

2011 Guide to Trial Support Services

# Los Angeles Lawyer

February 2011 / \$4

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Julian W. Poon (right)  
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## Recovering Attorney's Fees in Probate Actions

**TWO CALIFORNIA COURT OF APPEAL OPINIONS** from 2010 leave any lawyer attempting to recover attorney's fees in a probate matter with greater uncertainty than ever before. At the same time, practitioners studying the decisions will be empowered by rules of interpretation that have the potential to stand any statute—not just those in the Probate Code—on its head. Together the two opinions issued by separate divisions of the Fourth District—along with a probate case decided by the Fifth District in 2009—provide ample support for litigators arguing in any situation for a broad interpretation of statutory language.

In one of the cases, *Leader v. Cords*,<sup>1</sup> the court provided salient rules for victorious practitioners seeking attorney's fees. They should rely on the principle that a statute is ambiguous if susceptible to two differing, reasonable interpretations. In accord with that principle, they should invite their opponents to state their arguments and then respond with a reasonable position. In this way the targeted goal of statutory ambiguity will be reached. After that, all practitioners need to do for an award of attorney's fees is demonstrate that the statute in question is remedial and wide enough in scope to cover the misconduct of their opponents. While these rules seem to clear a smooth path for successful probate litigants seeking attorney's fees, the court in *Soria v. Soria*<sup>2</sup> had other ideas. Still, *Soria* supports a broad reach for the statute authorizing fees.

Ultimately, *Leader* and *Soria* obscure the application of Probate Code Section 17211 and the meaning of similar Probate Code Sections 2622.5 and 11003—the former dealing with conservatorships and guardianships and the latter with estate administration. These three cover the ambit of probate disputes and attempt to remove incentives for litigation filed without reasonable cause and in bad faith. That is the key part of the code sections, and *Leader* is right on that point. *Soria*, by contrast, seems to have gone off the rails to reach the correct result.

*Leader*<sup>3</sup> arose in the context of Probate Code Section 17211, which authorizes a probate court to issue an award of attorney's fees if a party to a contest of a trustee's account has acted without reasonable cause and in bad faith. Division One of the Fourth District of the California Court of Appeal interpreted the statute broadly in a manner not supported by published precedent. Three months later, Division Three of the Fourth District decided in *Soria*<sup>4</sup> that the liberal interpretation of Section 17211 had gone far enough. Section 17211 is virtually identical to Probate Code Sections 2622.5 and 11003, so *Leader* and *Soria* not only apply to a trustee's account contest but also to bad faith litigation over conservatorships, guardianships, and estate administration.

In *Leader*, the trustee had refused to make a distribution to beneficiaries. Instead, he used his trustee's powers to leverage a benefit for himself. While obligated to regularly render accounts to the beneficiaries, the trustee had failed to do so, and the beneficiaries demanded an accounting. Ultimately, the beneficiaries filed a petition seeking a finding that the trustee had committed breaches of trust by



failing to file regular accountings. The beneficiaries also sought attorney's fees under Section 17211.

The trial court found that the trustee had violated the Probate Code but nevertheless denied the beneficiaries' request for attorney's fees. According to the trial court, the action against the trustee for failure to file an account did not amount to a "contest of the trustee's account," stating that Section 17211 was unambiguous on this point. The appellate court disagreed.

Citing *Mayo v. DMV*, the court of appeal declared that a statute is ambiguous if it is "reasonably susceptible of two disputed meanings."<sup>5</sup> The beneficiaries argued that a petition based on a theory of breach of trust for failure to file an accounting amounted to a contest of the trustee's account. The trustee and the trial court took the opposite view. The petition filed by the beneficiaries did not contest an account but instead sought only a determination that the trustee's con-

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duct constituted a breach of trust. In resolving this dispute, the appellate court stated, “Thus, if we accept [the trustee’s] interpretation of the phrase as reasonable, the phrase [‘contests the trustee’s account’] is reasonably susceptible to more than one meaning.”<sup>6</sup>

In *Leader*, the beneficiaries sought to have the statute interpreted broadly in order to collect attorney’s fees. They easily surmounted the hurdle of “without reasonable cause and in bad faith,” but the unfortunate phrase “contests the trustee’s account” stood in the way. Nevertheless, the court relied on another handy rule of interpretation. Referring to the statute as remedial, the court declared that the statute’s language was entitled to broader interpretation and determined that the phrase “contests the trustee’s account” should include contests “related to an account.”

Thus, a statute that provides a means for the enforcement of a right or the redress of a wrong is a remedial statute.<sup>7</sup> Litigators may wonder how many statutes do *not* fall into this category. Moreover, according to the *Leader* court, a remedial statute “must be liberally construed ‘to effectuate its object and purpose, and to suppress the mischief at which it is directed.’”<sup>8</sup> The opinion concludes:

We do not envision that the Legislature intended to leave beneficiaries in [the petitioners/beneficiaries’] position without potential recourse under section 17211, subdivision (b), for the unreasonable and bad faith opposition to [their] petition for distribution, merely because they do not challenge the accuracy of the account’s enumerated receipts and distributions, or assets and liabilities. Such a narrow reading of 17211, subdivision (b) would defeat its remedial purpose.<sup>9</sup>

### **Soria versus Leader**

After *Leader*, one might have predicted that the odds of securing an award of attorney’s fees in probate litigation related to a trustee’s account (or an objection to an account of a conservator or guardian filed under Section 2622.5, or an account filed in connection with estate administration under Section 11003) had gone up considerably, provided one party could prove the other’s unreasonableness and bad faith. Not so. Three months after the publication of *Leader*, the *Soria* court issued its opinion dealing with the exact same statute.

The *Soria* plaintiffs were the grandchildren of the defendants. In a written agreement, the grandparents had accepted title to the plaintiffs’ family home with the understanding that the house would be reconveyed to the grandchildren. When that did not happen, the plaintiffs filed a complaint containing multiple causes of action, including a request for

similar relief to that secured by the *Leader* beneficiaries—a determination of a breach of trust by the trustees and an injunction compelling the grandparents/trustees to account. The action was not brought under the Probate Code. A jury rendered a verdict for the grandchildren/beneficiaries who subsequently, and successfully, moved against the grandparents for attorney’s fees under Section 17211(b).

The *Soria* court reversed on several grounds. First, the grandchildren/beneficiaries did not contest a trustee’s account:

Instead, [the plaintiffs] pursued a civil action against [the defendants], alleging they breached their duties as trustees, and sought an injunction to compel [the defendants] to produce an account. The very existence of a trust was in dispute. At trial, there was no contest of a trustee’s account within the meaning of section 17211(b).<sup>10</sup>

This is an odd statement, since the grandparents called an accountant as a witness, and he presented an accounting at trial.

Next, the *Soria* court argued that *Leader* was distinguishable because *Soria* was a civil action, and the fees were sought as a personal judgment against the trustees, not surcharged against future compensation from or an interest in the trust. The court stated, “Section 17211(b) does not permit attorney fees to be awarded in such a manner.”<sup>11</sup>

Neither of these grounds can withstand reasonable scrutiny. The grandchildren’s challenge in *Soria* was certainly related to a trustee’s account, just like the *Leader* beneficiaries’ petition for a determination of a breach of trust for failure to account. That the grandchildren did not file a petition under Section 17200, as had the beneficiaries in *Leader*, differentiates the two cases, but in form only, not at all in substance. The plaintiffs and the defendants in *Soria*, in effect, acquiesced to the jurisdiction of the court at law, not equity, and a jury trial followed. Indeed, one can question whether this was the parties’ prime motivation in choosing to forego a probate proceeding. But did that forum selection deprive the parties of the special rules of a court in equity and the application of the Probate Code to the proceedings?

The *Soria* court noted<sup>12</sup>:

[The probate court] had exclusive jurisdiction over Grandchildren’s claims.... By hearing a matter within the probate court’s exclusive jurisdiction, a trial court acts merely in excess of jurisdiction, not without jurisdiction.... In this case, no party has objected to the trial court’s exercise of jurisdiction over a matter exclusively within the probate court’s jurisdiction, and therefore the trial court merely acted in

excess of jurisdiction....As a result, the judgment is not void....<sup>13</sup>

Thus, the Probate Code applied, and the trial court was acting within its power when it applied Section 17211(b). That left the question of whether Section 17211(b) was properly applied, but the *Soria* court’s attempt to distinguish *Leader* by noting the issue of forum selection appears to lack substance.

The *Soria* court determined that Section 17211(b) does not apply on the ground that the remedy available under the Probate Code is a surcharge against the trustee’s compensation or other interest of the trustee in the trust. The opinion states that this type of remedy cannot be accomplished in a civil action that results in a money judgment against the trustee. However, Section 17211(b) states that the trustee shall be personally liable for any amount that remains unsatisfied from the trustee’s compensation or interest in the trust. The line drawn by the *Soria* court is a distinction without a meaningful difference.

*Leader* posed a truly substantive problem that required disposition. The beneficiaries in *Leader* did not contest the trustee’s account but brought an action alleging a breach of fiduciary duty for failure to account. The *Soria* beneficiaries similarly brought an action to compel an accounting, so *Leader* and *Soria* both invoke an account. Therefore, following the logic of *Leader*, the court of appeal in *Soria* should have upheld the trial court.

The *Soria* court did not dodge this reasoning and agreed that Section 17211(b) is remedial and must be liberally construed. Nevertheless, the court applied a “prevailing party” standard. The trustees’ trial presentation of an account had served as the basis for the ultimate award, which required both parties to make certain payments: “Thus, if Grandchildren did anything at trial that could be construed as a contest to the account, the contest was unsuccessful.”<sup>14</sup> In other words, the action may have been related to or a contest of an account, but the plaintiffs were not the prevailing party—a factor implicit in a statute that conditions relief on a finding that an action was without reasonable cause and in bad faith. Had the *Soria* court concluded its opinion on this point, the two cases might have been reconciled. Simply put, in *Soria* the grandparents/trustees acted with reasonable cause and not in bad faith. That constitutes a true point of distinction.

Unfortunately, the *Soria* court went further. Its opinion attempts to distinguish *Leader* with an analysis of the statutory scheme in Part 5 of the Probate Code, Judicial Proceedings Concerning Trusts, including Sections 17000 to 17450 and, in particular, Section 17211. The court’s efforts in this regard are unconvincing. The court draws a distinction between a contest to an existing

account and a proceeding to compel the trustee to account, thus veering away from liberally construing Section 17211(b) to include anything “relating to an account.”

Concluding that an action to compel an accounting would not be covered by Section 17211(b), the *Soria* court delivered a coup de grace to liberal construction: “If the Legislature intended to include within section 17211 a proceeding to compel the trustee to account, it would have expressly done so.”<sup>15</sup> The opinion proceeds to drive the point home: “Section 17211 is a remedial statute, but liberal construction can only go so far.”<sup>16</sup> To apply Section 17211(b) in this case “would in effect turn section 17211(b) into a statutory basis for recovery of attorney fees in virtually any case in which the existence of a trust is in dispute or any action of a trustee is challenged. We do not discern any intent by the Legislature to reach that result by enacting section 17211(b).”<sup>17</sup> The court directly addressed the *Leader* ruling:

Our conclusion is not inconsistent with *Leader* because it differs from this case [in that]...the beneficiaries in *Leader* pursued a petition in the probate court [and]...[h]ere, in contrast, Grandchildren did not follow the Probate Code procedures for proceedings concerning the internal affairs of a trust but pursued a civil action....In *Leader*, the petition to compel the trustee to make a final distribution arose from and was directly related to the trustee’s accounting. Here, Grandchildren’s lawsuit did not arise out of an accounting. Grandchildren and Grandparents disputed whether a trust even existed.<sup>18</sup>

The rule of law is not advanced by this part of the opinion.

Once the court had made its determination of the section’s inapplicability, it ruled out other sources of potential recovery of attorney’s fees for the grandchildren/beneficiaries. Starting its analysis with a description of the American Rule—each party to a dispute is responsible for its own attorney’s fees unless otherwise specified by agreement or statute—as codified in Code of Civil Procedure Section 1021, the *Soria* court simply states, “There are a few exceptions to this rule, but none is applicable here.”<sup>19</sup> From the *Soria* court’s view that the grandchildren’s choice of forum rendered the dispute at issue a “civil proceeding,” not a “probate proceeding,” the only means of recovery of attorney’s fees for the victorious party was by statute or contract, neither of which existed to support an award of attorney’s fees.

### Broad Equitable Powers

However, the *Soria* court’s dismissal of exceptions to the American Rule was a major over-

sight. One very significant exception to the American Rule is available in courts of equity, including probate courts—and probate courts maintain broad equitable powers over trusts within their jurisdiction. Once the jury rendered its verdict that the agreement was a trust, the trial court in *Soria* became, in effect, a probate court. Indeed, according to *Rudnick v. Rudnick*—a decision issued by the Fifth District of the court of appeal in 2009—those broad equitable powers include the power to award attorney’s fees, especially when the court has determined that the proceeding is unfounded and was brought in bad faith.<sup>20</sup>

At trial in *Rudnick*, three (of more than 10) beneficiaries (“objectors”) challenged a trustee’s petition under Section 17200 regarding instructions to consummate a sale of a large tract of land near Tehachapi. A majority of the beneficiaries had voted favorably, and the trustee sought approval from the probate court. The trustee called the trust accountant to the stand, who presented an accounting and the proposed distribution of sale proceeds. The trial court ruled in favor of the trustee, finding the objectors’ testimony lacked credibility. Moreover, in response to a subsequent motion by the trustee for attorney’s fees and costs, the court ruled that the objectors had acted in bad faith by challenging the petition pretextually, with the real intent to delay and derail the sale approved by the majority. In granting the motion, the trial court assessed the fees against future distributions to the objectors.

The trustee had advanced two arguments:

- The probate court has the general equitable authority to make an award of attorney’s fees to apportion the costs of a trial among those whose bad faith conduct was responsible for those costs.
- Under Section 17211(a), the mirror image of subsection (b), the trial court may make an award of attorney’s fees against beneficiaries who contest the trustee’s account without reasonable cause and in bad faith.

The objectors’ argument was identical to those made by the trustee in *Leader* and the *Soria* court: The objectors’ contest was to the sale (or distribution), not to an account rendered by the trustee.

However, the trial court in *Rudnick* never reached the trustee’s second argument. Its decision was predicated on the general exception to the American Rule for probate courts under *Estate of Ivey*,<sup>21</sup> cited as the case law upon which the passage of Section 17211 was based. This seminal case stands for the proposition that “a probate court, pursuant to its equitable powers and authority over administration of a testamentary trust, may provide that reasonable and necessary legal fees incurred by other beneficiaries in oppos-

ing a first beneficiary’s frivolous bad faith attacks on the trustee’s account had to be paid out of the first beneficiary’s share of the trust.”<sup>22</sup>

Section 17211 and *Ivey* are founded on the notion that it is unfair for nonlitigant beneficiaries of a trust to bear the costs of defending against bad faith litigation instigated by other beneficiaries. The trial court in *Rudnick* never ruled on the statutory argument but ordered that attorney’s fees be charged to the future distributions of the objectors, because it was unfair for the nonlitigants to have to pay the costs of defending against the bad faith actions of the objectors. The Fifth District Court of Appeal agreed that this was an equitable apportionment of costs incurred by the trustee.

The *Rudnick* court relied on *Conley v. Waite*<sup>23</sup>: “[W]hen an unfounded suit is brought against [the trustee] by the cestui que trust, attorney’s fees may be allowed him in defending the action and may be made a charge against the interest in the estate of the party causing the litigation.”<sup>24</sup> The *Ivey* court also relied on *Conley*, among others:

Courts having jurisdiction over trust administration have the power to allocate the burden of certain trust expenses to the income or principal account and not infrequently do so in connection with accountings or suits relating to the administration of the trust. Sometimes this authority is stated in statutory form, but it exists as part of the inherent jurisdiction of equity to enforce trusts, secure impartial treatment among the beneficiaries, and to carry out the express or implied intent of the settlor....Where the expense of litigation is caused by the unsuccessful attempt of one of the beneficiaries to obtain a greater share of the trust property, the expense may properly be chargeable to that beneficiary’s share....<sup>25</sup>

In *Leader*, the beneficiaries paid their own attorney’s fees and one-half of the trustee’s attorney’s fees to defend their own action. This was inequitable because the trustee’s opposition to the beneficiaries’ contest was in bad faith. Thus, the beneficiaries were awarded their attorney’s fees against the trustee’s interest in the trust or in compensation from the trust. If there had been a finding that the action was not a contest of a trustee’s account, the *Leader* court, relying on *Ivey* and *Rudnick*,<sup>26</sup> might still have made its attorney’s fees award to equitably apportion legal fees incurred by the bad faith conduct of the trustee in trying to use his power to distribute as leverage to secure a benefit from the beneficiaries to which he was not entitled under the trust.

There was no finding of bad faith in *Soria* and no clear winner, although the grandparents were ordered to reconvey the home. The trustee apparently mounted a legitimate contest that required a jury to characterize a layman's document as a trust and then interpret the trust. Equitable apportionment arguably was not warranted, so the alternative to applying Section 17211(b) was still not available. However, the reliance in *Soria* on the American Rule is misplaced. Probate courts, sitting in equity, have the power to protect innocent beneficiaries and a trust corpus from the costs of defending against bad faith litigation.<sup>27</sup> This general rule is modified by Section 17211 to be applicable when the conduct relates to or contests a trustee's account.<sup>28</sup> The standard under that statute requires a finding that the conduct is without reasonable cause and in bad faith.

### Need for Legislative Action

Beneficiaries in both *Leader* and *Soria* initiated actions to accomplish something more fundamental than contesting an account, and any focus on the word "contesting" may run counter to the statutory purpose. Both sought a distribution of trust assets from reluctant trustees. In *Leader*, the alleged failure to account supports the court's finding that the action was related to an account. In *Soria*, the plaintiffs sought an injunction to compel the reconveyance of the residence, the trust corpus, and the rendering of an account. Notwithstanding the *Soria* court's characterization that what was presented did not constitute an account under the Probate Code, the defendants did indeed present one at trial. These cases are not distinguishable on the ground set forth by *Soria* that the plaintiff grandchildren's action was not related to or a contest of a trustee's account.

The distinction, if there is one, is that the trustee in *Leader* acted without reasonable cause and in bad faith—a characterization that the court did not make regarding the trustee's actions in *Soria*. A finding of a breach of the trust agreement is not ipso facto acting without reasonable cause and in bad faith. The *Soria* court simply might have determined that Section 17211(b) was inapplicable because the failure to account by the grandparents/trustees was not without cause and in bad faith. The appellate court did not go that far but rather looked for another reason to determine the section inapplicable. By repeatedly referring to the plaintiffs' failure to follow procedures under the Probate Code, the *Soria* court seems to be hedging its bet—rendering Section 17211(b) inapplicable by choice of forum, if not by statutory interpretation.

Focusing on the trustee's conduct in the two cases may lead to a more harmonized con-

clusion. In *Leader*, the trustee refused to make a distribution unless the beneficiary agreed to something unrelated to the trust. In *Soria*, the trustees refused to convey (distribute) the house, claiming there was no trust and that the preconditions to reconveyance had not been satisfied. The former was not a justification for the trustee's contest of the beneficiaries' action. The latter was.

This analysis is not evident in the most recent decision. The *Soria* court's conclusion that the action was not a contest of a trustee's account is contrary to the *Leader* holding and can only lead to confusion. Section 17211 has now been interpreted in such a manner as to raise issues that are truly incidental to its statutory intent, such as the meaning of "contests a trustee's account," "account," and now "related to a trustee's account." The statute should apply to actions taken by either a trustee (as in *Leader*) or beneficiaries (as in *Rudnick*) when such actions are without reasonable cause and in bad faith and impose unreasonable costs on other beneficiaries or the trust estate. The application of this remedial statute ought to be available to litigants regarding any matter raised under Section 17200. This raises the question of whether Section 17211 is a sanction or a means by which costs may be fairly allocated, or both.

A starting point is a review of Section 17211(a), which allows a trustee to charge his or her attorney's fees against the trust interests when objecting beneficiaries challenge the trustee's account in bad faith. Why should this power be limited to an "account" as narrowly defined in certain sections of the Probate Code? If the trustee reports on internal matters of the trust, such as the approval of an asset sale by the majority beneficiaries, as in *Rudnick*, and seeks instructions from the court to consummate the transaction, why should the costs of a bad faith attack on that petition be borne by the other beneficiaries who, arguably, are protected against something less momentous—a bad faith attack on a list of assets and liabilities? Is it probable that the legislature, in enacting Section 17211(b), intended for beneficiaries to be entitled to an award of attorney's fees incurred in connection with a trustee's bad faith opposition to a contest of their account but would not be entitled to attorney's fees if they brought an action to compel a distribution or an accounting by a trustee, who then files an opposition without reasonable cause and in bad faith?

The *Leader* court does a decent statutory analysis and comes to the right conclusion that Section 17211(b) should be available in actions related to a trustee's account. It reached this result under circumstances in which the trustee used his position of power

to establish a negotiating advantage unrelated to the trust corpus. The court was not required to go further and rule that the statute must be applied whenever a trustee or beneficiary contests a matter brought under Section 17200 without reasonable cause and in bad faith, but that result would have been much easier to understand than a rule that applies the statute when the contest is "related" to an account.

*Soria*, in which the trustee denied even the existence of a trust and proved that money was to be paid by others, declines to follow that path because there was no bright line of bad faith. A court can only apply a remedial statute when it clearly perceives misconduct.

In *Olmstead v. Arthur J. Gallagher & Company*, the California Supreme Court states: "[T]he language of a specific Section must be construed in the context of the larger statutory scheme of which it is a part."<sup>29</sup> A court must interpret code sections "to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.... But it is settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend...."<sup>30</sup> Both the *Leader* and *Soria* courts agree that Section 17211 is remedial but disagree as to which wrongs are to be remedied.

The legislature needs to amend Probate Code Section 17211 as well as Sections 2622.5 and 11003 to clarify that if a litigant in a probate matter is pursuing a claim without reasonable cause and in bad faith, the litigant must pay all costs and fees incurred. Whether the litigation involves a report, an account, an accounting, a distribution, an expense reimbursement, a failure to perform under the code, or any other legitimate function of conservators, guardians, estate administrators, or trustees, any party found to have acted without reasonable cause and in bad faith ought to pay. Litigation depletes assets—not only those of directly affected parties but also innocent third parties, including taxpayers. ■

<sup>1</sup> *Leader v. Cords*, 182 Cal. App. 4th 1588 (2010), *rev. denied*, No. S182335 (June 9, 2010).

<sup>2</sup> *Soria v. Soria*, 185 Cal. App. 4th 780, 783 (2010), *rev. denied*, No. S184803 (Sept. 1, 2010).

<sup>3</sup> *Leader*, 182 Cal. App. 4th 1588.

<sup>4</sup> *Soria*, 185 Cal. App. 4th 780.

<sup>5</sup> *Leader*, 182 Cal. App. 4th at 1596 (citing *Mayo v. DMV*, 193 Cal. App. 3d 406, 408 (1987)).

<sup>6</sup> *Id.*

<sup>7</sup> *Rich v. Maples*, 33 Cal. 102, 106 (1867); *Miller v. Hart*, 11 Cal. 2d 739, 741 (1938).

<sup>8</sup> *Leader*, 182 Cal. App. 4th at 1598 (citing *Tintocalis v. Tintocalis*, 20 Cal. App. 4th 1590, 1592 (1993) (citing *Ford Dealers Ass'n v. DMV*, 32 Cal. 3d 347, 356 (1982))).

<sup>9</sup> *Id.* at 1599.

<sup>10</sup> Soria v. Soria, 185 Cal. App. 4th 780, 783 (2010), *rev. denied*, No. S184803 (Sept. 1, 2010).

<sup>11</sup> *Id.* at 784.

<sup>12</sup> *Id.* at 787 n.3.

<sup>13</sup> *Id.* (citations omitted).

<sup>14</sup> *Id.* at 787. The statute does not employ the term “success” or “prevailing party” or otherwise require a certain outcome, although the likelihood of a court making the requisite finding but ruling against the petitioner seems slim. The Senate Committee report on SB 392 on January 16, 1996, described the new statute as “authoriz[ing] a court to award [attorney’s] fees to a prevailing party where there is a bad faith challenge or defense to a [trustee’s] account.” CAL. SENATE JUDICIARY COMM. PROBATE LAW OMNIBUS BILL, 1995-96 Reg. Sess., at 6 (1996).

<sup>15</sup> Soria, 185 Cal. App. 4th at 788.

<sup>16</sup> *Id.* at 789.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 785 (citing Gray v. Don Miller & Assocs., Inc., 35 Cal. 3d 498, 504 (1984)).

<sup>20</sup> Rudnick v. Rudnick, 179 Cal. App. 4th 1328 (2009) (citing Hollaway v. Edwards, 68 Cal. App. 4th 94, 99 (1998)).

<sup>21</sup> Estate of Ivey, 22 Cal. App. 4th 873 (1994).

<sup>22</sup> ARNOLD H. GOLD, MONICA DELL’OSSO & MARY F. GILICK, CALIFORNIA CIVIL PRACTICE PROBATE AND TRUST PROCEEDINGS §§10:51, 24:118 (2005 & Supp. 2009). Judge Arnold Gold (ret.) filed an amicus curiae letter on February 10, 2010, with the California Supreme Court in support of a petition for review of *Rudnick*. In this letter, Judge Gold stated that the ruling in *Rudnick* was “quite dangerous—it opens the door to a flood of requests for attorneys fees awards in trust litigation based solely on the argument that such an award would be ‘equitable’ under the circumstances—excessively encouraging litigation and discouraging settlements.” Amicus Curiae Letter from Hon. Arnold H. Gold to California Supreme Court, at 1 (Feb. 10, 2010) (“Judge Gold Amicus Curiae Letter”), in *Rudnick*, No. S179383. However, *Rudnick* specifies that an equitable apportionment is not an abuse of discretion when a beneficiary’s contest is unfounded. *Rudnick*, 179 Cal. App. 4th at 1334 (citation omitted).

<sup>23</sup> Conley v. Waite, 134 Cal. App. 505, 506 (1933).

<sup>24</sup> *Rudnick*, 179 Cal. App. 4th at 1334.

<sup>25</sup> Ivey, 22 Cal. App. 4th at 883 (citations and quotations omitted).

<sup>26</sup> See also Vokal v. Davison, 121 Cal. App. 2d 252, 260-61 (1953); Estate of Reade, 31 Cal. 2d 669, 671-72 (1948), *cited in Rudnick*, 179 Cal. App. 4th at 1336 n.2; Estate of Kann, 253 Cal. App. 2d 212, 223 (1967); Serrano v. Priest, 20 Cal. 3d 25, 35 (1977) (citing Quinn v. State of Cal., 15 Cal. 3d 162, 167 (1975)).

<sup>27</sup> See *Rudnick*, 179 Cal. App. 4th 1328.

<sup>28</sup> Judge Gold takes credit for authoring Section 17211 and “shepherd[ing] it through the legislative process.” Judge Gold Amicus Curiae Letter, *supra* note 22, at 2. He describes this statute as granting probate courts the power to order the losing party in a contest over an accounting to pay attorney’s fees and other expenses of the contest if the contest or defense thereof was without reasonable cause and in bad faith and notes it was modeled after *Ivey*. *Id.* His letter concludes, “Why did I bother? According to the *Rudnick* opinion, the probate court already had that power as part of its equitable powers (and especially when bad faith has been shown)! I suspect that a review of the legislative history of Probate Code Section 17211 would reflect that the Legislature didn’t think it was engaging in an idle act when it adopted that statute.” *Id.*

<sup>29</sup> Olmstead v. Arthur J. Gallagher & Co., 32 Cal. App. 4th 804, 811, 11 Cal. Rptr. 3d 298, 303 (2004).

<sup>30</sup> *Id.* (citations omitted).

## Judge Michael D. Marcus (Ret.)



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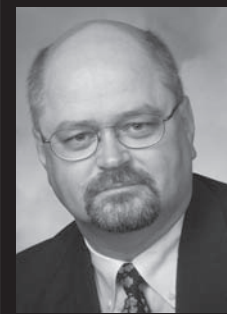
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- reorganization plan feasibility

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