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2 UNITED STATES BANKRUPTCY COURT  
3 EASTERN DISTRICT OF CALIFORNIA  
4 MODESTO DIVISION  
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6 In re: )  
7 )  
8 PEREIRA AND MELO DAIRY, ) Case No. 04-90682-D-7  
9 )  
10 Debtor. ) D.C. MGO-11  
11 ) Submitted February 8, 2005  
12 )  
\_\_\_\_\_ )

13 MEMORANDUM DECISION

14 The debtor filed a petition under chapter 11 of the Bankruptcy  
15 Code<sup>1</sup> on February 24, 2004. On June 15, 2004, the debtor converted  
16 this case to one under chapter 7. Michael D. McGranahan  
17 ("Trustee") was appointed as interim chapter 7 trustee. Creditors  
18 did not vote at the meeting of creditors to elect a third party as  
19 trustee and thus Trustee became the trustee for the case. 11  
20 U.S.C. § 702(d).

21 On October 29, 2004, the trustee objected to the claim filed  
22 in this case by the Conservatorship of Florence Alves ("Claimant").  
23 The initial objection was simply that the claim had no supporting  
24 documentation to justify the \$486,000 sought. By stipulation of  
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27 <sup>1</sup> Unless otherwise noted, all statutory references are to the  
28 Bankruptcy Code, 11 U.S.C. §101 *et seq.*, and all "Rule" references are  
to the Federal Rules of Bankruptcy Procedure.

1 the parties, the initial hearing was continued to December 28,  
2 2004. On December 14, 2004, Claimant filed a written response with  
3 supporting documentation to prove up its claim.

4 In its response, Claimant alleges that the debtor partnership  
5 and its two partners wrongfully converted monies from Claimant in  
6 the approximate amount of \$243,000. The transfers allegedly  
7 occurred between January 25, 2002 and June 25, 2002. On October  
8 28, 2002, the Stanislaus County Superior Court made findings  
9 sufficient to appoint the Stanislaus County Public Guardian as  
10 conservator for the person and the estate of Florence Catherine  
11 Alves. On November 26, 2002, Claimant filed an action in the  
12 Stanislaus County Superior Court seeking to recover the alleged  
13 wrongful transfers pursuant to California Probate Code Section 850.  
14 Claimant also requested double damages pursuant to California  
15 Probate Code Section 859. Trial on Claimant's Section 850 and 859  
16 requests was set for February 25, 2004, but was stayed by the  
17 filing of debtor's petition on February 24, 2005.

18 At the hearing on December 28, 2005, the parties requested  
19 that the matter be continued so that both sides could brief the  
20 purely legal question of whether Probate Code Section 859 was  
21 applicable. The court continued the matter to February 8, 2005.  
22 Both parties timely filed briefs. After oral argument, the court  
23 took the matter under submission. The court having considered both  
24 memoranda and also having done its own research, concludes that  
25 Section 859 is applicable subject to Claimant meeting its burden of  
26 proof. Nothing herein constitutes a finding of bad faith. That  
27 issue will be decided following the submission of evidence.

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1 and the historical progression of the statute.

2 "Both the legislative history of the statute and the wider  
3 historical circumstances of its enactment may be considered in  
4 ascertaining the legislative intent." Dyna'Med, Inc., 43 Cal.3d at  
5 1387. Section 859 is the latest iteration of a statute which has  
6 existed since at least 1907. The 1931 statute, former Probate Code  
7 Section 612, read: "If any person embezzles, conceals, smuggles or  
8 fraudulently disposes of any property of a decedent, he is  
9 chargeable therewith, and liable to an action by the executor or  
10 administrator of the estate for double the value of the property,  
11 to be recovered for the benefit of the estate." Estate of Harvey,  
12 224 Cal.App.2d 555, 560 (Cal.Dist.Ct.App. 1964). The words  
13 "property belonging to the estate of..." were not then part of the  
14 statute.

15 At least one case applying the 1931 statute indicates that the  
16 statute could be applied to transactions predating the event that  
17 causes court administration of an estate. In Bogan v. Wiley, 90  
18 Cal.App.2d 288 (Cal.Dist.Ct.App. 1949), an action under Probate  
19 Code § 612, the Court of Appeal reversed the denial of defendant's  
20 motion for judgment notwithstanding the verdict and directed entry  
21 of judgment for defendant. In doing so, the Court of Appeal  
22 considered, inter alia, whether the defendant could have embezzled  
23 (within the meaning of Probate Code § 612) a check issued to Zaida  
24 and Lewis Bogan, apparently on the day of Zaida Bogan's death. The  
25 court concluded that "[t]he check never became the property of  
26 Zaida Bogan or her estate." 90 Cal.App.2d at 292. The court went  
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28

1 on to say:

2 Since title to the check was neither vested in, nor held by  
3 defendant for, Zaida Bogan or her estate it never became her  
4 property or that of her estate. If it was not property of  
5 Zaida Bogan or her estate it could not be embezzled,  
6 concealed, smuggled or fraudulently disposed of within the  
7 meaning of Probate Code, section 612 since by its terms that  
8 section applies only to "any property of a decedent."

9 Id. (emphasis added).

10 The conclusion that the predecessor statutes to probate Code §  
11 859 applied to transactions predating the event that causes court  
12 administration of an estate is confirmed by the Code Commissioner's  
13 note from 1956: "The amendment [of C.C.P. § 1458 in 1907] omits the  
14 word "alienates," and inserts in lieu thereof the words "conceals,  
15 smuggles, or fraudulently disposes," to make the phraseology of the  
16 section uniform with that of sections 1459 and 1460. A remedy of  
17 this kind should not be given except in cases where the action of  
18 the defendant has been fraudulent or criminal. The amendment also  
19 makes the section apply to embezzlement committed at any time,  
20 whether administration is pending or not. It would seem to be as  
21 important in the one case as in the other." (emphasis added).

22 Section 612 was restated and modified in 1988, when the  
23 Legislature created Probate Code Section 8874. Section 8874  
24 provided for a double recovery against a person "who, in bad faith,  
25 has wrongfully taken, concealed, or disposed of property in the  
26 estate of the decedent..." The legislative history relating to  
27 Probate Code Section 8874 is terse. "Section 8874 restates former  
28 Section 612 with the addition of a bad faith limitation." 19  
Cal.L.Rev.Comm. Reports 769 (1988). The change in language from  
"property of a decedent" to "property in the estate of a

1 decedent...." is not explained. The absence of such an  
2 explanation, coupled with the statement that Section 8874 was  
3 intended to restate former Section 612 with a bad faith limitation,  
4 gives no indication that the legislature intended to overrule Bogan  
5 v. Wiley.

6 In 1990, the Legislature created Probate Code Section 2619.5,  
7 which provided for double recovery against a person "who, in bad  
8 faith, has wrongfully taken, concealed, or disposed of property in  
9 the estate of the ward or conservatee...." "Section 2619.5 is new  
10 and continues Section 8874 as that section was applied to  
11 guardianship and conservatorship proceedings by former subdivision  
12 (c) of Section 2616." 20 Cal.L.Rev.Comm.Reports 1001 (1990). The  
13 legislative history indicates that Section 2619.5 merely stated  
14 separately the double recovery provision for conservatees and  
15 wards. There is no indication that its enactment was intended to  
16 change how Sections 612 and 8874 had previously been applied.

17 In 2001, the Legislature consolidated the like provisions in  
18 the Probate Code directed at decedent's estates, conservatees and  
19 wards, and trusts:

20 Existing law provides for the determination of claims brought  
21 to determine ownership of real or personal property claimed by  
22 an estate, a ward or conservatee, or a trustee, as specified.  
23 Among other provisions, if a court finds that a person has, in  
24 bad faith, wrongfully taken, concealed, or disposed of  
25 property in the estate of a ward or conservatee, in the estate  
of a decedent, or in or belonging to the trust, he or she is  
liable for twice the value of the property. A court may not  
grant a petition under these provisions if the court  
determines that the matter should be determined by a civil  
action.

26 This bill would revise, recast, and consolidate those  
27 provisions. The bill would specify that an action brought  
pursuant to these provisions may include claims, causes of

1 action, or matters that are normally raised in a civil action  
2 to the extent that the matters are related factually to the  
subject matter of the petition.

3 2001 Cal. Legis. Serv. Ch. 49 (S.B. 669) (WEST)

4 Again, the legislative history indicates no intent to overrule  
5 prior law applying former Section 612 to transactions predating the  
6 event that causes court administration of an estate. The 2001 bill  
7 was merely an effort to unclutter the Probate Code by consolidating  
8 similar provisions. The trustee's arguments to the contrary at  
9 oral argument are unpersuasive. The language over which both sides  
10 are arguing ("property belonging to the estate of a...conservatee")  
11 is simply another way of saying "property in the estate of...the  
12 ...conservatee...", which latter language existed in the prior  
13 statute, Probate Code Section 2619.5, and in the statute before  
14 that, Probate Code Section 8874.

15 The conclusion that Probate Code § 859 applies to transactions  
16 predating the event that causes court administration of an estate  
17 is consistent with the statutory scheme as a whole. "The words of  
18 the statute must be construed in context, keeping in mind the  
19 statutory purpose, and statutes or statutory sections relating to  
20 the same subject must be harmonized, both internally and with each  
21 other, to the extent possible." Dyna'Med, Inc., 43 Cal.3d at 1387.  
22 Probate Code Sections 850 to 859 together make up Part 19 of the  
23 Probate Code. Part 19 is a coherent scheme designed to allow  
24 guardians, conservators, executors, or trustees to recover assets  
25 which should be part of the relevant estate but which are not  
26 because they were transferred improperly. Section 850 permits a  
27 conservator to sue third parties to recover property allegedly  
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1 belonging to the conservator estate. See Ross & Grant, Cal. Prac.  
2 Guide.: Probate, § 15:350.1 (The Rutter Group 2005); Estate of  
3 Linnick, 171 Cal.App.3d 752, 760 (Cal. Ct. App. 1985)("Section  
4 851.5 [now 850] now provides the authority and the procedure for  
5 the hearing of a petition by a decedent's estate concerning any  
6 claim involving property allegedly wrongfully possessed by  
7 another.")

8       Once property is recovered under Section 850, it becomes  
9 "property belonging to the estate of ... a conservatee" and a  
10 double recovery is available if the court then finds that the  
11 property was wrongfully taken in bad faith. The double recovery is  
12 not available in a vacuum. It requires that the conservator first  
13 prevail under Section 850. "Damages equal to twice the value of  
14 any property allegedly 'taken concealed or disposed of are  
15 recoverable in § 850 proceedings from the persons who in 'bad  
16 faith' deprived the estate of same." Ross & Grant, Cal. Prac.  
17 Guide.: Probate, § 15:351.1 (The Rutter Group 2005)

18       This brings the court to the trustee's argument that if  
19 Section 859 is applicable to transfers predating court appointment  
20 of the conservator, the statute could conceivably have no temporal  
21 limitation. An analysis of Part 19 as a whole disposes of this  
22 argument completely. As noted above, double recovery is  
23 unavailable until the court determines that the property is  
24 recoverable under Section 850. For that to occur, the court must  
25 determine that the transfers are somehow defective. In the case of  
26 a conservatee, that defect typically takes the form of undue  
27 influence, mental infirmity, or some other incapacitating effect.



1 The temporal limitation on Section 850 and therefore Section 859 is  
2 that period of time during which the conservatee was subject to the  
3 infirmity which ultimately supported the adjudication that the  
4 conservatee was incompetent. That determination is fact specific  
5 and must be established by the claimant.

6  
7 **CONCLUSION**

8 Over the history of the statute since 1931, the legislative  
9 history indicates that there has been no change in the statute's  
10 application but for the addition of the "bad faith" requirement in  
11 1988. For the above reasons, the court concludes that Section 859  
12 is available in this claim proceeding subject to claimant's first  
13 proving entitlement to a recovery under Section 850 followed by  
14 proof of a bad faith wrongful action by the debtor.

15 The trustee's objection to claim remains opposed. This matter  
16 involves disputed facts that cannot be resolved on declarations.  
17 Pursuant to Bankruptcy Rule 9014(c), all of the rules of Part VII  
18 shall apply. The clerk shall assign an adversary proceeding  
19 number, and docket control number MGO-11 shall no longer be used in  
20 reference to this matter. On or before June 14, 2005, trustee  
21 Michael D. McGranahan, as plaintiff, shall pay the adversary  
22 proceeding filing fee, or file an application to defer payment of  
23 the filing fee, and file and serve a summons and an amended  
24 complaint that complies with Bankruptcy Rule 7008 and all other  
25 applicable rules. The defendant shall be The Conservatorship of  
26 the Person and the Estate of Florence Alves. The adversary  
27 proceeding will next appear on the status conference calendar date

1 set in the summons.

2 The court will issue an interim order that conforms to the  
3 above ruling.

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5 Dated:

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THOMAS C. HOLMAN  
UNITED STATES BANKRUPTCY JUDGE

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