Filed 3/6/12 Nederlander v. Papiano CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

TAYLOR SUSAN NEDERLANDER, a Minor, etc. et al., Plaintiffs and Respondents, v. NEIL PAPIANO, Individually and as Trustee, etc., Defendant and Appellant.	B223129 (Los Angeles County Super. Ct. Nos. BP092252, BP092253)

APPEAL from judgments of the Superior Court of Los Angeles County, Aviva K. Bobb, Judge. Affirmed in part and reversed in part.

Law Office of Bruce Adelstein, Bruce Adelstein, for Defendant and Appellant.

Oldman, Cooley, Sallus, Gold, Birnberg & Coleman, Marc L. Sallus and Mary-Felicia Apanius, for Plaintiffs and Respondents.

Neil Papiano appeals from two judgments ordering him to pay damages to two trusts, of which he and Wells Fargo Bank were cotrustees. The trusts were for the benefit of Taylor Susan Nederlander and Sarah Nicole Nederlander,[1] minors represented in this case by their guardian ad litem, Mark Sallus. Appellant argues that since the trusts were revocable, he owed no fiduciary duty to the trust beneficiaries. He argues further that, since the trusts could be amended without the trustees' consent, he breached no duty by allowing the settlor, Scott Nederlander, to amend the trusts eight times and withdraw from them a total of $1,770,000.

To accomplish the settlor's purpose as expressed in the trust instruments and avoid an absurd result, we conclude that the purported amendments in this case required the trustees' consent. Appellant breached his fiduciary duty to the beneficiaries when he allowed Scott to withdraw trust funds, and he did so in bad faith when he conditioned most of the withdrawals on Scott's payment of attorney fees to appellant's law firm for legal services unrelated to the trusts. We affirm the judgment to the extent that the trial court found appellant liable for damages to the trusts and for double damages under Probate Code section 859.[2]

Respondents have cross-appealed from the damages awarded by the trial court. We reverse the judgment to the extent that the court awarded less damages than required by section 859.

FACTUAL AND PROCEDURAL SUMMARY

The Nederlander family owns many theater venues. Appellant and his law firm have represented various Nederlander family members and their business entities. Harry Nederlander and his son Scott are among those appellant represented. Scott had a history of substance abuse and excessive spending, and Harry asked appellant to "protect Scott

[1] After introducing each member of the Nederlander family with his or her full name, we use only his or her first name in future references for the sake of clarity.

[2] All statutory references are to the Probate Code unless otherwise indicated.

from himself." In 1999, Scott and his estranged wife Dawn talked about reconciling, and as part of the reconciliation considered creating a trust for each of their two daughters, Taylor and Sarah. Dennis Page, a partner at appellant's law firm, drafted the trust instruments. Before the end of 1999, Scott funded each trust with $1,020,000, and he signed the trust instruments in early 2000.

The trust instruments use identical language except for the names of the two beneficiaries. Each daughter is the primary beneficiary of her respective trust. Each is entitled to the net income and principal of her trust, which may not be used to discharge Scott's child support obligations while she is a minor. (Art. 2, ¶ A) Appellant and Wells Fargo Bank are cotrustees. The trust instruments provide that "[i]n exercising their discretion," the trustees must consider the settlor's desire to afford each daughter the opportunity to pursue higher education, obtain capital to pursue a business or profession, and make a down payment on a home. (Art. 2, ¶ G) The trustees are required to exercise their powers "at all times in a fiduciary capacity primarily in the interest of the beneficiaries." (Art. 4, ¶ AA) They "are expressly prohibited from exercising any power . . . primarily for the benefit of the settlor rather than the benefit of the beneficiaries." Their power to disburse funds to the settlor is limited to protect the corpus of each trust: "Notwithstanding any provision of this Agreement to the contrary, no powers enumerated herein or accorded to trustees generally pursuant to law shall be construed . . . to enable the settlor to borrow all or any part of the corpus or income of the trusts, directly, or indirectly, without adequate interest or security." (Art. 4, ¶ CC)

Page initially drafted the trusts as irrevocable, but in order to avoid a $500,000 gift tax, he gave Scott power to revoke with the consent of the two independent nonadverse trustees. The revocation provision states: "The settlor during his lifetime shall have the power to revoke this trust, in whole or in part, but only with the consent of the trustees then in office. A revocation, to be effective, shall be in the form of a duly acknowledged instrument in writing which is signed and dated by settlor and each of the trustees then in office, and which is filed with the permanent records of the trust." (Art. 6, ¶ A) Page also included a standard amendment provision that stated: "The settlor may at any time

during his lifetime amend any of the terms of this instrument in writing signed and acknowledged by the settlor and delivered by certified mail to the trustees. No amendment shall substantially increase the duties or liabilities of the trustees or change their compensation without the consent of the trustees, nor shall the trustees be obligated to act under such amendment unless the trustees accept it." (Art. 6, ¶ C) Any revocation or amendment was to "be made in the manner provided in paragraph A of this Article SIX." (Art. 6, ¶ E)

Page included the requirement of the trustees' consent for revocation as a brake "on precipitous actions by the settlor." It served the double purpose of protecting the beneficiaries and protecting Scott from his own improvidence. Page testified that his failure to include the consent requirement in the amendment provision was perhaps inadvertent. After Scott signed the trust instruments, Page realized that he had left "a loophole" or "a back door" because Scott could amend the trusts without the consent of the trustees, delete the consent requirement in the revocation provision, and then revoke the trusts. In a memo to the file, Page queried whether there should be an exception to Scott's power to amend the revocation provision, but he did not bring his concern to anyone's attention.

Scott signed the trust instruments believing that, although they were revocable, he could not take the money back. He understood that the trusts were "strictly for the girls, that they could not be revoked or amended." Two years later, when he needed money, Scott had an attorney in Michigan draft an amendment to delete the consent requirement and revoke the trusts. Although appellant believed that Scott had an absolute right to revoke the trusts, he dissuaded Scott from revoking them outright and instead convinced him to take money out incrementally. Appellant did not petition the probate court for instructions.

In March 2002, Page drafted a first amendment to the trusts, which stated: "Notwithstanding anything to the contrary contained in the terms and provisions of the Trust Agreement . . . including but not limited to Paragraph 'CC' of ARTICLE FOURTH, the Trustees are authorized, in their sole discretion, to disburse, return to, or

deliver to the settlor . . . on a one-time basis only and upon his written request thereof, cash . . . not to exceed . . . $75,000.00 . . . ." Appellant signed an acknowledgment, accepting this amendment and giving his "consent to its provisions." A total of $150,000 was withdrawn from the trusts as a result.

Dawn filed for divorce in 2003, and appellant represented Scott in the divorce proceedings. From May 2004 through February 2005, Scott amended the trusts seven more times and gradually withdrew $1,770,000 from them. The seven amendments traced the language of the first amendment except that, in authorizing the trustees to disburse funds to Scott, they omitted the phrase "in their sole discretion." Each amendment was followed by an acknowledgment that the trustees "accepted" it, and "consent to its provisions and agree to act in accordance" with it.

On the day the second amendment was signed, Page set up a separate irrevocable trust with Scott as the beneficiary and appellant as the trustee. Wells Fargo Bank transferred funds from the girls' trusts to Scott's trust under the seven amendments. The money was used to cover Scott's various debts and expenses, including his living expenses and child support obligations, Dawn's household expenses, as well as sundry payments for the girls' private lessons, clothing, gifts, and a remodeling of their bedroom. There were occasions when appellant did not allow Scott to withdraw money from the girls' trusts, and he conditioned any withdrawal on Scott's payment of his legal bills. At least $239,548.77 was paid to appellant's law firm for its representation of Scott in the divorce and other matters. Appellant told Scott that withdrawing money from the girls' trusts was illegal or wrong and that it should be repaid. Had there not been withdrawals, the corpus of each trust, as invested, would have grown to approximately $1,064,000.

This case was filed in 2005 against appellant, Scott, and Wells Fargo Bank. The latter two settled for a total of $737,500 per trust, leaving appellant as the sole defendant in the operative second amended petitions for breach of fiduciary duty and accounting.

After trial, the court issued an identical statement of decision on each petition. It found that the girls' trusts could be amended only with the trustees' consent, appellant owed fiduciary duties to the beneficiaries, and he breached those duties by allowing the

amendments to each trust. The court awarded damages of $191,500 per trust after subtracting the settlement amount from the loss caused by the withdrawals. The court also found that appellant acted in bad faith by allowing funds from the girls' trusts to be used to pay his firm's legal fees because he had a conflict of interest as a cotrustee of the girls' trusts, a trustee of Scott's trust, counsel for Scott in the divorce proceeding, and counsel for other family members. The court found that none of the legal fees paid to appellant's firm were for matters related to the girls' trusts. It awarded additional $100,000 per trust or $200,000 total in damages under section 859.

Judgments on the two petitions were entered on December 17, 2009. Appellant moved for a new trial and then timely appealed. Respondents cross-appealed.

DISCUSSION

I

We interpret a trust instrument independently unless the interpretation turns on disputed extrinsic evidence. (*Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 73.) The settlor's intent, as expressed in the trust instrument, controls, and we determine that intent from the entire instrument as opposed to one part of it. (*Id*. at pp. 73-74.) Like the trial court, we may consider extrinsic evidence regarding the circumstances under which the trust instrument was executed, in order to determine whether its terms are ambiguous. (*Id*. at p. 73.) An ambiguity exists when, in light of the circumstances surrounding its execution, the terms are reasonably susceptible of two or more interpretations. (*Id*. at p. 74.) If a drafting error renders ambiguous the expression of the settlor's intent in a trust instrument, we may consider extrinsic evidence, including the drafter's testimony, to resolve the ambiguity and give effect to the settlor's intent. (*Ibid*.)

A. The Drafting Error

The trust instruments in this case expressly state that the trusts are for the benefit of the named beneficiaries, the trustees owe fiduciary duties primarily to the beneficiaries, and the trustees cannot exercise their powers primarily for the benefit of the settlor or allow the settlor to borrow from the corpus without adequate security. The

extrinsic evidence at trial confirmed that the trusts, which were set up as part of the parents' reconciliation, were meant to be "strictly" for the girls' benefit, and that Scott was to have no say or power of any kind. The power to revoke was added only in order to avoid a gift tax, but it was conditioned on the trustees' consent to the revocation as a protection against Scott's improvidence. Because as a whole the trust instruments limit the settlor's power to revoke or otherwise reach the corpus of the trusts set up for the benefit of the beneficiaries, it would be absurd to conclude that Scott has an unabridged power to amend the trusts, withdraw funds from them without restraint, and defeat his own express intent. Yet, appellant argues that the first sentence of the amendment provision (art. 6, ¶ C), which does not limit the settlor's power to amend, gave Scott the right to do just that.

The trial court solved this problem by concluding that other provisions limited the settlor's right to amend the trusts. The court imported the consent requirement from the revocation provision into the amendment provision through the separate requirement that revocations and amendments "be made in the manner" stated in the revocation provision. (Art. 6, ¶ E) The Probate Code uses the word "manner" interchangeably with the word "method" to specify the form the revocation should take—"a writing (other than a will) signed by the settlor and delivered to the trustee . . . ." (§ 15401; see also Rest.2d Trusts, § 330, com. i, j, pp. 138-139; Rest.3d Trusts, § 63, com. h, i, pp. 447-448 [using "method" and "manner" interchangeably to describe form of notice to be given trustee].) Indeed, the revocation provision here states that, to be effective, a revocation must be made in the form of a signed, dated, and acknowledged writing, filed with the trust records. (Art. 6, ¶ A) We agree with appellant that the word "manner" cannot fairly be read as encompassing the separate consent requirement in the revocation provision.

The court also read expansively the consent-and-acceptance requirement of the second sentence of the amendment provision as applying to all amendments. By its terms, that requirement applies to amendments that substantially increase the trustees' duties and liabilities or change their compensation. Appellant maintains that since the amendments in this case did not purport to do either, they did not require his consent, and

his acceptance was solely ministerial. While we accept appellant's narrow interpretation of the consent-and-acceptance language of the amendment provision, it is noteworthy that appellant signed an acknowledgement for each amendment, expressing not only his acceptance but his consent to its provisions. His current position that his consent was not required is at odds with the language used in these acknowledgments.

Rather than import the consent requirement from other parts of the trust instrument, the trial court was free to look to the drafter's explanation for the noninclusion of the consent requirement in the amendment provision. Page acknowledged that, by leaving the settlor's power to amend unchecked, he had inadvertently created a loophole, potentially allowing Scott to dismantle the trusts through an amendment followed by a revocation. Page's testimony amounted to an acknowledgment that the settlor's unlimited power to amend the trusts resulted from a drafting error.

California courts have both equitable and statutory powers to correct a drafting error that defeats the primary purpose of a trust. (*Ike v. Doolittle*, *supra*, 61 Cal.App.4th at pp. 79-87.) In *Ike v. Doolittle*, the trial court found several drafting errors in a living trust set up by a husband and a wife that did not clearly dispose of their property upon death. The court modified the distribution provisions of the trust and made the trust irrevocable to accomplish the settlors' estate planning goals. (*Id*. at p. 70.) The Court of Appeal approved this modification. (*Id*. at p. 87.)

The issue of modifying the trusts is not before us because, unlike *Ike v. Doolittle*, neither the trustees nor the beneficiaries in this case petitioned for instructions or sought a modification under section 17200. In light of Page's concern about the loophole in the trust instruments and appellant's admitted uneasiness about revoking the trusts, it strains credulity to suggest that the eight amendments Page drafted were clearly allowed. It would have been prudent to petition the probate court for instructions before taking advantage of a drafting error that frustrated the settlor's expressed intent.

But we find it unnecessary to determine whether Scott needed to obtain the trustees' consent for amendments generally or whether the drafting error would have

necessitated a modification of the express terms of the trusts. Rather, we only decide whether Scott could use the amendment provision to effectuate a revocation without the trustees' consent. We conclude that the eight purported amendments functioned as partial revocations because the only purpose they served was to allow Scott to withdraw funds, and their only effect was on the corpus of each trust. (See Rest.3d Trusts, § 63, com. e, p. 446 [power to revoke in part allows settlor to withdraw some rather than all property from trust].) These amendments did not modify any of the terms of the trust documents and did not delete the consent requirement for full or partial revocation. Since the trust instruments expressly require that the trustees consent to revocation, it follows that amendments used solely to revoke the trusts required the trustees' consent. Any other interpretation would render the limitation placed on the settlor's power to revoke meaningless and would defeat the settlor's expressed intent.

We disagree with appellant that the drafter's chosen nomenclature determines the effect of the amendments. The trust instruments do not state that a writing is effective as an amendment or a revocation only if it is appropriately titled. Nor do we agree that exempting each withdrawal from all trust provisions to the contrary can properly be characterized as amending the trusts. The settlor has a right to borrow funds with interest or security, and he also has the right to withdraw funds by partially revoking the trusts, but only with the trustees' consent. (Art. 4, ¶ CC; Art. 6, ¶ A) Each trust amendment purported to suspend all trust provisions, so that Scott could withdraw funds. Each then provided that, except for that withdrawal, all terms and provisions "shall remain intact and in full force and effect." The amendments did not change the beneficiaries' rights or the trustees' duties. (Cf. *Heifetz v. Bank of America* (1957) 147 Cal.App.2d 776, 783 [settlor amended trust to eliminate all beneficiaries except her daughter and with daughter's consent revoked trust].) Thus, by their own terms, they did not change the trusts in any way, aside from reducing the corpus.

Because they partially revoked the trust's corpus, the purported amendments required the trustees' consent.

B. The Trustee's Duty to the Beneficiaries

Appellant argues that, even if he had a say on whether Scott could withdraw funds from the trusts, the applicable statutes do not answer the question whether his discretion was constrained by his fiduciary duties to the beneficiaries. We disagree.

Because California trust law derives from the Restatement Second of Trusts, which has been superseded by the Restatement Third of Trusts, California courts generally look to them for guidance. (*Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 379; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, §§ 12, 17, pp. 579-580, 583-585.) California differs from the Restatement and from many other states where trusts are presumed to be irrevocable unless the settlor reserves the right to revoke. (13 Witkin, *supra*, Trusts, § 194, pp. 776-778.) California trust law presumes instead that a trust is revocable unless expressly made irrevocable by the trust instrument. (§ 15400.) Most California statutory trust provisions also assume that the settlor has an absolute right to revoke, and the beneficiaries have merely a potential interest in the trust property that can "evaporate in a moment" at the settlor's whim. (See *Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1319-1320 & fn. 14.)

But section 15800, which states the general rule that the trustee of a revocable trust owes no duty to the beneficiaries, is introduced by the clause: "Except to the extent that the trust instrument otherwise provides . . . ." This clause "recognizes that the trust instrument may provide rights to beneficiaries of revocable trusts which must be honored until such time as the trust is modified to alter those rights." (Cal. Law Revision Com. com., 54 West's Ann. Prob. Code (1991 ed.) foll. § 15800, pp. 644-645.) Thus, California trust law accommodates a trust instrument, like the ones in this case, that gives the beneficiaries of revocable trusts more rights than they are provided by statute. Although it is silent on the question of the settlor's conditional power of revocation, California trust law is not necessarily incompatible with the Restatement's approach to this question.

The Restatement provides that when the settlor reserves a power to revoke the trust with the trustee's consent, he or she cannot normally revoke without that consent, and the trustee's discretionary decision is reviewable for abuse of discretion. (See Rest.2d Trusts, § 330, com. l, pp. 140-142; Rest.3d Trusts, § 63, com. j, p. 448.) "What may constitute an abuse in a case of this type depends on whether a standard is provided or a purpose can be discerned against which the reasonableness of the trustee's judgment can be measured, and if not whether the trustee has acted in bad faith or from an improper motive." (Rest.3d Trusts, § 63, com. j, p. 448; see also §87, com. a, p. 242 ["a power is discretionary except to the extent its exercise is directed by the terms of the trust or compelled by the trustee's fiduciary duties"].)

Section 16202 similarly provides: "The grant of a power to a trustee, whether by the trust instrument, by statute, or by the court, does not in itself require or permit the exercise of the power. The exercise of a power by a trustee is subject to the trustee's fiduciary duties." The comment to this section suggests that a trustee may exercise this power "in a manner that conflicts with a general duty . . . where the trustee is directed so to act by a person holding the power to revoke the trust." (Cal. Law Revision Com. com., 54A Pt.1 West's Ann. Prob. Code (2011 ed.) § 16202, p. 120.) But where, as here, the settlor's power to revoke is conditioned on the trustee's consent, and the trust instruments grant rights to the beneficiaries during the settlor's lifetime rather than upon his death, the trustee is obliged to honor those rights until the trust is amended to alter them. (§ 15800.) As we already explained, the amendments in this case did not alter the beneficiaries' rights in any way. Therefore, the trustees could not follow Scott's directions without considering their fiduciary duty to the beneficiaries.

Appellant argues that, because the trial court concluded that the trusts were de facto irrevocable, the trustees could never consent to the withdrawal of funds from the trusts. The trusts would then result in a complete gift and expose Scott to gift tax, which would be contrary to his intent to avoid that tax by setting up the trusts as revocable in the first place. There are several problems with this argument. The primary purpose for setting up the trusts was not to avoid paying a tax as they were not intended as a tax

shelter. But to the extent that Scott's intent to avoid gift tax affected the nature of the trusts, the consent requirement for revocation does not make the trusts irrevocable for purposes of gift tax law. A conditionally revocable trust, as appellant recognizes, is an incomplete gift so long as the trustees do not have "a substantial adverse interest in the disposition of the transferred property or the income therefrom." (26 C.F.R. 25.2511-2, subd. (e).) A substantial adverse interest may exist in cases where a beneficiary's consent is required for revocation, or where a trustee is also a beneficiary of the trust, but an independent trustee, such as appellant, does not have any personal interest in the trust property or income. (See *Hazel B. Beckman Trust v. C.I.R.* (1956) 26 T.C. 1172, 1182; *Camp v. C.I.R.* (1952) 195 F.2d 999, 1004-1005.)

Assuming there may be circumstances in which the independent trustees could consent to a partial or complete revocation without breaching their duty to the beneficiaries under the trusts, we need not speculate about what those circumstances may be. Appellant's own testimony that he owed a duty of loyalty to Scott, who he believed had "the absolute right to do whatever he wanted under the trust," is contrary to the express terms of the trust instruments and supports the inference that he did not exercise his discretion primarily in the interest of the beneficiaries. The funds withdrawn from the girls' trusts under all but one amendment were initially deposited in Scott's irrevocable trust and only then used to make various payments, very few of which could be traced to the girls independently from Scott's child support obligations. The end to which the funds were put becomes evident only with regard to the withdrawals from Scott's irrevocable trust. It cannot be said, therefore, that the withdrawals from the girls' trusts were justified based on any particular purpose related to those trusts. Scott's testimony that appellant conditioned the withdrawals on his payment of appellant's attorney fees supports the conclusion that appellant was motivated primarily by his own financial interest rather than by the beneficiaries' or, for that matter, Scott's interest.

Thus, even without going as far as the trial court did when it deemed the trusts effectively irrevocable, we find substantial evidence in the record to support its conclusion that appellant breached his fiduciary duties to the trust beneficiaries.

II

The parties raise several issues regarding damages. If a party fails to raise the issue of the adequacy of a damages award in the trial court through a motion for a new trial, that party is precluded from raising the issue for the first time on appeal. (*Schroeder v. Auto Driveaway Co.* (1974) 11 Cal.3d 908, 918.) Only legal errors, such as the failure to apply the proper legal measure of damages, may be brought on appeal without a motion for a new trial. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122.)

Respondents challenge the damages awarded based on the actual losses to each trust. The trial court awarded $191,500 per trust, taking $1,064,000 as the amount to which each trust corpus would have grown but for the withdrawals, subtracting from it $135,000 (the amount left in each trust after the withdrawals) and offsetting the difference with $737,500 per trust from the combined settlement with Scott and Wells Fargo Bank. Respondents argue the court should have considered that the actual amount remaining in each trust was approximately $80,000. The trial court stated that the issue at trial concerned the wrongful withdrawals appellant permitted, not investment losses, administrative costs, or trustee's fees that would explain the lower remaining balance in the trusts. Respondents did not file a motion for a new trial and have pointed us to no evidence indicating that appellant should be held liable for these additional losses. We see no computational or other error as to the $191,500 in actual damages awarded each trust.

Appellant argues that the trial court erred in imposing double damages under section 859 because there is no evidence that he acted in bad faith. Section 859 states in relevant part: "If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to the estate of a decedent, conservatee, minor, or trust, the person shall be liable for twice the value of the property recovered by an action under

this part."[3] The trial court found that appellant acted in bad faith when he accepted payments of attorney fees from the girls' trust funds for services unrelated to the trusts. Accepting appellant's position that "bad faith" for purposes of section 859 requires the examination of appellant's subjective motives to determine whether they were improper, we find that substantial evidence supports such a finding. (See *Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 1263.)

There was evidence that appellant knew withdrawing money from the girls' trusts was wrong, and it should be repaid. Yet, he not only did not discourage the withdrawals, but created conflicts of interest through his simultaneous representation of various members of the Nederlander family. While he was a trustee of the girls' trusts, appellant also became the trustee of a separate trust for Scott, to which the funds withdrawn from the girls' trusts were transferred. His representation of Scott during the divorce proceedings prompted the family court to appoint a separate attorney for the girls. Most importantly, appellant injected his own personal interest ahead of the interests of the beneficiaries by conditioning the withdrawal of funds on Scott's payment of legal fees to appellant's firm. Attorney fees appear to have been paid after each of the seven withdrawals between 2004 and 2005. Since appellant knew withdrawing funds from the girls' trusts was wrong to begin with, conditioning the withdrawals so as to serve his own financial interest was in bad faith.

Respondents argue that the court did not impose the correct amount of damages under section 859. Although they failed to move for a new trial, respondents are not precluded from making this argument on appeal because they claim only that the trial court committed a legal error in determining the amount of statutory damages. (See *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co., supra,* 66 Cal.App.3d at p. 122.) Section 859 mandates a penalty of twice the value of property wrongfully taken in bad faith, stating that once the court finds a bad faith wrongful taking

---

[3] Under section 850, any interested person may bring a petition to recover real or personal property in a trustee's possession, where the property, or some interest, belongs to another.

of property, "the person shall be liable for twice the value of the property recovered." (See also *Estate of Kraus* (2010) 184 Cal.App.4th 103, 118 [awarding twice the amount taken in bad faith].) Thus, the statute does not give the probate court any discretion regarding the measure of damages.

The trial court stated that it would award double damages on the attorney fees paid to appellant's firm with funds taken from the girls' trusts. The amount of these legal fees was $239,549.77. Appellant's counsel argued generally that all attorney fees incurred in representing Scott in the divorce and other matters benefitted his daughters. The trial court disagreed and concluded there was no evidence the fees were incurred for legal services rendered to the girl's trusts. Appellant speculates that the trial court may have concluded that at least some of the fees were for the benefit of the girls' trusts. This speculation is contrary to the court's actual finding that no such evidence had been presented. While the court suggested that it could allow the presentation of additional evidence on this issue, it did not do so, choosing instead to reduce the amount of damages without any such evidence. Thus, instead of doubling the entire amount of attorney fees, the court awarded $200,000 under section 859, or $100,000 per trust. Based on the court's finding that there was no evidence the fees were incurred for legal services rendered to the girls' trusts, the damages under section 859 should be double the amount of legal fees paid to appellant's firm using funds from those trusts. That amount is $479,097.54, or $239,549.77 per trust.

DISPOSITION

The amount of damages is modified to an aggregate of $431,049.77 per trust, consisting of $191,500 in actual damages and $239,549.77 in damages under section 859. In all other respects, the judgment is affirmed. Respondents to have their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.