

RESOLUTION 10-05-2008

DIGEST

Family Law: Interest Penalty for Breach of Fiduciary Duty

Amends Family Code section 1101 to permit trial judges discretion to award up to 10 percent pre-judgment interest for breaches of spousal fiduciary duties.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Family Code section 1101 to permit trial judges discretion to award up to 10 percent pre-judgment interest for breaches of spousal fiduciary duties. This resolution should be approved in principle because it allows family law courts to remedy damages caused by a spouse who transfers or fails to disclose assets in violation of his or her fiduciary duties.

Marriage is a relationship “arising out of a civil contract” between the parties. (Cal. Fam. Code § 300.) The contract includes duties imposed by law. (*Mott v. Mott*, 82 Cal. 413, 416 (1890); see also Cal. Fam. Code § 720.) Those duties necessarily include the fiduciary obligations imposed by the Family Code.

Prejudgment interest is already permitted in simple breach of contract actions. Civil Code section 3287 provides for pre-judgment interest in an action for breach of contract. Under section 3289, the interest rate is 10 percent if the contract does not otherwise provide a legal rate of interest.

Under Family Code section 1101, subdivision (g), remedies for breach of a spouse’s fiduciary duty include awarding the innocent spouse 50 percent of the undisclosed or wrongfully transferred asset’s highest value on the date of the breach of the fiduciary duty, the date of any sale or disposition of the asset, or the date of the court award. In cases where the asset has grown in value, the amount of the award may fully compensate the innocent spouse and pre-judgment interest would be unnecessary.

In other cases, where the asset’s value has declined or where it has increased by only a slight amount, awarding half of its highest value may not sufficiently compensate the innocent spouse. It could result in an award substantially less than he or she could have realized if the same amount had been prudently invested. In those cases, the court should have discretion to award pre-judgment interest.

SECTION/COMMITTEE REPORTS

FAMILY LAW SECTION

APPROVE IN PRINCIPLE

The Family Law Section Executive Committee approves this resolution in principle. This resolution seeks to amend Family Code §1101 to give the trial judge additional statutory discretion to award up to 10% of prejudgment interest on the value of an asset that a spouse has transferred or failed to disclose in violation of his or her fiduciary duty during the course of the marriage or through the conclusion of these dissolution proceedings. Drawing a parallel to Civil Code §§3287 and 3289, which permit the award of interest for prejudgment for breach of contract, this amendment would give the Court greater authority to impose an interest charge on each and every breach of fiduciary duty. The Family Law Section supports this additional remedy for a breach of fiduciary duty as it would provide an additional method of recovery to adequately compensate an innocent spouse.

This position is only that of the Family Law Section of the State Bar of California. This position has not been adopted by either the State Bar 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 Family Law Section is voluntary, and funding for section activities, including all legislative activities, is obtained entirely from voluntary services.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Family Code § 1101 as follows:

- 1 § 1101.
- 2 (a) A spouse has a claim against the other spouse for any breach of the fiduciary
- 3 duty that results in impairment to the claimant spouse's present undivided one-half interest
- 4 in the community estate, including, but not limited to, a single transaction or a pattern or
- 5 series of transactions, which transaction or transactions have caused or will cause a
- 6 detrimental impact to the claimant spouse's undivided one-half interest in the community
- 7 estate.
- 8 (b) A court may order an accounting of the property and obligations of the parties
- 9 to a marriage and may determine the rights of ownership in, the beneficial enjoyment of, or
- 10 access to, community property, and the classification of all property of the parties to a
- 11 marriage.
- 12 (c) A court may order that the name of a spouse shall be added to community
- 13 property held in the name of the other spouse alone or that the title of community property
- 14 held in some other title form shall be reformed to reflect its community character, except
- 15 with respect to any of the following:
- 16 (1) A partnership interest held by the other spouse as a general partner.
- 17 (2) An interest in a professional corporation or professional association.
- 18 (3) An asset of an unincorporated business if the other spouse is the only spouse
- 19 involved in operating and managing the business.
- 20 (4) Any other property, if the revision would adversely affect the rights of a third
- 21 person.

22 (d)(1) Except as provided in paragraph (2), any action under subdivision (a) shall
23 be commenced within three years of the date a petitioning spouse had actual knowledge
24 that the transaction or event for which the remedy is being sought occurred.

25 (2) An action may be commenced under this section upon the death of a spouse or
26 in conjunction with an action for legal separation, dissolution of marriage, or nullity
27 without regard to the time limitations set forth in paragraph (1).

28 (3) The defense of laches may be raised in any action brought under this section.

29 (4) Except as to actions authorized by paragraph (2), remedies under subdivision
30 (a) apply only to transactions or events occurring on or after July 1, 1987.

31 (e) In any transaction affecting community property in which the consent of both
32 spouses is required, the court may, upon the motion of a spouse, dispense with the
33 requirement of the other spouse's consent if both of the following requirements are met:

34 (1) The proposed transaction is in the best interest of the community.

35 (2) Consent has been arbitrarily refused or cannot be obtained due to the physical
36 incapacity, mental incapacity, or prolonged absence of the nonconsenting spouse.

37 (f) Any action may be brought under this section without filing an action for
38 dissolution of marriage, legal separation, or nullity, or may be brought in conjunction with
39 the action or upon the death of a spouse.

40 (g) Remedies for breach of the fiduciary duty by one spouse, including those set out
41 in Sections 721 and 1100, shall include, but not be limited to, an award to the other spouse
42 of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in
43 breach of the fiduciary duty plus attorney's fees and court costs. The court may also award
44 interest on the value of the asset at the rate not to exceed 10 percent per annum from the
45 date of the breach. The value of the asset shall be determined to be its highest value at the
46 date of the breach of the fiduciary duty, the date of the sale or disposition of the asset, or
47 the date of the award by the court.

48 (h) Remedies for the breach of the fiduciary duty by one spouse, as set forth in
49 Sections 721 and 1100, when the breach falls within the ambit of Section 3294 of the Civil
50 Code shall include, but not be limited to, an award to the other spouse of 100 percent, or an
51 amount equal to 100 percent, of any asset undisclosed or transferred in breach of the
52 fiduciary duty.

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

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS:

Existing Law: Family Code §§721 and 1100 establish fiduciary duties that each spouse owes the other in the management and control of community property. Remedies for breach of the fiduciary duty include the award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney's fees and court costs. Fam. Code § 1101(g).

This Resolution: Would amend Family Code §1101 to give the trial judge discretion to award up to 10 percent pre-judgment interest on the value of any asset that a spouse transferred or failed to disclose in violation of his or her fiduciary duty.

Marriage is a relationship “arising out of a civil contract” between the parties. (Fam. Code §300.) The contract include duties imposed by law. (*Mott v. Mott*, 82 Cal. 413, 416 (1890); see also Fam. Code §720.) Those duties necessarily include the fiduciary obligations imposed by the Family Code.

Civil Code § 3287 provides for pre-judgment interest in an action for breach of contract. Under Civil Code §3289 the interest rate is 10 percent if the contract does not otherwise provide a legal rate of interest. But it would not be appropriate to award 10 percent pre-judgment interest in every case of breach of a spouse’s fiduciary duty.

Under Family Code § 1101(g), remedies for breach of a spouse’s fiduciary duty include awarding the innocent spouse 50 percent of the undisclosed or wrongfully transferred asset’s highest on the date of the breach of the fiduciary duty, the date of any sale or disposition of the asset, or the date of the court award. *Id.* In cases where the asset has grown in value, the amount of the award may fully compensate the innocent spouse and pre-judgment interest would be unnecessary.

In other cases, where the asset’s value has declined or where it has increased by only a slight amount, awarding half of its highest value may not sufficiently compensate the innocent spouse. It could result in an award substantially less than he or she could have realized if the same amount had been prudently invested. In those cases, the court should have discretion to award pre-judgment interest.

The Problem: The remedies provided by Family Code §1101 for breach of a spouse’s fiduciary duty may not fully compensate the innocent spouse for loss of an asset the other spouse wrongfully concealed, sold or otherwise diverted.

IMPACT STATEMENT:

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

AUTHOR AND/OR PERMANENT CONTACT: Jay-Allen Eisen, Jay-Allen Eisen Law Corporation, 980 Ninth Street, Suite 1900, Sacramento CA 95814. (916) 444-6171 voice, (916) 441-5810 fax. jae@eisenlegal.com

RESPONSIBLE FLOOR DELEGATE: Jay-Allen Eisen