

The 'treat 'em like they're dead' remedy: inheritance forfeiture and elder abuse

By Denise Chambliss

In an action of elder abuse, one of the remedies is an inheritance forfeiture provided in Probate Code Section 259, commonly known by the nickname — the “treat ‘em like they’re dead” remedy. Section 259 provides that an abuser shall be deemed to have predeceased a decedent where elder abuse is proven. Subdivision (c), provides that “[a]ny person found liable [of elder abuse]...shall not (1) receive any property, damages, or costs that are awarded to the decedent’s estate... whether that person’s entitlement is under a will, a trust, or the laws of intestacy....” This statute is applicable to financial elder abuse as well as physical elder abuse.

The function of this statutory forfeiture remedy was recently addressed in the case of *In Estate of Frank Dito* 2011 DJDAR 12875 (1st Dist. Aug. 23, 2011). The Dito court held that Section 259 is not an elimination of the abuser’s entitlement to a share of the decedent’s estate on a finding of elder abuse. Rather, the statute provides that the value of the estate comprising the abuser’s share is restricted.

The *Dito* legal proceedings began with a petition to determine the inheritance rights of Elenice S. Dito, the decedent’s second wife. Elenice had been the live-in housekeeper for the decedent Frank P. Dito and his first wife. Elenice was 28 and Frank was 94 at the time of their marriage. Frank and Elenice had a prenuptial agreement in which they both waived their rights to alimony, maintenance, and spousal support in the event of divorce or death. Frank died in December 2004.

Elenice petitioned for her share of Frank’s estate as an omitted spouse and claimed that the prenuptial agreement and the surviving spouse’s waiver contained in it were unenforceable. After a bench trial, the probate court held that Elenice was Frank’s surviving spouse pursuant to Probate Code Section 21610 et seq., and that she was entitled to a share of Frank’s estate and that both the pre-

nuptial agreement and the surviving spouse’s waiver were invalid and unenforceable due to procedural and substantive defects.

Barbara Merritt, Frank’s daughter from his first marriage, then initiated a subsequent action in the probate court, alleging that Elenice committed financial elder abuse against Frank by paying her friends at least \$19,357 from a joint account during Frank’s lifetime. Barbara’s petition sought a determination that Elenice was deemed to have predeceased Frank pursuant to Section 259 as a result of the elder abuse and that Elenice had forfeited all of her inheritance due to this alleged abuse.

Elenice successfully demurred to Barbara’s elder abuse petition, on grounds including res judicata arising from the court’s rulings from the prior omitted spouse action. But the appellate court reversed, and held that Barbara’s petition was not barred by res judicata. It, however, affirmed the granting of the demurrer on other grounds, with leave to amend. On the res judicata challenge, the *Dito* court held that the primary right at issue in the former proceeding was *Elenice’s personal right* under Section 21610 to receive a share of Frank’s estate as an omitted spouse, whereas the primary right at issue in Barbara’s petition was *Frank’s right* to be free from abuse.

On the elder abuse issue, the *Dito* court held that the new financial elder abuse allegations had no bearing on whether Elenice was an omitted spouse entitled to receive a share of Frank’s estate pursuant to Section 21610. The court explained that even if the elder abuse issue was raised in the prior proceeding, a determination that Elenice committed financial elder abuse would not be a proper basis for denying her entitlement to a share of the estate. This is because a Section 259 claim is distinct from a claim that an omitted spouse is entitled to a share of the estate, notwithstanding the fact that this may appear contrary to the probate court’s prior determination that Elenice was entitled to a share of Frank’s estate.

In regards to Section 259’s forfeiture remedy, the *Dito* court stated that “the parties and the court below appear to be operating under the assumption that a person found liable for elder abuse is deemed to have predeceased the decedent for purposes of any entitlement to property, interests, and benefits the abuser would otherwise receive by reason of the decedent’s death. While that may be the practical effect of [S]ection 259 in some cases, the statute does not necessarily disinherit an abuser entirely but rather restricts the abuser’s right to benefit from his or her abusive conduct.” With this explanation, the court clarified a confusing issue that had emerged from dicta in the case of *Estate of Lowrie* (2004) 118 Cal.App.4th 220.

Consequently, the *Dito* court concluded that Elenice would still be entitled to her share of Frank’s estate as an omitted spouse under Section 21610, but would not be allowed to share in any damages and costs recovered by the estate as a result of her alleged elder abuse.

Thus, Probate Code Section 259 does not necessarily eliminate the abuser’s entitlement to a share of the estate; rather this statute simply restricts the value of the estate to which the abuser’s percentage share is applied and prevents that person from benefiting from his or her own wrongful conduct.



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