

RESOLUTION 04-04-2008

DIGEST

Probate: Civil Standard of Proof for Determining Felonious and Intentional Killing

Amends Probate Code section 254 to change the civil standard of proof for “felonious and intentional killing” to clear and convincing evidence and adds Probate Code section 254.1 to appoint defense counsel in such cases.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 254 to change the civil standard of proof for “felonious and intentional killing” to clear and convincing evidence and adds Probate Code section 254.1 to appoint defense counsel in such cases. This resolution should be approved in principle because it provides valuable procedural protections to a person accused of a “felonious and intentional killing” that are currently lacking in probate proceedings.

In a criminal action, the accused has a panoply of protections, including the right to counsel and proof beyond a reasonable doubt. Even in a wrongful death suit, the accused has the right to a jury trial. By contrast, in probate court, an heir accused of killing the decedent has no right to a jury trial or counsel and may be found culpable based only on a preponderance of the evidence. Raising the standard of proof is justified as a procedural protection. This resolution would provide the benefit of appointed counsel, where appropriate. The cost of defense counsel is not at the expense of the state, but at the expense of the estate.

SECTION/COMMITTEE SECTION

TRUSTS AND ESTATES SECTION

DISAPPROVE

The issue raised by the proponent is that, prior to any criminal finding of a felonious killing, the probate court can make a determination which would deprive the accused of rights in the probate estate using only a preponderance of the evidence standard and that, in light of the far higher standard in criminal law, this standard should be increased. TEXCOM believes that the right of which the accused is being deprived here is a property right and therefore there is no reason to have a higher standard than for any other tort. In addition, the proposal for appointment of counsel is likely to create significant burdens by using public defenders in cases where the disinheritance is upheld.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar’s Board of

Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add section 254.1 and to amend Probate Code section 254 to read as follows:

- 1 § 254.
2 (a) A final judgment of conviction of felonious and intentional killing is conclusive
3 for purposes of this part.
4 (b) In the absence of a final judgment of conviction of felonious and intentional
5 killing, the court may determine by ~~a preponderance of~~ clear and convincing evidence
6 whether the killing was felonious and intentional for purposes of this part. The burden of
7 proof is on the party seeking to establish that the killing was felonious and intentional for
8 the purposes of this part.
9
10 § 254.1.
11 (a) The court may appoint a public defender or private legal counsel for an accused
12 person in any proceeding under this division if the court determines the accused person is
13 indigent, not otherwise represented by legal counsel and that the appointment would be
14 helpful to the resolution of the matter or is necessary to protect the accused person's
15 interests.
16 (b) If a person is furnished legal counsel under this section, the court shall, upon
17 conclusion of the matter, fix a reasonable sum for compensation and expenses of counsel.
18 The sum may, in the discretion of the court, include compensation for services rendered,
19 and expenses incurred, before the date of the order appointing counsel.
20 (c) Compensation determined in (b) shall be paid first from any estate assets
21 transferred from the decedent to the defendant and then from any assets of the defendant
22 including but not limited to, assets owned jointly with the decedent or assets represented
23 by a partial interest in assets owned by the decedent.

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS:

Existing law: Section 254 of the Probate Code, provides that a surviving spouse or joint tenant may, without criminal proceeding and by a preponderance of the evidence presented, be deemed to have feloniously and intentionally caused the death of the deceased spouse or joint tenant.

This Resolution: This resolution would change the standard of determination by the Probate court to “clear and convincing evidence” when considering motions under Section 254, and thereby make the Probate Code standard for determining felonious action commensurate with the standard of the Penal Code for determining such action.

The problem: The standard under the Probate Code for determining that a person has feloniously and intentionally killed another is too low. The problem is best demonstrated by a hypothetical scenario. Assume that a husband dies and leaves joint/community property assets. A party with an interest in the estate of the husband can bring a motion under Section 254 to have the probate court declare that the wife feloniously and intentionally caused the death of the husband, and the standard of proof to convince the court of this is by the preponderance of the evidence. The moving party only needs to convince a single mind that it is a 51% possibility that the wife committed the killing. Once a determination of a felonious and intentional killing is made, the wife may be barred from inheriting the husband’s interest in any community property. This then has the effect of tying up any community assets and most likely preventing the wife from utilizing such assets to fend off the accusation that she killed her husband. Without the additional safeguard of having to convince an entire jury, the standard of a preponderance of evidence is simply too low.

By setting a higher standard of proof, and allowing the court discretion to appoint counsel if necessary, a motion under Section 254 can no longer be used as an “end run” around the Penal Code and the presumption of innocence.

IMPACT STATEMENT

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

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RESPONSIBLE FLOOR DELEGATE: Carter Glahn

COUNTERARGUMENT

BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY

This Resolution would not only raise the burden of proof for demonstration of felonious death from preponderance of the evidence to clear and convincing, but would also add a provision that the person alleged to have caused the death be defended at the expense of the Decedent. Thus, instead of affording a Decedent's heirs an expeditious way to disinherit the wrongdoer for the felonious murder of the Decedent, the Resolution would punish them through no fault of their own by having them pay for the wrongdoer's defense of the action. The amendment proposed by this Resolution would encourage the bad actor to prolong litigation, thereby depriving Decedent's heirs of prompt full distribution.