



**Stop! What You Claim Is Yours Is Mine**  
**Probate Code §850 Actions And §859 Double Damages**



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**Handout Materials**

- 1. Program Slide Deck**
- 2. Selections from the Rutter Group California Practice Guide to Probate 2022 Update: Sec D. Ch. 15, p. 156-169**
- 3. Probate Code §850 and §859**

# STOP! WHAT YOU CLAIM IS YOURS IS MINE

PROBATE CODE §850 ACTIONS AND §859 DOUBLE DAMAGES

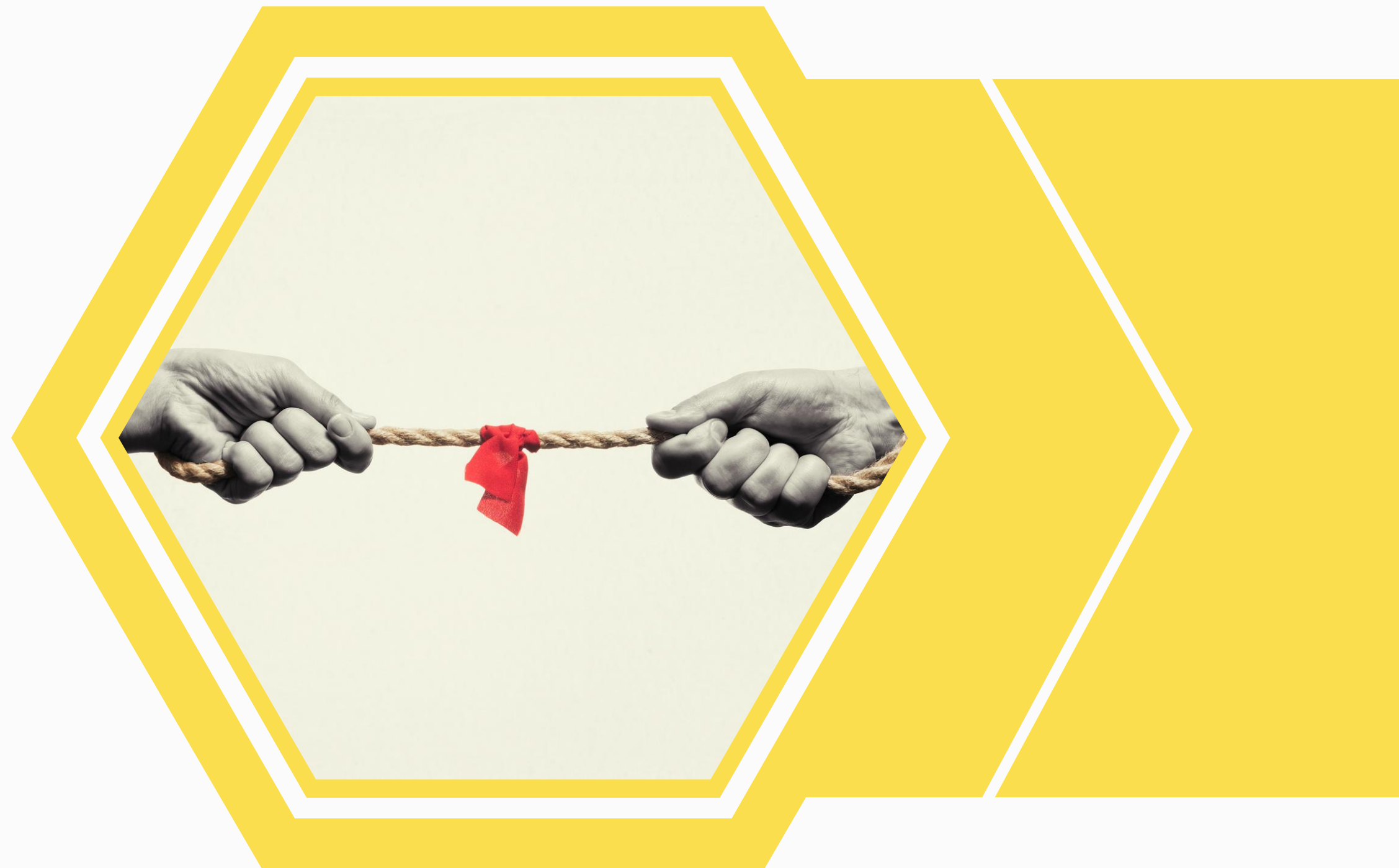


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November 16, 2022



# OUR SPEAKERS



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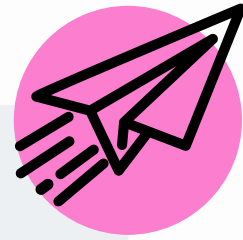
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# THE BASICS OF PROBATE CODE §850

# PURPOSE



To transfer property into or out of a trust, estate, conservatorship or guardianship



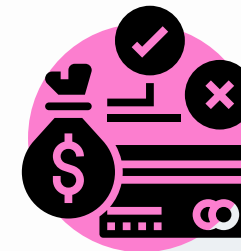
Determination of surviving spouse's community property interest



To enforce performance of a contract entered into by the Decedent



Determination of joint tenancy v. tenancy in common



May include claims against "wrongful takers" based on elder abuse, undue influence, etc.

# STANDING

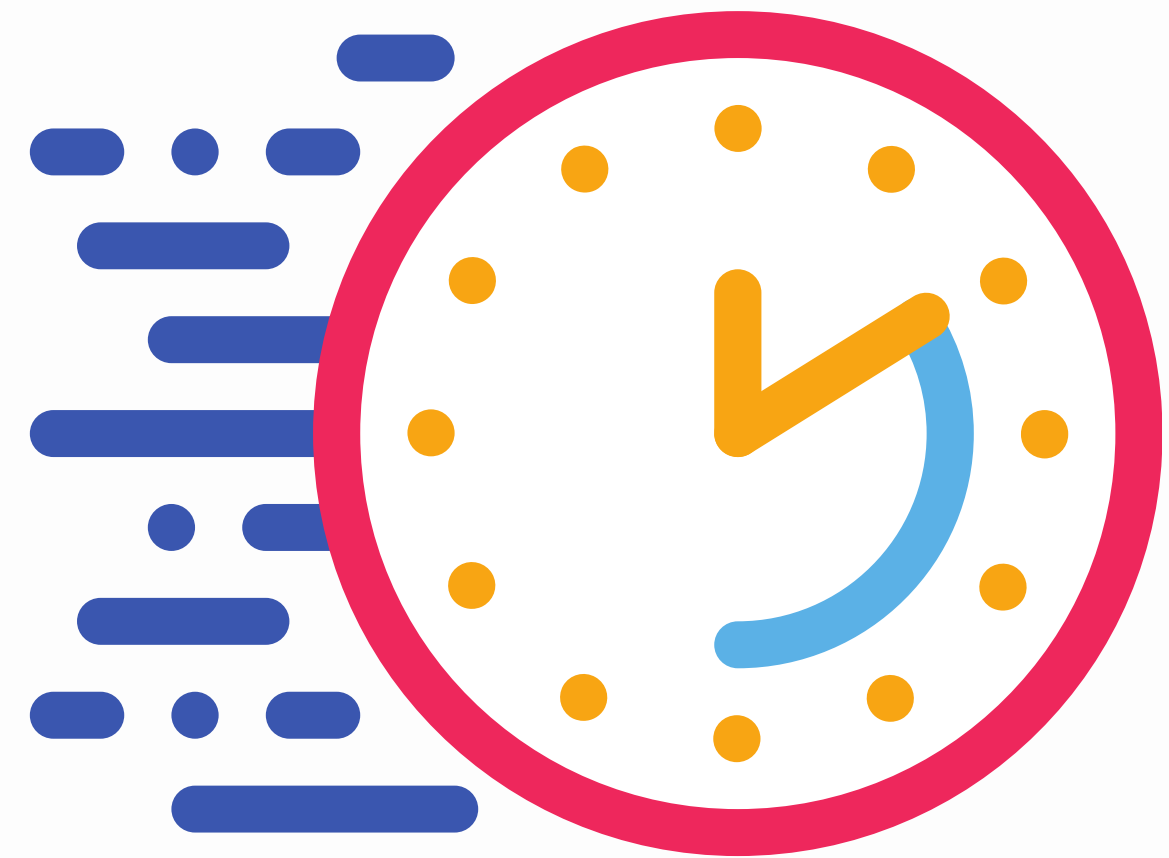
INTERESTED PARTIES OR  
STRANGERS WITH CLAIMS  
TO PROPERTY INVOLVING  
AN ESTATE, TRUST,  
CONSERVATORSHIP OR  
GUARDIANSHIP



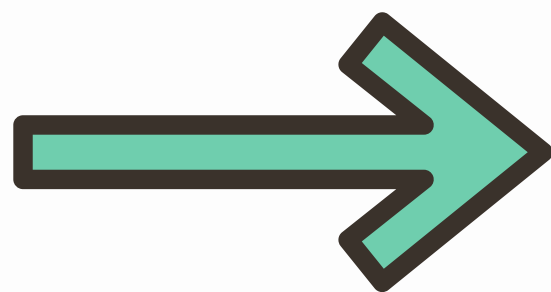


# STATUTE OF LIMITATIONS

1. Generally, statutes of limitations governing civil actions apply
2. What is the impact of CCP §366.2 on actions against a decedent's estate or trust?



# NOTICE OF INITIAL HEARING



**PERSONAL SERVICE REQUIRED  
ON PERSONAL REPRESENTATIVE  
AND ANY PERSON CLAIMING AN  
INTEREST IN OR HAVING  
POSSESSION OF THE PROPERTY  
IN DISPUTE**

**NOTE: THE COURT MAY NOT SHORTEN THE TIME  
FOR GIVING NOTICE OF THE INITIAL HEARING**



# CLAIMS NOT AVAILABLE UNDER §850

Unrecorded security  
interest in real  
property



Documents and  
communications: Parker  
v. Schwarz, Court of  
Appeal A165163 (2022)



**§859 DOUBLE  
DAMAGES**

# CALIFORNIA CODE, PROBATE CODE §859

IF A COURT FINDS THAT A PERSON HAS IN BAD FAITH WRONGFULLY TAKEN, CONCEALED, OR DISPOSED OF PROPERTY BELONGING TO A CONSERVATEE, A MINOR, AN ELDER, A DEPENDENT ADULT, A TRUST, OR THE ESTATE OF A DECEDENT, OR HAS TAKEN, CONCEALED, OR DISPOSED OF THE PROPERTY BY THE USE OF UNDUE INFLUENCE IN BAD FAITH OR THROUGH THE COMMISSION OF ELDER OR DEPENDENT ADULT FINANCIAL ABUSE, AS DEFINED IN Section 15610.30 of the Welfare and Institutions Code, the person shall be liable for twice the value of the property recovered by an action under this part. In addition, except as otherwise required by law, including Section 15657.5 of the Welfare and Institutions Code, the person may, in the court's discretion, be liable for reasonable attorney's fees and costs. The remedies provided in this section shall be in addition to any other remedies available in law to a person authorized to bring an action pursuant to this part.

# RECOVERY

**859 RECOVERY IS TYPICALLY REQUESTED IN THE 850 PETITION BUT IS NOT SOLELY LIMITED TO ACTION IN PROBATE COURT.**



# NOTICE

NOTICE MUST BE  
GIVEN THAT 859  
RELIEF IS SOUGHT.



# CERTAIN PRESUMPTIONS OF FRAUD OR UNDUE INFLUENCE APPLY

PC 21380(a)

PC 21380(b)

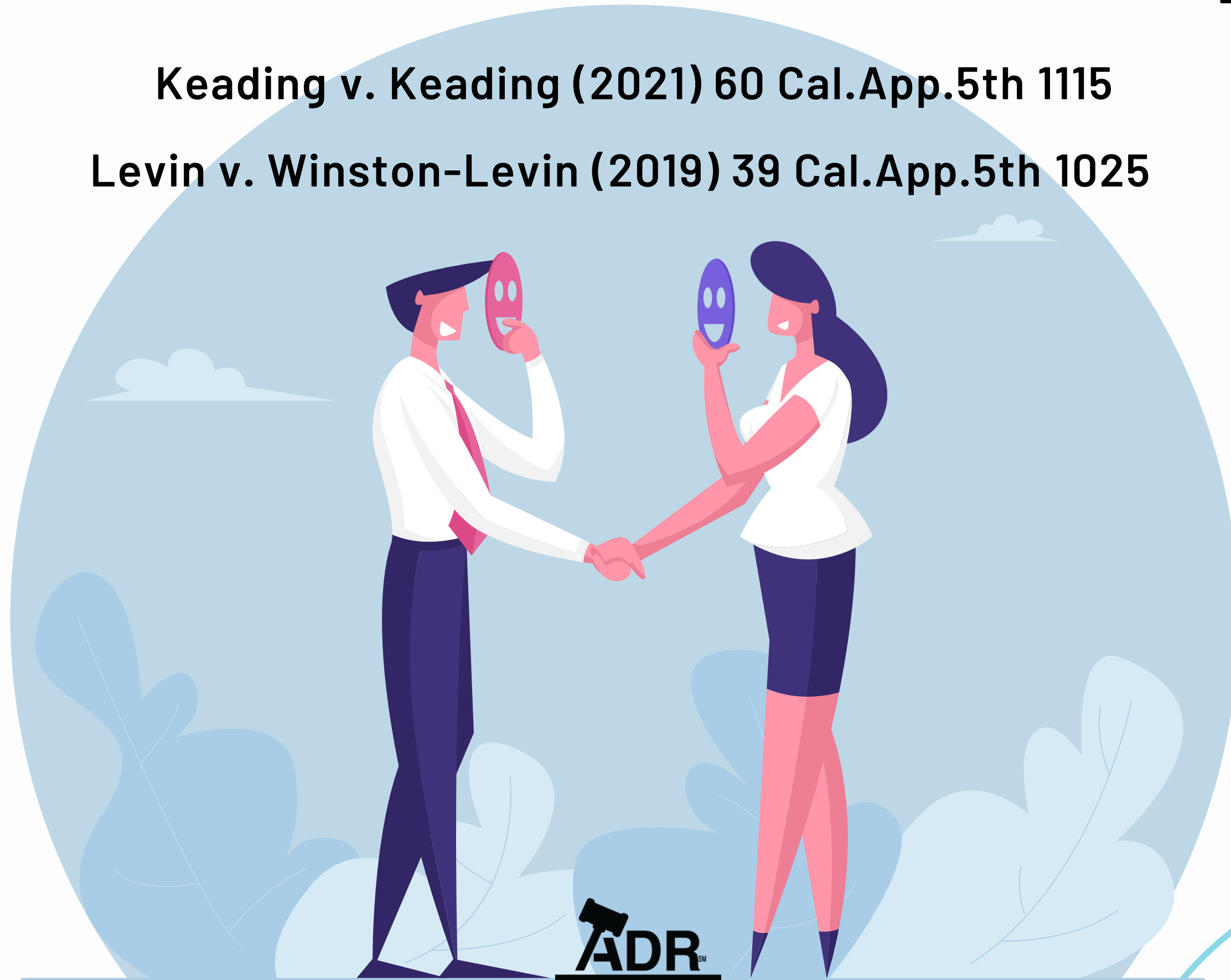
PC 21382,  
21384,  
21385



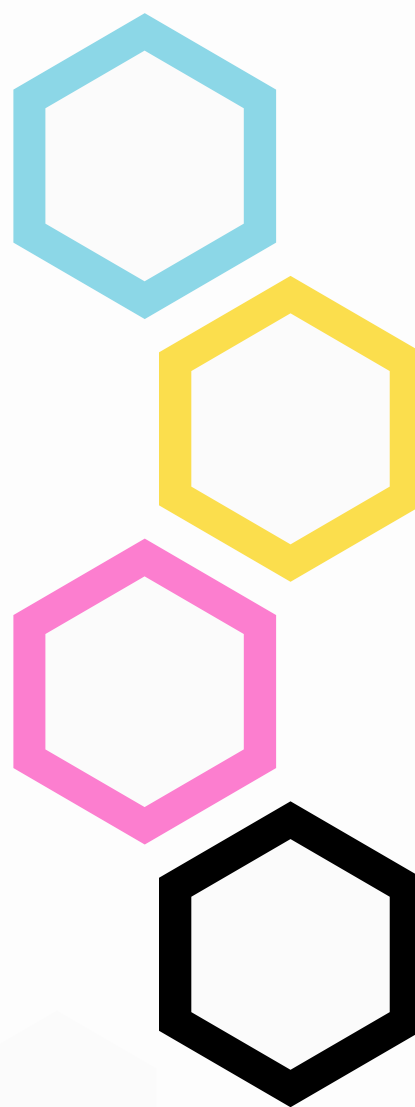
# IS FORMAL PROOF OF BAD FAITH REQUIRED?

Keading v. Keading (2021) 60 Cal.App.5th 1115

Levin v. Winston-Levin (2019) 39 Cal.App.5th 1025



# WHAT DOES "DOUBLE DAMAGES" REALLY MEAN?



**Estate of Kraus (2010) 184 Cal.App.4th 103**

**Hill v. Superior Court (2016) 244 Cal.App.4th 1281**

**Conservatorship of Ribal (2019) 31 CA5th 519**

**Estate of Ashlock (2020) 45 Cal.App.5th 1066**

# TIPS



**Stipulate that 859 damages will not be sought if settlement agreed to.**



**Bad faith is tricky and must be more than negligent mishandling.**



**Mediation is preferable to trial and appeal in virtually all cases.**



# PRACTICAL APPLICATIONS

# THANK YOU



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# California Practice Guide **PROBATE**

CHAPTERS 13-16  
TABLES & INDEX

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**2022**

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In either case, the Act's heightened remedies apply only when it is proved by *clear and convincing evidence* that the perpetrator is guilty of recklessness, oppression, fraud or malice in commission of the abuse (§15:545). [See Welf. & Inst.C. §§15657, 15657.5(b); *Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 CA4th 396, 405, 129 CR3d 895, 902; *Perlin v. Fountain View Mgmt., Inc.* (2008) 163 CA4th 657, 664, 77 CR3d 743, 748—failure to prove causation by clear and convincing evidence precluded attorney fees award under Welf. & Inst.C. §15657(a)]

- h. [15:554] **Writ of attachment available in cases involving financial abuse:** Where financial abuse of an elder or dependent person is alleged, the Attachment Law (CCP §481.010 et seq.) is available to secure the property in issue during the litigation, regardless of whether other forms of relief are sought. [Welf. & Inst.C. §15657.01]
- i. [15:554.1] **Expedited appeal in elder abuse actions:** The Legislature has added a limited expedited appeal process for a person filing a claim under the Elder and Dependent Adult Civil Protection Act who has previously received a CCP §36 preference to try their case. Unless a continuance is granted for good cause and to promote the interests of justice, an appellate decision “shall” be issued no later than 100 days after the notice of appeal is filed. [CCP §1294.4]

*Cross-refer:* For a more comprehensive treatment of elder abuse claims and actions under the California Elder Abuse and Dependent Adult Civil Protection Act, see Balisok, *Elder Abuse Litigation* (TRG).

#### D. ADJUDICATING ADVERSE CLAIMS TO PROPERTY (PROB.C. §850)

1. [15:555] **Background:** Historically, superior courts sitting in probate had no jurisdiction to try *title disputes*; probate jurisdiction could only be exercised over assets *unqualifiedly* belonging to decedent or their estate. In no event could a third party claimant be brought into the proceedings, because they lacked “privity” with the estate.

In time, exceptions arose, whereby one claiming to be “in privity” with the estate (i.e., an heir, beneficiary or appointed representative claiming through the estate) could litigate their title claim in the probate proceeding. [See *Estate of Abdallah* (1947) 80 CA2d 634, 636-637, 182 P2d 596, 598; *Estate of Baglione* (1966) 65 C2d 192, 196-197, 53 CR 139, 142-143]

Recognizing that it is more expeditious to resolve the entire controversy in a single proceeding, the Legislature ultimately broadened these exceptions to the point that the historical limitations have disappeared. All title disputes and adverse claims—including those involving strangers to the estate—are now resolvable in the probate proceeding under Prob.C. §850(a)(2), discussed

below. [*Estate of Young* (2008) 160 CA4th 62, 86, 72 CR3d 520, 538; *Estate of Kraus* (2010) 184 CA4th 103, 113-114, 108 CR3d 760, 767-768; see also Prob.C. §800—superior court sitting in probate is court of “general jurisdiction” (¶13:52)]

## 2. Section 850 et seq. Framework—In General

a. [15:556] **Circumstances supporting the action:** Prob.C. §850 et seq. governs probate litigation over *adverse claims to property*. [See *Parker v. Walker* (1992) 5 CA4th 1173, 1186, 6 CR2d 908, 914 (citing text)] In a decedent’s estate administration, §850 proceedings may be commenced as follows:

- (1) [15:557] **Estate property claimed to belong to another:** Where “decedent died in *possession of, or holding title to*, real or personal property, and the property or some interest therein is *claimed to belong to another*.” [Prob.C. §850(a)(2)(C) (emphasis added); *Estate of Layton* (1996) 44 CA4th 1337, 1339, 52 CR2d 251, 252, fn. 2; *Estate of Myers* (2006) 139 CA4th 434, 440, 42 CR3d 753, 757]
- (2) [15:558] **Property held by another claimed to belong to decedent:** Where “decedent died *having a claim to real or personal property, title to or possession of which is held by another*.” [Prob.C. §850(a)(2)(D) (emphasis added); *Estate of Layton*, supra; *Estate of Myers*, supra]

*Cross-refer:* Prob.C. §850 proceedings to specifically enforce decedent’s contracts to convey or transfer property (Prob.C. §850(a)(2)(A) & (B)) are discussed at ¶13:394 ff.

b. [15:559] **Effect—probate court may adjudicate adverse claims:** Under the above circumstances (¶15:556 ff.), the personal representative (pursuant to §850(a)(2)(C)) or the third party claimant (pursuant to §850(a)(2)(D)), or any other “interested person” may seek an adjudication of the adverse claims in the probate court, requesting a court order directing the conveyance or transfer of *title or possession* accordingly. [Prob.C. §§850(a)(2), 856; e.g., *Estate of Howard* (1976) 58 CA3d 250, 260-261, 129 CR 836, 842-843; *Estate of Fisher* (1988) 198 CA3d 418, 422, 244 CR 5, 7—action under predecessor statute to determine entitlement to funds in decedent’s savings account; also see *Estate of Baumann* (1988) 201 CA3d 927, 934-935, 247 CR 532, 534-535 (discussed at ¶15:574)]

(1) [15:560] **“Interested” parties or strangers:** Section 850 proceedings may be brought by or against “strangers” to the estate *or* parties who are in “privity” with (i.e., “interested” or claiming through) the estate. [*Estate of Linnick* (1985) 171 CA3d 752, 760, 217 CR 552, 556, fn. 7; *Estate of Myers* (2006) 139 CA4th 434, 440-441, 42 CR3d 753, 757-758—creditor of estate presumptively qualifies to initiate §850 proceeding]

(a) [15:561] **Wrongful takers, etc.:** Section 850(a)(2)(D) (decedent’s claim to property held by another) is

broad enough to permit the court to adjudicate the estate’s claims against persons charged with *embezzling, concealing, or otherwise wrongfully taking or retaining* property belonging to the estate. And the Code authorizes the recovery of *double damages* (twice the value of the property), as well as reasonable attorney fees and costs, in specified cases of a wrongful taking, concealment or disposition by the defendant using undue influence in “bad faith,” or resulting from financial elder abuse (¶15:590). [Prob.C. §859; *Keading v. Keading* (2021) 60 CA5th 1115, 1128-1129, 275 CR3d 338, 347—double damages under Prob.C. §859 properly awarded based on finding of financial elder abuse, no finding of bad faith necessary; *Hill v. Sup.Ct. (Staggers)* (2016) 244 CA4th 1281, 1287, 198 CR3d 831, 835; *Kerley v. Weber* (2018) 27 CA5th 1187, 1197-1198, 238 CR3d 781, 789—no separate finding of bad faith necessary where property taken through elder or dependent abuse as defined by Welf. & Inst.C. §15610.30(a)(1), prohibiting the taking of property “for a wrongful use or with intent to defraud”; but see *Levin v. Winston-Levin* (2019) 39 CA5th 1025, 1035-1038, 252 CR3d 518, 525-528—recovery of double damages for financial elder abuse as defined by Welf. & Inst.C. §15610.30(a)(3) requires finding of bad faith]

Although Prob.C. §§8870-8873 (citation and interrogatory procedure directed at person alleged to be holding decedent’s property) also provide a remedy against the wrongdoer (see ¶15:565, 15:874 *ff.*), the matter may be handled in a §850 proceeding (this principle overrules prior case law to the contrary; *Laing v. Sup.Ct.* (1948) 88 CA2d 641, 644, 199 P2d 373, 374). [See Law Rev. Comm’n Comment to predecessor statute]

- (2) [15:562] **Concurrent jurisdiction:** The adverse claims need not necessarily be litigated in the probate proceeding. In this context, the probate court’s jurisdiction is concurrent with that of the superior court sitting in civil actions generally (see ¶3:60). Accordingly, a third party claimant may bring an independent civil action, e.g., to quiet title (although this approach rarely will be the most expedient alternative; see “*Practice Pointer*” at ¶15:612). [See *Richer v. Sup.Ct. (Cook)* (1976) 63 CA3d 748, 757, 134 CR 52, 56-57 (disapproved on other grounds by *Kowis v. Howard* (1992) 3 C4th 888, 899, 12 CR2d 728, 734)]
- (3) [15:563] **Abatement if civil action pending:** If an independent civil action is *already* pending with respect

to the adverse claims, the court ordinarily *must*, upon request of any party to the civil action, *abate* the §850 proceeding until conclusion of the civil action unless the court finds the civil action was filed for the purpose of delay. [See Prob.C. §854, ¶15:609]

- c. [15:564] **Compare—action to compel conveyance or transfer to complete decedent’s contract:** As noted, the §850 et seq. procedure is also available to compel performance of decedent’s specifically enforceable contract to convey or transfer property. [See Prob.C. §850(a)(2)(A) & (B) (*discussed in detail at ¶13:394 ff.*)]
- d. [15:565] **Compare—§8873 accounting from persons controlling estate property:** Under Prob.C. §8873, on the personal representative’s petition, the court is empowered to “cite” any person having possession or control of estate property to appear and account under oath for the property and their actions taken with respect to the property. [Prob.C. §8873, ¶15:877]

The §8873 proceeding is in the nature of a “bill of discovery”; it does *not* empower the probate court to *try title* to property the estate claims it owns. [*Estate of Linnick*, supra, 171 CA3d at 759, 217 CR at 555-556; *Estate of Schechtman* (1955) 45 C2d 50, 53, 286 P2d 345, 346-347] Thus, a §850 proceeding is the preferred remedy.

[15:566-569] *Reserved.*

### 3. Limitations on Disputes Subject to §850 Proceeding

- a. [15:570] **Claims on behalf of decedent—decedent must have had an enforceable claim at death:** Section 850 jurisdiction may be invoked on behalf of the estate only when decedent had a “ripened” or *enforceable* claim to the subject property *at the time of their death*. If something remained to be done to perfect the claim when decedent died (i.e., it was only an “inchoate” claim at best), there is not a sufficient “claim” to the property to entitle the estate to bring the action. [*Estate of Linnick*, supra, 171 CA3d at 761-763, 217 CR at 557-558]
- [15:571] Attorney had entered into a contingency fee contract with Company to represent its interest in sale of land owned by Company. Attorney died before sale of the land occurred. Estate’s claim to contract attorney fees could not be litigated in a §850 proceeding, because there was no *enforceable* claim to the fees until the contingency—the sale of land—occurred . . . and that event occurred *after* attorney’s death. [*Estate of Linnick*, supra (decided under predecessor statute)]

b. **Third party actions**

- (1) [15:572] **Security interest not a sufficient “adverse claim”:** Similarly, an unrecorded security interest generally will not itself support a §850 petition. Case law has consistently limited standing in §850 proceedings to third party claimants seeking a declaration of *title, ownership or possession*. [See *Estate of Sayles* (1982) 130 CA3d 275, 279-280, 181 CR 543, 545-546]
  - (a) [15:573] **Example—trust deed beneficiary:** For example, the beneficiary of a trust deed securing a promissory note may not bring a §850 action against the estate. The beneficiary’s interest in this case is simply too remote; the most such claimant might receive is the *money owed* (following foreclosure), *not the property itself*. [*Estate of Sayles*, supra, 130 CA3d at 279, 181 CR at 545—“Since its enactment, cases decided under . . . [predecessor statute] have required an ‘interest’ in real or personal property far more substantial than merely being the beneficiary of a trust deed securing a promissory note”]
  - (b) [15:574] **Compare—judgment lienholder’s claim that property not part of estate:** However, a third party judgment creditor claiming under a *judgment lien* may use a §850 proceeding to raise the issue of whether the subject property is properly before the probate court as property of the decedent debtor’s estate—e.g., whether decedent’s interest in the property was owned as tenant in common or, instead, as a *joint* tenant (in the latter case, of course, the property would *not* be part of the probate estate).  
Unlike the *Sayles* situation, supra, under these circumstances, the judgment lienholder’s §850 petition is not beyond the probate court’s jurisdiction because it seeks to adjudicate the *debtor’s* (not the lienholder’s) interest in the property. [See *Estate of Baumann* (1988) 201 CA3d 927, 933-934, 247 CR 532, 534-535—probate court had jurisdiction to entertain judgment lienholder’s application under predecessor statute to compel distribution of sale proceeds in satisfaction of his judgment . . . on theory that petition sought to prove the underlying property was not property of the estate (*Sayles* distinguished)]
  - (c) [15:575] **Comment:** *Sayles*, supra, may still be good law with respect to its facts. However, because it was decided under a predecessor statute that restricted standing to estate representatives and property claimants, it has been described as “of little persuasive effect in ascertaining the parameters



of standing under current section 850.” [See *Estate of Myers* (2006) 139 CA4th 434, 441-442, 42 CR3d 753, 757-758—creditor of estate presumptively qualifies to initiate §850 proceeding]

[15:576-579] *Reserved.*

- (2) [15:580] **Surviving spouse’s claim to personal community property share:** An old and now discredited case held that a third party’s Prob.C. §850 petition may only reach property held by decedent at death (and hence by the estate) and, therefore, that decedent’s surviving spouse lacked standing to have the probate court adjudicate the surviving spouse’s community property interest in property under §850 unless the surviving spouse elected to subject their property to probate. [*Estate of Scott* (1987) 197 CA3d 913, 918, 243 CR 93, 96 (decided under predecessor statute)]

Given the probate court’s general jurisdiction broadly conferred by Prob.C. §800, the *Scott* holding is no longer good law.

[See *Estate of Heggstad* (1993) 16 CA4th 943, 951-952, 20 CR2d 433, 437-438—trustee may invoke probate court’s general jurisdiction to determine whether property is part of estate or trust; *Kucker v. Kucker* (2011) 192 CA4th 90, 95-96, 120 CR3d 688, 692 (same)]

[15:581-584] *Reserved.*

#### 4. Commencement of Proceedings

- a. [15:585] **Petition:** A §850 action is commenced by filing a verified petition (Prob.C. §1021; CRC 7.103) with the court where the probate is pending. The petition must set forth the “facts upon which the claim is based.” [Prob.C. §850(a)(2), (b)]
- (1) [15:586] **Who may file:** Again, the petition may be filed by the personal representative or any “interested person” (Prob.C. §850(a)(2)):
- Ordinarily, the personal representative should file if the allegation is that a *third person* holds title to or possession of property *claimed to belong to the estate*. But if the representative fails or refuses to initiate the action, any other person interested in the estate (heir, beneficiary or creditor) may file.
  - Conversely, if the allegation is that the *estate* holds title to or possession of property claimed to belong to another person, the *third-party claimant* should file.
- (2) [15:587] **Time to file:** There is no statutory time limit on filing the petition. Presumably, therefore, the proceeding

may be commenced at any time up until final distribution and closing of the estate.

Indeed, the court has authority to act on a third party's §850(a)(2) petition even after the property in question has been *sold* to a bona fide purchaser. Under these circumstances, the petition reaches the *sale proceeds* now held by the estate. [*Estate of Blair* (1988) 199 CA3d 161, 165-166, 244 CR 627, 629]

(a) [15:588] **Statute of limitations concerns:** The claim underlying the §850 petition is subject to the same statute of limitations that would apply had an ordinary (“non-§850”) civil suit been brought. [*Parker v. Walker* (1992) 5 CA4th 1173, 1186, 6 CR2d 908, 914 (citing text) (decided under predecessor statute)—§850 proceeding is an “action” subject to statutory limitations on actions]

But it is unclear whether the applicable limitations period is further limited by application of CCP §§366.2 or 366.3 (prescribing one-year limitations periods triggered by decedent’s death, *see* ¶8:19.3 *ff.*). One court has suggested that this may not be the case and the result may turn on the nature of the claim upon which the §850 action is based. [See *Estate of Yool* (2007) 151 CA4th 867, 874, 60 CR3d 526, 531, fn. 5 (citing text)—Prob.C. §366.2 inapplicable to action to establish resulting trust; *and further discussion at* ¶8:99.2]

(3) [15:589] **Form of petition; local rules:** Beyond requiring that the petition set forth the *facts* upon which the petitioner claims title or possession, the statutes do not prescribe any particular form or content. However, many local court rules impose specific requirements (these rules should always be consulted before filing, since failure to comply may render the petition subject to dismissal or, more likely, continuance for amendment). [See L.A. Sup.Ct. Rule 4.37(a)—“caption of the petition must reference Probate Code section 850”]

At a minimum, sufficient facts should be alleged to enable the court to determine that it has *jurisdiction* over the dispute and to disclose the basis upon which the petitioner asserts a superior claim to title or possession.

- **FORM:** Petition to Determine Title to and Require Transfer of Property to Estate (Prob.C. §850), *see Form 15:F.*

(4) [15:590] **Double damages recovery; attorney fees and costs:** Damages equal to twice the value of the property recovered for the estate in a §850 proceeding, as well as reasonable attorney fees and costs, are recoverable upon a finding that defendant (a) *in bad faith*

wrongfully took, concealed or disposed of the property, or (b) took, concealed or disposed of the property “by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse” (as defined in Welf. & Inst.C. §15610.30). [Prob.C. §859; *Keading v. Keading* (2021) 60 CA5th 1115, 1128-1129, 275 CR3d 338, 347—double damages under Prob.C. §859 properly awarded based on finding of financial elder abuse, no finding of bad faith was necessary; *Hill v. Sup.Ct. (Staggers)* (2016) 244 CA4th 1281, 1287, 198 CR3d 831, 835; *Estate of Ashlock* (2020) 45 CA5th 1066, 1076-1077, 259 CR3d 322, 329-330—where property is wrongfully taken in bad faith, twice the value of the property is recoverable under Prob.C. §859 *in addition to* recovery of the property itself under §856; but see *Conservatorship of Ribal* (2019) 31 CA5th 519, 525, 243 CR3d 177, 181-182—although damages under Prob.C. §859 are “in addition to any other remedies available,” double damages amount is inclusive of, and not in addition to, actual damages]

**b. Notice of hearing**

(1) [15:591] **Persons entitled to notice and manner of giving notice:** Notice of hearing on the petition must be given as follows:

(a) [15:592] **Minimum 30 days’ notice by CCP §413.10 et seq. service:** At least *30 days* before the hearing, petitioner must serve notice *and a copy of the petition* in the manner prescribed for service of a civil summons (CCP §413.10 et seq.) on the personal representative and any person claiming an interest in or having title to or possession of the property, unless such persons are themselves petitioning parties. [Prob. C. §§851(a)(1) & (2), 1201]

(b) [15:593] **Notice under Prob.C. §1220:** In addition, except for those persons who must be served under §851(a) (¶15:592), minimum 15 days’ notice of the hearing *along with a copy of the petition* must be given pursuant to Prob.C. §1220, which in turn requires delivery (personally, electronically, or by mail) pursuant to Prob.C. §1215 to:

- The persons listed in Prob.C. §1220; and
- Each “known” heir and devisee “whose interest in the estate would be affected.” [Prob.C. §851(b)(1)]

(Remember that persons who requested *special notice* must also be served with a *copy of the petition*, unless such notice is excused for cause; Prob.C. §1252(a), ¶3:512.)

- (2) [15:594] **No shortening of notice:** Ordinarily, for any probate matter requiring a noticed hearing, the court may *shorten* the minimum time for giving notice on “good cause” shown (Prob.C. §1203(a), ¶3:466.4). However, §850 proceedings are one of the few exceptions: “The court may *not* shorten the time for giving the notice of hearing under . . . [Section 851].” [Prob.C. §851(c) (emphasis added)]
- (3) [15:595] **Form of notice—content requirements:** The §851 notice is given on the general Notice of Hearing—Decedent’s Estate or Trust form (DE-120), available online at the California Courts website ([www.courts.ca.gov](http://www.courts.ca.gov)). The Notice of Hearing must contain all of the following:
- A description of the property that is the subject of the §850 petition sufficient to provide adequate notice to any party who may have an interest in the property. For real property, the notice must include the street address or, if none, a description of the property’s location and assessor’s parcel number;
  - A description of the relief sought under Prob.C. §859 (¶15:561) sufficient to provide adequate notice to the party against whom the relief is requested; and
  - A statement advising any person interested in the property that they may file a response to the petition. [Prob.C. §851(c)]

Some local rules also impose content requirements, recognizing that the proceeding is akin to an adversarial civil action. For example, the Los Angeles Superior Court Probate Rules require all notices of hearing on such petitions to contain:

- A *description* of the property involved sufficient to give adequate notice to any party who “might be interested in the property” . . . including with respect to real property, the street address or, if none, a “description of the property’s location”; and
  - A statement advising “any person interested in the property” that they may file an answer to the petition. [See L.A. Sup.Ct. Rule 4.37(b)]
- (a) [15:596] **Limitation—CRC prohibition re altered Judicial Council forms, etc.:** Notwithstanding local rule requirements, courts may not mandate use of an “altered form” in place of the Judicial Council Notice of Hearing (Probate) form (see CRC 1.31(e)). Nor may courts reject the official form for filing on the ground that it “lacks any other material added

by [the] court, unless the material is required by the Judicial Council.” [See CRC 1.42(5)]

[15:597-598] *Reserved.*

(4) [15:599] **Proof of notice given:** As with all probate petitions requiring a noticed hearing, proof of proper service and required mailed notice pursuant to §851 must be made “to the satisfaction of the court” at or before the hearing (*see generally*, ¶3:498 *ff.*).

c. [15:600] **Optional lis pendens if proceeding involves real property:** If the petition affects real property, either party may file a notice of pendency of the proceeding (“lis pendens”) pursuant to CCP §405 et seq. (the same procedure governing lis pendens in civil actions generally). [Prob.C. §1004; *Maltaman v. State Bar* (1987) 43 C3d 924, 952, 239 CR 687, 703]

➡ [15:601] **PRACTICE POINTER:** Filing a lis pendens is strictly *optional*. Even so, the lis pendens procedure normally should be followed since, from the time the notice is properly recorded (in the county where the subject real property is located), it effectively gives constructive notice “to the world” of the pendency of the proceeding, thereby “cutting off” subsequent BFP claims (*see* CCP §405.24).

*Cross-refer:* Lis pendens procedures (including motions to expunge) are discussed in detail in Greenwald & Bank, *Cal. Prac. Guide: Real Property Transactions* (TRG), Ch. 11.

d. [15:602] **Effect of IAEA authority:** The power to “allow, compromise, or settle” third party claims to estate property and determining decedent’s claims to property held by another are among those actions listed under the IAEA requiring a notice of proposed action. [Prob.C. §10518, ¶9:34.4] What exactly this procedure empowers an IAEA representative to do in the face of a title or possession dispute is not clear. It is doubtful that even IAEA representatives may skip the court supervision process under §850, since a court *order* is necessary to direct a title transfer as to disputed property (Prob.C. §856). However, an IAEA representative could proceed under the notice of proposed action procedure to *settle* a potential §850 claim.

[15:603-604] *Reserved.*

5. [15:605] **Response:** “Interested persons” have a right to object to the action for transfer of title or possession by filing a response to the petition, as follows:

[15:606 — 15:610]

- a. [15:606] **Time to respond; request for extension of time:** The minimum 15-day and 30-day service periods (§§ 15:592 *ff.*) might not allow adequate time to investigate the facts and prepare a response before the hearing date. Recognizing this problem, the Code allows any “interested person” to request an extension of time for filing a response to the petition, for *discovery* proceedings, or for “other preparation for the hearing.” For any of these purposes, the court “shall” *continue* the hearing for a “reasonable time.” [Prob.C. §852; see *Dixon v. Sup.Ct. (Daubenbis)* (1987) 195 CA3d 758, 766, 240 CR 897, 902—continuance granted to L.A. County Treasurer holding funds of decedent under a criminal conviction restitution order]
- b. [15:607] **Objections (abatement or dismissal):** Objections seeking to *obviate a hearing* on the petition may be raised as follows:
  - (1) [15:608] **Improper venue—ground for dismissal:** Any person having or claiming title to or an interest in the property which is the subject of the proceeding may, *at or prior to* the hearing, object to the court’s hearing the petition on the ground that the petition was filed in a court which is “not the proper court under any other provision of law for the trial of a civil action seeking the same relief”—i.e., *improper venue*. [Prob.C. §853]  
  
If the “wrong court” objection is established, the court “shall not” grant the petition; in other words, the petition must be *dismissed*. [Prob.C. §853]  
  
*Cross-refer:* For a comprehensive discussion of civil action venue rules, see Weil & Brown et al., *Cal. Prac. Guide: Civ. Pro. Before Trial* (TRG), Ch. 3.
  - (2) [15:609] **Another action already pending—ground for abatement:** If a civil action with respect to the subject property is already pending and the court in that civil action obtained jurisdiction (complaint filed *and* summons and complaint served) *before* the §850 petition was filed, *upon request* of any party to the civil action, the probate court “shall abate” (*mandatory*) the §850 petition until conclusion of the civil action. [Prob.C. §854; and see *Conservatorship of Pacheco* (1990) 224 CA3d 171, 176-177, 273 CR 522, 525—probate proceeding involving same subject matter as pending civil action abated under parallel conservatorship law provision]
    - (a) [15:610] **Exception—civil action filed for delay:** Notwithstanding grounds for “mandatory” abatement under §854, abatement is *not* required if the probate court determines that the civil action was filed “for the purpose of delay.” In such event, the probate court has *discretion* to *deny* the abatement request and proceed with the hearing on the §850 petition. [Prob.C. §854]



- (b) [15:611] **Compare—discretionary abatement under other circumstances:** There is *no* Code provision for “mandatory” abatement of the probate action where a civil suit involving the subject property is commenced *after* a §850 petition is filed or where a civil suit *might* be filed. However, the probate court has *discretion* to determine that the §850 matter “should be determined by a civil action” (as where the issues are especially complex); and, in such case, the probate court “may not grant” the §850 petition. [Prob.C. §856.5]

➡ [15:612] **PRACTICE POINTER:** The parties should be advised of the advantages of litigating the matter pursuant to a §850 petition—of significance, in a probate proceeding they will not face the same delays in getting to trial that they might face in a general civil proceeding. [See *Heiser v. Sup.Ct. (Lewis)* (1979) 88 CA3d 276, 278, 151 CR 745, 747]

Thus, even if a civil action was first filed and served, consider suggesting that it be dismissed without prejudice to allow the dispute to be heard in the more expeditious §850 proceeding.

[15:613-614] *Reserved.*

## 6. Hearing and Disposition

- a. [15:615] **Continuance requests:** As noted above (¶15:606), the court must grant an “interested person’s” request to continue the hearing for a reasonable time where necessary to allow time to prepare a response to the petition, to engage in discovery or “for other preparation for the hearing.” [Prob.C. §852, ¶15:606]

But the right to a continuance presupposes that the request will be made *promptly* after service of the §850 petition. As a practical matter, courts are unlikely to delay the hearing where the requesting party “dragged their heels” in bringing the supposed necessity for continuance to the court’s attention.

(Indeed, many courts prefer to set an extended hearing date when the petition is filed so as to avoid the need for a possible continuance; see L.A. Sup.Ct. Rule 4.37(a)—§850 petitions not set for hearing sooner than six weeks from date of filing, and if difficulties in serving required notice are anticipated, “attorneys shall request a later hearing date *so as to avoid continuance . . .*”)

- b. [15:616] **Prehearing “surrender orders”:** In an appropriate case, where it appears an adverse claimant in possession of the disputed property might transfer or convey it before adjudication of the matter, the probate court may issue a

pendente lite order requiring that the property be released to the other party before a full hearing on the petition. This authority is implicit in Prob.C. §800, expressly granting probate courts “the same power and authority” as civil courts generally and, hence, the power to grant any *injunctive relief* authorized by CCP §525 et seq. (*see* ¶13:60.6 ff.).

- (1) [15:617] **Distinguish—*independent action for restraining order***: Of course, appropriate TROs and preliminary injunctions (CCP §527; Fam.C. §240 et seq.) might also issue pursuant to an *independent civil action*—e.g., restraining the party in possession from taking specified action which might *harm* or *destroy* the property. But the facts would have to support the relief sought under appropriate statutory authority.

In one case, for example, special administrators filed a petition for TRO and preliminary injunction to enjoin their brother from harassing them and other family members. Among other things, the petition alleged that the brother remained in possession of the decedent father’s home and that he threatened to kill one of the petitioners and burn down the house if she were to proceed with the probate and take the house from him. Petitioners sought immediate removal of the brother from the house.

The lower court’s order granting the injunction was *reversed* . . . because petitioners actually sought “domestic violence” relief (summary removal from a dwelling to quell or prevent domestic violence, Fam.C. §6200 et seq.) and that remedy is authorized only when the person for whose protection the order is made was *actually residing* with the person at whom the order is directed. Nor could the injunction be based on the court’s general equity power because there was *no other pending civil action* on which to base the injunction. [See *Marquez-Luque v. Marquez* (1987) 192 CA3d 1513, 1518-1519, 238 CR 172, 176-177]

- c. [15:618] **No right to jury trial**: Section 850 proceedings are *not* triable by jury. [Prob.C. §825; *see* ¶15:229]

- (1) [15:619] **Compare—*civil action seeking same relief***: In *independent civil actions* claiming an interest in or right to possession of real or personal property of the estate, the litigants’ right to jury trial is determined under the Code of Civil Procedure—*not* the Probate Code. [See CCP §592; *Heiser v. Sup.Ct. (Lewis)*, *supra*, 88 CA3d at 278, 151 CR at 747]

[15:620-624] *Reserved.*

- d. [15:625] **“Summary determination” alternatives**: A “full blown” court trial naturally will run up the costs to all concerned

parties and will likely consume a lot of time. Of course, a pretrial *settlement* may be the most time and cost-effective method of resolving the dispute and should always be pursued as a first recourse. But the Code also offers two expeditious “summary determination” alternatives in lieu of traditional litigation:

If the parties so agree, they may submit the dispute for summary determination by a designated temporary judge (Prob.C. §9620) or may have the matter decided by *binding arbitration* (Prob.C. §9621).

*Cross-refer:* For an overview of the Probate Code “summary determination” procedures, *see* ¶15:965 *ff.* And for a detailed discussion in connection with creditor claim litigation, *see* ¶8:115 *ff.*

- e. [15:626] **Order:** After a full evidentiary hearing, if the court is “satisfied” that a conveyance or transfer pursuant to the §850 petition is warranted, it “shall” authorize and direct the person with title or possession (personal representative or other person, as the case may be) to execute a conveyance or transfer to the person entitled to the disputed property or grant “other appropriate relief.” [Prob.C. §856]

**FORM:** Order Directing Transfer/Conveyance of Property (Prob.C. §856), *see Form 15:G.*

- (1) [15:627] **Recordation of order affecting real property:** When the §856 order directs the conveyance of real property, a certified copy of the order must be recorded in the office of the county recorder for the county (or counties) where any portion of the property is situated. [Prob.C. §7263]
- (2) [15:628] **Effect of order and conveyance or transfer thereunder:** The §856 order and a conveyance or transfer made pursuant thereto have the following effect:
  - (a) [15:629] **Order as prima facie evidence of authority to convey or transfer:** The court’s order is “prima facie evidence of the correctness of the proceedings” *and* of the personal representative’s or other person’s authority to make the conveyance or transfer. [Prob.C. §857(a)]
  - (b) [15:630] **Transferee’s immediate right to possession:** Once entered, the order itself gives the named transferee the right to immediate possession of the subject property and the right to hold the property according to the terms of the order “as if the property *had been* conveyed or transferred” as directed by the court. [Prob.C. §857(b) (emphasis added)]

[15:631-634] *Reserved.*

**State of California**

**PROBATE CODE**

**Section 850**

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850. (a) The following persons may file a petition requesting that the court make an order under this part:

(1) A guardian, conservator, or any claimant, in the following cases:

(A) Where the conservatee is bound by a contract in writing to convey real property or to transfer personal property, executed by the conservatee while competent or executed by the conservatee's predecessor in interest, and the contract is one that can be specifically enforced.

(B) Where the minor has succeeded to the interest of a person bound by a contract in writing to convey real property or to transfer personal property, and the contract is one that can be specifically enforced.

(C) Where the guardian or conservator or the minor or conservatee is in possession of, or holds title to, real or personal property, and the property or some interest therein is claimed to belong to another.

(D) Where the minor or conservatee has a claim to real or personal property title to or possession of which is held by another.

(2) The personal representative or any interested person in any of the following cases:

(A) Where the decedent while living is bound by a contract in writing to convey real property or to transfer personal property and dies before making the conveyance or transfer and the decedent, if living, could have been compelled to make the conveyance or transfer.

(B) Where the decedent while living binds himself or herself or his or her personal representative by a contract in writing to convey real property or to transfer personal property upon or after his or her death and the contract is one which can be specifically enforced.

(C) Where the decedent died in possession of, or holding title to, real or personal property, and the property or some interest therein is claimed to belong to another.

(D) Where the decedent died having a claim to real or personal property, title to or possession of which is held by another.

(3) The trustee or any interested person in any of the following cases:

(A) Where the trustee is in possession of, or holds title to, real or personal property, and the property, or some interest, is claimed to belong to another.

(B) Where the trustee has a claim to real or personal property, title to or possession of which is held by another.

(C) Where the property of the trust is claimed to be subject to a creditor of the settlor of the trust.

(b) The petition shall set forth facts upon which the claim is based.

(Added by Stats. 2001, Ch. 49, Sec. 1. Effective January 1, 2002.)

**State of California**

**PROBATE CODE**

**Section 859**

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859. If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to a conservatee, a minor, an elder, a dependent adult, a trust, or the estate of a decedent, or has taken, concealed, or disposed of the property by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse, as defined in Section 15610.30 of the Welfare and Institutions Code, the person shall be liable for twice the value of the property recovered by an action under this part. In addition, except as otherwise required by law, including Section 15657.5 of the Welfare and Institutions Code, the person may, in the court's discretion, be liable for reasonable attorney's fees and costs. The remedies provided in this section shall be in addition to any other remedies available in law to a person authorized to bring an action pursuant to this part.

(Amended by Stats. 2013, Ch. 99, Sec. 1. (AB 381) Effective January 1, 2014.)