in the Probate Code. As noted above, where definitions of "relative" are offered in the Probate Code -- i.e., Probate Code section 1513, concerning guardianship proceedings, and Probate Code section 21402, dealing with abatement of gifts under a will -- they offer conflicting definitions, and the present resolution does not undertake a definition. This leaves unanswered who precisely is to be considered a relative for purposes of disinheritance; a relative of a former spouse or domestic partner could also independently be a relative of the transferor. Therefore, the change proposed in the resolution could automatically

disinherit the children of the divorced couple, who are "relatives" of the divorced spouse. Similarly, the resolution does not take into account situations where relatives of the spouse or domestic partner have an especially close bond with the testator; rights and expectations could be unintentionally eliminated. Automatic is often problematic, and that is particularly true with a broad category of disinheritance, which may well catch testator and family members by surprise. This problem might be cured by adding language that disinheritance would not apply if the "relative" is specifically named in the testamentary document.

Probate and family law practitioners typically counsel their clients to closely review their estate plans following dissolution. Therefore, if an existing estate plan also provides for relatives of the divorcing couple, those relatives can be removed by amendment. There is no need to extend the automatic disinheritance provisions to "relatives" of the former spouse or domestic partner, particularly without a clear definition of who those "relatives" are.

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code sections 5040, 6122, and 6122.1 to read as follows:

§ 5040

(a) Except as provided in subdivision (b), a nonprobate transfer to the transferor's former spouse or a relative of the former spouse, in an instrument executed by the transferor before or during the marriage or registered domestic partnership, fails if, at the time of the transferor's death, the former spouse is not the transferor's surviving spouse as defined in Section 78, as a result of the dissolution or annulment of the marriage or termination of the domestic partnership. A judgment of legal separation that does not terminate the status of spouses is not a dissolution for purposes of this section.

(b) Subdivision (a) does not cause a nonprobate transfer to fail in any of the following cases:

(1) The nonprobate transfer is not subject to revocation by the transferor at the time of the transferor's death.

(2) There is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer to the former spouse or relative of the former spouse.

(3) A court order that the nonprobate transfer be maintained on behalf of the former spouse is in effect at the time of the transferor's death.

(c) Where a nonprobate transfer fails by operation of this section, the instrument making the nonprobate transfer shall be treated as if the former spouse or relative of the former spouse failed to survive the transferor.

(d) Nothing in this section affects the rights of a subsequent purchaser or encumbrancer for value in good faith who relies on the apparent failure of a nonprobate transfer under this section or who lacks knowledge of the failure of a nonprobate transfer under this section.

(e) As used in this section, "nonprobate transfer" means a provision, other than a provision of a life insurance policy, of either of the following types:

(1) A provision of a type described in 5000.

(2) A provision in an instrument that operates on death, other than a will, conferring a power of appointment or naming a trustee.

§ 6122

(a) Unless the will expressly provides otherwise, if after executing a will the testator's marriage is dissolved or annulled, the dissolution or annulment revokes all of the following:

(1) Any disposition or appointment of property made by the will to the former spouse or a relative of the former spouse.

(2) Any provision of the will conferring a general or special power of appointment on the former spouse or a relative of the former spouse.

(3) Any provision of the will nominating the former spouse or a relative of the former spouse as executor, trustee, conservator, or guardian.

(b) If any disposition or other provision of a will is revoked solely by this section, it is revived by the testator's remarriage to the former spouse.

(c) In case of revocation by dissolution or annulment:

(1) Property prevented from passing to a former spouse or to a relative of the former spouse because of the revocation passes as if the former spouse or relative of the former spouse failed to survive the testator.

(2) Other provisions of the will conferring power or office on the former spouse or relative of the former spouse shall be interpreted as if the former spouse or relative of the former spouse failed to survive the testator.

(d) For purposes of this section, dissolution or annulment means any dissolution or annulment which would exclude the spouse within the meaning of Section 78. A decree of legal separation which does not terminate the status of spouses is not a dissolution for purposes of this section.

(e) Except as provided in Section 6122.1, no change of circumstances, other than as described in this section, revokes a will.

(f) Subdivisions (a) to (d), inclusive, do not apply to any case where the final judgment of dissolution or annulment of marriage occurs before January 1, 1985. That case is governed by the law in effect prior to January 1, 1985

§ 6122.1

(a) Unless the will expressly provides otherwise, if after executing a will the testator's domestic partnership is terminated, the termination revokes all of the following:

(1) Any disposition or appointment of property made by the will to the former domestic partner or a relative of the former domestic partner.

(2) Any provision of the will conferring a general or special power of appointment on the former domestic partner or a relative of the former domestic partner.

(3) Any provision of the will nominating the former domestic partner or a relative of the former domestic partner as executor, trustee, conservator, or guardian.

(b) If any disposition or other provision of a will is revoked solely by this section, it is revived by the testator establishing another domestic partnership with the former domestic partner.

(c) In case of revocation by termination of a domestic partnership:

(1) Property prevented from passing to a former domestic partner or a relative

of the former domestic partner because of the revocation passes as if the former domestic partner or relative of the former domestic partner failed to survive the testator.

(2) Other provisions of the will conferring power or office on the former domestic partner or a relative of the former domestic partner shall be interpreted as if the former domestic partner or relative of the former domestic partner failed to survive the testator.

(d) This section shall apply to wills executed on or after January 1, 2002.

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

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem: This amendment expands Probate Code sections 5040, 6122, and 6122.1 to provide for the automatic revocation of devises made to the relatives of a former spouse or domestic partner (as opposed to just the former spouse or domestic partner), as provided for in many other states.

California courts have already recognized that a testator normally intends to exclude relatives of an ex-spouse after dissolution, unless a contrary intention is indicated elsewhere in the will. (See *Estate of Herman* (1995) 39 Cal.App.4th 1525 [finding that the children of decedent's former spouse, who were identified in his will as "my spouse's children," were not entitled to share in the decedent's estate since they no longer qualified as such and because there was nothing in the will to indicate that the testator wanted to provide for his former spouse's children]; see also *Estate of Jones* (2004) 122 Cal.App.4th 326, 333 [agreeing that a testator normally intends to exclude relatives of an ex-spouse after dissolution, unless a contrary intention is indicated elsewhere in the will.] Thus the current statutes are not consistent with California law.

The Solution: This Resolution would expand Probate Code sections 5040, 6122, and 6122.1 to provide for the automatic revocation of devises made to the relatives of a former spouse, unless the testator reaffirms his or her intent to benefit relatives of their former spouse by way of execution of a new instrument following the divorce or dissolution. This result would thus make the statutes consistent with rulings from California courts that have recognized that a testator normally intends to exclude relatives of an ex-spouse after dissolution, unless a contrary intention is indicated elsewhere. Moreover, to the extent that a testator continues to desire to benefit the relatives if his or her former domestic partner after a termination of the domestic partnership (which would be the exception), the testator is free to reaffirm such intent in a new instrument following the termination.

IMPACT STATEMENT

This resolution does not affect any other laws, statutes, or rules.

CURRENT OR PRIOR RELATED LEGISLATION

None

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COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

DISAPPROVE

This Resolution proposes a change that would automatically revoke devises and nominations of fiduciaries in a decedent's estate planning documents that the decedent made to or in favor of the *relatives* of a former spouse or domestic partner.

TEXCOM disapproves this Resolution because is not necessarily reflective of decedent's intentions as many individuals associate with former in-laws after a divorce, and would want their in-laws to receive bequests or act for them in a fiduciary capacity. Furthermore, family law and estate planning attorneys routinely counsel their divorcing clients to reevaluate their estate plans in light of a divorce and the divorce. Lastly, the definition of "relative" is unclear, and (as drafted) would include the decedent's own child born from the marriage between the decedent and the decedent's former spouse within the class of persons to whom gifts are automatically revoked.

RESOLUTION 05-05-2020

DIGEST
Conservatorships: Compensation to Petitioner and Attorney
Amends Probate Code section 2640.1 to allow a successful petitioner for the appointment of a third party to serve as conservator, to petition for compensation, costs and attorney's fees.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
Similar to Resolution 02-12-2014, which was approved in principle.

Reasons:
This resolution amends Probate Code section 2640.1 to allow a successful petitioner for the appointment of a third party to serve as conservator, to petition for compensation, costs and attorney's fees. This resolution should be approved in principle because a person who successfully petitions for the appointment of a third person to serve as a conservator should be entitled to seek reimbursement of costs, compensation and attorney's fees from the conservatee's estate, just as a person can be reimbursed when they petition for their own appointment as a conservator.

Under Probate Code section 2640, where a petitioner is appointed as a conservator, they can also petition the court for reimbursement of their costs, compensation and attorney's fees from the conservatee's estate. Under Probate Code section 2640.1, as currently written, when a petitioner is unsuccessful, i.e. where the court appoints another conservator while the petition was pending, that petitioner can also petition the court for reimbursement of costs, compensation and attorney's fees, and be receive them if the court determines that the petition was in the conservatee's best interests. However, there is no provision that allows a successful petitioner to be reimbursed when they successfully petition for the appointment of a third person, such as a professional fiduciary,.

In practice, most probate courts will allow a successful petitioner who obtains the appointment of a third party as conservator to petition the court to be reimbursed for costs, compensation and attorney's fees, on the basis that the petition benefitted the conservatee and/or the conservatorship estate. However, this is solely within the discretion of the court since it is not clearly authorized by the Probate Code. Courts can refuse such reimbursement and/or compensation on the basis that there is no statutory authority for such an allowance. Family members should be encouraged to seek the appointment of an independent third party to serve as conservator, especially if it will minimize contentious intra-family disputes over the control of the conservatee's affairs.

This resolution would eliminate this current gap in the law, and any supposed basis for the denial of the costs and compensation incurred by petitioner where the petition benefitted the conservatee.

The resolution tracks Senate Bill 929 (Vidak) (Regular Session 2015-2016), which was introduced on February 19, 2015, but died in committee.

Therefore, this resolution should be approved in principle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 2640.1 to read as follows:

§ 2640.1

(a) If a person has petitioned for the appointment of a particular conservator and that particular conservator was appointed, but not before the expiration of 90 days from the issuance of letters, the person who petitioned for the appointment of a conservator and that person's attorney may petition the court for an order fixing and allowing compensation and reimbursement of costs, provided that the court determines that the petition was filed in the best interests of the conservatee.

(b) If a person has petitioned for the appointment of a particular conservator and another conservator was appointed while the petition was pending, but not before the expiration of 90 days from the issuance of letters, the person who petitioned for the appointment of a conservator but was not appointed and that person's attorney may petition the court for an order fixing and allowing compensation and reimbursement of costs, provided that the court determines that the petition was filed in the best interests of the conservatee.

(c)Notice of the hearing shall be given for the period and in the manner provided in Chapter 3 (commencing with Section 1460) of Part 1.

(d) Upon the hearing, the court shall make an order to allow both of the following:

(1) Any compensation or costs requested in the petition the court determines is just and reasonable to the person who petitioned for the appointment of a conservator but was not appointed, for his or her services rendered in connection with and to facilitate the appointment of a conservator, and costs incurred in connection therewith.

(2) Any compensation or costs requested in the petition the court determines is just and reasonable to the attorney for that person, for his or her services rendered in connection with and to facilitate the appointment of a conservator, and costs incurred in connection therewith.

Any compensation and costs allowed shall be charged to the estate of the conservatee. If a conservator of the estate is not appointed, but a conservator of the person is appointed, the compensation and costs allowed shall be ordered by the court to be paid from property belonging to the conservatee, whether held outright, in trust, or otherwise.

(e) It is the intent of the Legislature for this section to have retroactive effect.

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

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: Under current law, an individual petitioning for the appointment of a conservator of another may be entitled to reimbursement of attorneys' fees in two situations: (1) when they successfully petition to have themselves appointed and (2) when they unsuccessfully petition to have a certain conservator appointed and another conservator is appointed. California law, however, does not allow for the reimbursement of attorneys' fees when they successfully petition to have another appointed as conservator. Such prohibition of

reimburse of attorneys' fees in one situation, while allowing reimbursement for every other conceivable situation is without any sound rationale. Oftentimes, a family member will not want to serve as their conservator because they want to avoid protentional friction with their family member or will want to appoint a private professional fiduciary to serve as conservator. In these situations, the petitioner, while successful in their petition and benefitting the conservatee, is unable to be reimbursed for attorneys' fees.

The Solution: To resolve the issue, Probate Code section 2640.1 should be amended to specifically allow for the reimbursement of attorneys' fees when a petitioner successfully has another nominated conservator appointed. Reimbursement of attorneys' fees is already allowed for the successful appointment of petitioner and even allowed when the petitioner is unsuccessful in having their preferred conservator appointed. The allowance of reimbursement of attorneys' fees in these situations but not in a situation when a petitioner successfully has another appointed is without merit. These fees will also not be guaranteed because the court still has discretion and must determine that it benefits the conservatee. Instead the law removes a prohibition of approval of attorneys' fees in certain very important situations. By amending section 2640.1, petitioners will be incentivized to select an appropriate party to serve as conservator better benefitting the conservatee.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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

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RESPONSIBLE FLOOR DELEGATE: Joseph E. Gruber, Jr.

COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

BANSDC

As drafted, it appears that the resolution, while accommodating the proponent's desire for compensation to the petitioner when a third party conservator of the petitioner's selection is appointed, it appears to remove the possibility of compensation for a petitioner who seeks appointment as conservator where someone else is ultimately appointed. We submit the proponent's goal could be achieved, without eviscerating the spirit and intent of the existing section, if the section were amended to substitute the phrase "third party" for "particular" at line 2, and inserting the phrase "that nominee or" between "and" and "another" at line 2, deleting the underlined language at lines 3 and 4, and deleting the strikeout from the phrase "but was not appointed" from line 5.

[The change would then read:

2640.1. (a) If a person has petitioned for the appointment of a ~~particular~~ third party

conservator and that nominee or another conservator was appointed while the petition was pending, but not before the expiration of 90 days from the issuance of letters, the person who petitioned for the appointment of a conservator but was not appointed and that person's attorney may petition the court for an order fixing and allowing compensation and reimbursement of costs, provided that the court determines that the petition was filed in the best interests of the conservatee.

CA Prob. Sec. 2640.1 (California Code (2020 Edition))]

RESOLUTION 05-06-2020

DIGEST
Conservatorships: Notice to Court Appointed Counsel in Conservatorship Review Hearings
Amends Probate Code section 1850 to require notice to court appointed counsel during conservatorship review hearings.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Probate Code section 1850 to require notice to court appointed counsel during conservatorship review hearings. This resolution should be disapproved because it does not ensure that all necessary persons are provided notice of conservatorship review hearings.

Probate Code section 1850 does not currently require notice to court appointed counsel during conservatorship review hearings. Conservatorships often involve a significant deprivation of rights. Courts are therefore empowered to appoint counsel to represent the interests of conservatees with diminished capacity whose ability to defend their own interests is typically impaired.

Prior to a conservatorship review hearing, the court investigator issues a "report to the court regarding the appropriateness of the conservatorship and whether the conservator is acting in the best interests of the conservatee regarding the conservatee's placement, quality of care, including physical and mental treatment, and finances." (Prob. Code, § 1850, subd. (a)(1).) The court then evaluates that report and any other relevant information to determine whether the conservatorship should continue, and if so whether any modifications are necessary. (*Ibid*.)

When courts conduct review hearings in conservatorship proceedings, notice to court appointed counsel is appropriate because appointed counsel can assist the court by identifying potential problems. Likewise, the presence of appointed counsel during review hearings increases oversight and ensures that the rights of this vulnerable population are protected. This resolution states that it will assist the court's oversight of conservatorship proceedings by requiring that notice be provided to court appointed counsel. However, the resolution's proposed change omits notice being provided to the conservatee, whose interests are at issue in the review hearing.

As TEXCOM's statement approving of the resolution in principle correctly notes, the correct procedure for notice would be to require service upon the conservatee, which in turn requires service upon the conservatee's counsel. Such an amendment to this resolution would ensure that all interested parties are provided notice of the hearing. However, without such a provision, this resolution would leave a gap in the notice requirements.

Therefore, this resolution should be disapproved.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 1850 to read as follows:

§ 1850

(a) Except as provided in subdivision (b), each conservatorship initiated pursuant to this part shall be reviewed by the court as follows:

(1) At the expiration of six months after the initial appointment of the conservator, the court investigator shall visit the conservatee, conduct an investigation in accordance with the provisions of subdivision (a) of Section 1851, and report to the court regarding the appropriateness of the conservatorship and whether the conservator is acting in the best interests of the conservatee regarding the conservatee's placement, quality of care, including physical and mental treatment, and finances. The court may, in response to the investigator's report, take appropriate action including, but not limited to:

(A) Ordering a review of the conservatorship pursuant to subdivision (b).

(B) Ordering the conservator to submit an accounting pursuant to subdivision (a) of Section 2620.

(2) One year after the appointment of the conservator and annually thereafter. However, at the review that occurs one year after the appointment of the conservator, and every subsequent review conducted pursuant to this paragraph, the court may set the next review in two years if the court determines that the conservator is acting in the best interest interests of the conservatee. In these cases, the court shall require the investigator to conduct an investigation pursuant to subdivision (a) of Section 1851 one year before the next review and file a status report in the conservatee's court file regarding whether the conservatorship still appears to be warranted and whether the conservator is acting in the best interests of the conservatee. If the investigator determines pursuant to this investigation that the conservatorship still appears to be warranted and that the conservator is acting in the best interests of the conservatee regarding the conservatee's placement, quality of care, including physical and mental treatment, and finances, no hearing or court action in response to the investigator's report is required.

(b) The court may, on its own motion or upon request by any interested person, take appropriate action including, but not limited to, ordering a review of the conservatorship, including at a noticed hearing, and ordering the conservator to present an accounting of the assets of the estate pursuant to Section 2620.

(c) Notice of a hearing pursuant to subdivision (b) shall be provided to all persons listed in subdivision (b) of Section 1822 <u>and court appointed counsel for the conservatee</u>.

(d) This chapter does not apply to either of the following:

(1) A conservatorship for an absentee as defined in Section 1403.

(2) A conservatorship of the estate for a nonresident of this state where the conservatee is not present in this state.

(e) The amendments made to this section by the act adding this subdivision shall become operative on July 1, 2007.

(f) A superior court shall not be required to perform any duties imposed pursuant to the amendments to this section enacted by Chapter 493 of the Statutes 2006 until the Legislature makes an appropriation identified for this purpose.

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

PROPONENT: San Mateo County Bar Association

STATEMENT OF REASONS

The Problem: Annually or biannually, a conservator is required to submit several documents to allow the court to review the conservator's actions as part of the court's oversight of these protective proceedings. If the court has appointed an attorney for the conservatee, that court appointed attorney must provide a report of all review documents and any concerns either they or the conservatee have. However, current law does not mandate notice of these proceedings, making it difficult for the court appointed counsel to fulfill their duty in providing these reports for the conservatee's protection and benefit.

The Solution: The solution is simple: amend Probate Code section 1850 to require notice to court appointed counsel during conservatorship review hearings. The impact will be minimal, only one additional person, and only if counsel was appointed at the time, will need such notice. This simple fix will allow for court appointed counsel to be fully informed to meet their duty while providing full oversight protection to the benefit of the conservatee.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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

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COUNTERARGUMENTS AND COMMENTS BY BAR ASSOCIATIONS AND CLA SECTIONS

TEXCOM

APPROVE IN PRINCIPLE

This Resolution proposes to amend Probate Code section 1850 to require that the notice of the court review hearing be provided to all persons listed in section 1822(b) and court appointed counsel for the conservatee.

TEXCOM agrees in principle that if the court has appointed counsel for a conservatee, the attorney should receive notice of the hearing. While the attorney may later be sent notice of petitions set the same day, being able to calendar the hearing, and anticipate potential conflicts is

efficient, and best allows court-appointed counsel to advocate for the conservatee. However, TEXCOM notes that Probate Code section 1214 already requires notices to be served on counsel. As a result, TEXCOM surmises that the problem that the Resolution seeks to rectify is that a conservatee does not receive notice under section 1822, since he or she must be personally served with a citation under Probate Code section 1823. Thus, the root problem is not that section 1850 does not require notice to counsel, but that section 1850 actually does not require notice to the conservatee. If section 1850 were amended to require notice to the conservatee, then notice to court-appointed counsel would necessarily be required under section 1214. This approach would be more consistent with how the Probate Code generally requires notice to counsel, i.e., through section 1214. TEXCOM recommends deleting "court appointed counsel for" from the Resolution's proposed amendment to Probate Code section 1850(c), so it reads as follows:

"(c) Notice of a hearing pursuant to subdivision (b) shall be provided to all persons listed in subdivision (b) of Section 1822 and ~~**court appointed counsel for**~~ the conservatee."