

Fighting Fees in Probate Court

BY HERB FOX

Most of us accept court filing and processing fees as a fact of life. But when John Gherini's client was assessed \$74,411 as a probate court fee, he fought back, and won. In a published decision, the Court of Appeal found that the fee was an unconstitutional "estate or inheritance tax masquerading as a probate court user or filing fee", and struck down the Government Code section authorizing such charges.

Gherini's client was the executrix of an estate worth over \$35 million. In order to close the estate, the probate court assessed a total filing fee of over \$74,000, based on the size of the estate (*Gov. Code §§ 26827, 68087 and Rules of Court 7.552(c)*). Gherini protested and petitioned for a refund, claiming that the fee should be only \$231. Probate Court Judge Bill McLafferty disagreed and denied the petition.

In an opinion by Associate Justice Kenneth Yegan, the Court of Appeal concluded that the code sections authorizing probate court filing fees to be fixed according to the

size of the estate in reality comprised a tax that contravened Proposition 6, which prohibits the legislature from imposing an estate or inheritance tax (*Tax & Revenue Code §13301; Cal.Const. art. II, §10 (c)*).

The Court of Appeal reasoned that the filing fee was indistinguishable from a tax. Because it is based on the size of the estate, it differs from typical filing fees that are fixed and generally less than \$500. The Court rejected the argument of the state Attorney General that the filing fee was actually a user fee, finding instead that the fee structure was designed to raise revenue and not to compensate for the actual cost to the court of processing a probate proceeding.

Now the question, of course, is whether those who recently paid probate filing fees based on the size of the estate are entitled to refunds.

The case is *Burkey v. Superior Court* (March 27, 2008) 161 Cal.App.4th 465. The State of California was represented by the Attorney General's Office and the Santa Barbara County Counsel's Office. ■



Herb Fox



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