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Current developments in California probate and trust law

*Trends in the California residential real estate market affecting
and impacting trusts and estates*

*Putting it all together: The evolution of interdisciplinary
collaboration between fiduciaries, attorneys and related
professionals (financial advisers and CPAs)*

PART ONE: CURRENT DEVELOPMENTS

Current Developments in Estate Planning, Trust and Probate Law in California

I. Asset Protection

✚ *Pratt v Ferguson* (2016) 3 Cal.App.5th (102)

Fact Summary: Revocable trust beneficiary's child support obligee petitioned to compel trustee to satisfy child support orders from beneficiary's share of the trust estate and to impose judgment lien on beneficiary's interest in the trust estate to satisfy a community property judgment. Trust had a spendthrift provision as well as a "shutdown clause" stating that "*All provisions for the payment of periodic installments of principal to any beneficiary shall become inoperative during any period when and to the extent that, if paid, they would become subject to the enforceable claims of creditors of the beneficiary.*"

Holding: Where a trustee has discretion to make or withhold payment, the trustee may not act with an intent to avoid child support, regardless of any provisions in the trust to the contrary.

Legal Analysis:

- Probate Code section 15305(b) provides that if a beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court may order the trustee to satisfy all or part of the support judgment out of all or part of those payments.
 - o Subsection (d) applies to a support judgment notwithstanding any provision in the trust instrument.
- A minor's right to support may not be defeated by a spendthrift clause in a trust instrument.
 - o Child support creditors are elevated to the status of 'preferred creditors' and permitted to reach a beneficiary's interest in a trust, despite the existence of a spendthrift provision
 - This also applies to a shutdown provision
- The amount to be applied from trust distributions to the beneficiary's support obligations is a matter for the trial court's discretion.
- Community property judgment is not subject to these rules.
 - o With respect to a community property judgment lien, if the trustee exercises his or her discretion to make payments to the judgment debtor beneficiary, the trial court, in its discretion, may order that up to 25% of the payment to the beneficiary may be used to satisfy the judgment. Discretionary payments that the trustee makes to the judgment debtor beneficiary in excess of the amount necessary for the beneficiary's education and support are subject to such a judgment lien.

✚ *O'Brien v AMBS Diagnostics, LLC* (2016) 246 CA4th 942

529 Plans do not qualify as exempt assets in California: Section 529 college savings accounts excluded from a debtor's bankruptcy estate under federal law are not exempt from levy of execution under California law.

✚ *Carne v Worthington* (2016) 246 Cal.App.4th 548

Fact Summary: Decedent created a trust in 1985 and transferred Via Regla property to the 1985 Trust by way of a recorded deed. In 2009, decedent created a new trust. Schedule A to the 2009 Trust listed the Via Regla property. Beneficiary of the 1985 Trust contended that the 2009 Trust failed to effectively transfer the Via Regla property because decedent was not the legal owner of the property at the time of the purported transfer.

Holding: Decedent's signature on the 2009 Trust was sufficient to convey good title to real property from the settlor's 1985 Trust, where settlor owned the property as the sole trustee, and the 2009 Trust stated that the property was to transferred.

Legal Analysis:

- When a trust contains real property, section 15206 of the Probate Code requires a writing demonstrating that the real property is held in trust.
- A trust agreement signed by the settlor and trustee, manifesting the settlor's present intention thereby to transfer specified property is sufficient to create a trust.
- Court declined to adopt a requirement that would, in effect, mandate that a trustor convey real property twice where the conveyance is in a trust document in order for it to constitute a valid transfer.
- "It is undisputed that, at the time of the execution of the 2009 Trust, the 1985 Trust was a revocable inter vivos trust, Liebler owned the Via Regla Property as the sole trustee of the 1985 Trust, and Liebler had the power during his lifetime to transfer the real property owned by the 1985 Trust. Under these circumstances, Liebler's signature on the 2009 trust was sufficient to convey good title from the 1995 Trust to the 2009 Trust.

II. **Litigation**

✚ *Gregge v Hugill* (2016) 1 Cal.App.5th 561 (Causes of Action)

Fact Summary: Grandson appeals the dismissal of his 17200 petition to determine the validity of a 2008 amendment to his grandfather's trust. The petition alleged the grandfather lacked testamentary capacity and was subject to undue influence when he executed the amendment. Emphasizing that the law disfavored will contests, the trial court stated its intention to dismiss the petition if another beneficiary would agree to relinquish his interest in the trust, thereby removing grandson's standing. When beneficiary agreed, trial court dismissed grandson's petition under section 17202.

Holding: A trial court does not have the authority or discretion to dismiss a beneficiary's petition; therefore, trial court abused its discretion by inviting a dismissal of the action and accepting a conditional disclaimer with the stated objection of terminating the litigation.

Legal Analysis:

- Being permissive and not mandatory, a dismissal under section 17202 invokes the discretion of the trial court; therefore, the abuse of discretion standard is the appropriate standard of review.
 - o Discretion of a trial judge is subject to reversal on appeal where no reasonable basis for the action is shown.
- Public policy demands that full and complete opportunity should be given to all interested parties to test the validity of such a testamentary document, not only to protect that which may be rightfully and legally theirs, but also to preserve the wishes and desires of the decedent.

✚ *Funston v Wells Fargo Bank, n.a. et. Al* (2016) 2 Cal.App.5th 959 (Will and Trust Contests)

Fact Summary: Co-settlor's son filed "safe-harbor" application requesting judicial determination that he would not violate a "no-contest" clause in a trust instrument by filing a petition to establish that he was the sole successor trustee of the trust, notwithstanding the fact that settlor designated an additional co-successor trustee after co-settlor passed away. The Probate court denied the petition, but also denied executor's petition for determination that the son's conduct violated the no-contest clause.

Holding: Propriety of a safe-harbor application under the Probate Code is a procedural issue which must be resolved independently of the question regarding what substantive law governs the enforceability of the underlying no-contest clause in a will or trust. Safe-harbor procedure is no longer available.

Legal Analysis:

- Safe-harbor petition was a method for determining whether a petition would violate a no-contest clause prior to filing the petition. As no-contest clause law became more complex, the safe-harbor procedure ended up increasing instead of reducing litigation.
- 2008 statute (section 21315) streamlined no-contest law and discontinued the safe-harbor declaratory relief procedure and limited application of the new law to instruments that became irrevocable on or after January 1, 2001.
- Section 21315 addresses the question of what law applies to an *instrument*. A safe-harbor application is not an instrument, but a pleading (i.e., a procedural device).

✚ *Butler v LeBouef* (2016) 248 Cal.App.4th 198 (Prohibited Transferees)

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Fact Summary: Heirs filed a petition to invalidate \$5 million donative transfer to attorney and remove him as trustee of a revocable trust, claiming that he drafted and transcribed will and trust to enrich himself.

Holding: Evidence of attorney's involvement with two prior trusts was admissible to show a common place or scheme.

Legal Analysis:

- Probate Code section 21380 states that a provision of an instrument making a donative transfer to, among others, a person who drafted the instrument is presumed to be the product of fraud or undue influence.
- To get around the conclusive presumption, the drafter must show either:
 - o That a certificate of independent review was obtained; or
 - o He did not draft the document
- If a beneficiary is unsuccessful in rebutting the presumption, he bears all costs of the proceeding, including reasonable attorney fees.

✚ *Kelly v. Orr* (2016) 243 Cal.App.4th 940

Fact Summary: Successor trustee brought malpractice suit against law firm representing predecessor trustee based on advice firm gave to predecessor during the trust administration.

Holding: Continuous representation tolling provision in CCP 340.6(a)(2) applies to toll legal malpractice claims brought by successor trustees against attorneys who represented the predecessor trustee.

Analysis:

- 340.6(a) establishes a one-year SOL for legal malpractice
- Subsection (a)(2) tolls that SOL during the time "[t]he attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred."
- Court looked to *Borrisoff* and *Moeller*
 - o *Borrisoff*: If the fiduciary who hired the attorney is replaced, the successor acquires the same powers the predecessor had with respect to trust or estate administration, including the power to sue for malpractice.
 - o *Moeller*: Successor trustee succeeds in his predecessor's shoes with respect to attorney-client privilege.
- Successor trustees may only avail themselves of tolling under 340.6(a)(2) for as long as the attorney continuously represents a predecessor trustee on matters of trust administration

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- After the predecessor ends the attorney-client relationship (or should reasonably believe the relationship has ended), the successor's one-year limitations period begins to run

✚ *Monschke v. Timber Ridge Assisted Living, LLC* (2016) 244 Cal.App.4th 583

Fact Summary: Plaintiff, acting as personal representative of her mother's estate, filed suit for wrongful death and elder abuse against defendant assisted living facility. Defendant petitioned to compel arbitration pursuant to an agreement plaintiff signed as an agent under her mother's power of attorney.

Holding: Arbitration agreement with assisted living facility did not apply to a wrongful death claim brought in plaintiff's capacity as personal representative of decedent's estate even though agreement purported to bind "all parties" and "their spouse, heirs, representatives, executors, administrators, successors, and assigns," where plaintiff signed the agreement in her capacity as decedent's power of attorney.

Analysis:

- Generally speaking, one must be a party to an arbitration agreement to be bound by it. Three exceptions are: (1) agent for principal, (2) spouses for each other, and (3) parent for child.
 - o Decedent was not plaintiff's agent, they were not married and plaintiff is not a minor child.
- A wrongful death cause of action under CCP 377.60 "creates a new cause of action in favor of the heirs as beneficiaries, based upon their own independent pecuniary injury suffered by loss of a relative, and distinct from any the deceased might have maintained."
 - o Recovery in a wrongful death action belongs to the heirs, not to the decedent or the estate.
 - o While a personal representative's interest may not directly align with the interests of any particular heir, the personal representative's duty is to stand in the position of the heirs, not the decedent.

✚ *East Bay Regional Park District v Griffin* (2016) 2 Cal.App.5th 734

Fact Summary: Optionee petitioned the probate court to enforce option to purchase a portion of real property owned by trust. Trustee and park district, as trust beneficiary, objected. The probate court ruled the option agreement unenforceable. Optionee appealed and the Court of Appeals reversed. On remand, beneficiary filed 1310(b) petition seeking an order authorizing the trustee to act. Probate Court granted the petition. Optionee appealed.

Holding: An order made under Probate Code section 1310(b) cannot be reversed on appeal.

Legal Analysis:

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- Probate Code section 1310(a) provides that, subject to listed exceptions, an appeal stays the operation of an order. Section (b) provides an exception to the stay by permitting a probate court's continued jurisdiction to direct the exercise of the powers of the fiduciary for the purpose of preventing injury or loss to a person or property. Accordingly, all acts of the fiduciary taken pursuant to the directions of the court are valid, irrespective of the result on appeal.
 - o An appellate court may not reverse an order made pursuant to 1310(b) to the extent doing so would disturb acts of the trustee taken accordingly.
- Appellate court cannot pass upon whether trial court's directives were necessary for prevention of injury or loss. The fact that the court issued the order is evidence that there was risk of injury or loss to person or property (circular argument).
 - o Even if appellant is correct that the probate court erred in issuing a 1310(b) order, appellate court cannot invalidate the actions of the trustee or otherwise undo the transaction.

III. Taxes

 *Alhadi v. Commission of Internal Revenue*, T.C. Memo. 2016-74 (2016)

Fact Summary: Decedent was a retired optometrist who lived frugally but also had \$3 million in investments. Decedent hired Alhadi as a Caregiver. Decedent paid Alhadi \$6,000 per month and \$1,000 per month for groceries. Decedent began making "irregular" cash payments that totaled some \$800,000 over 18 months with the cash ultimately going to Alhadi who reported none of the cash as income. After Decedent's death and a probate court proceeding, IRS issued a notice of deficiency to Alhadi for more than \$1 million in unreported income.

Holding: Undue influence can be found by applying the law of the state where it was exercised. Even if money is determined to be misappropriated via undue influence, that money would still constitute taxable income.

Analysis:

- State law creates property rights and interests, and federal law merely determines their tax treatment. Whether Alhadi took money from decedent through undue influence affects her right to that money and is thus a question of state law.
- Strong presumption that payments made beyond the employee's salary are compensation for services and not gifts.

IV. Conservatorships

 *Conservatorship of Estate of Bower* (2016) 247 Cal.App.4th 495

Factual Summary: As part of a conservatorship proceeding, temporary professional conservators filed petition to require conservatee's wife to use community property to

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pay them, and conservatee's sister filed petition to enforce support of conservatee from the community estate.

Holding: Neither conservator nor attorney fees are encompassed within the meaning of "support and maintenance" under section 3080 of the Probate Code; therefore, they may not be enforced under that section.

Analysis:

- If a conservatorship is established for a married person, the remaining spouse retains full management and control of the community property.
- Section 3080 allows a party to file a petition to require the competent spouse to apply the community property for the "support and maintenance" of the conservatee.
 - o There is nothing to suggest conservator or attorney fees are encompassed within the meaning of "support and maintenance."
 - o Neither conservatorship nor attorney fees are to be paid automatically, or as a matter of course, but must always be first approved by the court.
 - Attorney fee sanctions are independently enforceable.
 - o In cases involving considerable amounts of litigation, equating professional fees with support has the effect of unfairly penalizing the ability of the competent spouse to litigate her side of the story.

✚ *Babbitt v. Superior Court of Los Angeles* (2016) 246 Cal.App.4th 1135

Fact Summary: Remainder beneficiary filed petition seeking to compel trustee, who was also co-settlor, to provide an accounting of information including transactions that occurred while the trust was still revocable.

Holding: Although beneficiaries of an irrevocable trust have standing to petition for an accounting after a settlor dies and a portion of the trust becomes irrevocable, the probate court does not have authority to order the trustee to provide an accounting or information for the period while the trust was still revocable where there is no claim that the deceased settlor was incapacitated or subject to undue influence during the period of irrevocability.

Analysis:

- Because assets held in a revocable trust essentially belong to the settlor, he may dispose of the assets and effectively eliminate a beneficiary interest all together with no need to justify or explain his actions.
- In the absence of any claim that the settlor trustee was incompetent or subject to undue influence, nothing that an accounting of assets while the trust was revocable might reveal could support a claim for breach of trust.

- “Internal affairs” of the trust does not include an accounting or information concerning trust assets while the trust was revocable where the settlor and trustee are the same person.

✚ McKissock, *Marrying Into Elder Abuse*, 22 Cal Trusts & Estates Q 7 (2016).

V. Statutes

RUFADA: Revised Uniform Fiduciary Access to Digital Assets Act.

RUFADAA authorizes a decedent’s personal representative or trustee to access and manage digital assets and electronic communications

- ✚ § 872 – These provisions apply if the user resides in this state or resided in it at the time of death, regardless of whether the user’s will or trust was executed or the decedent died before, on, or after that date.
- ✚ § 873 – Authorizes a person to use an online tool to give directions to the custodian of digital assets regarding disclosure of those assets. Directions pursuant to use of the online tool override a contrary direction in a will, trust, power of attorney, or other record.
 - If a person hasn’t used an online tool, they can provide direction in the writings specified, including “other record” which is not defined.
 - A user’s direction overrides a contrary provision in a terms-of-service agreement.
- ✚ § 875 – A custodian may, in its sole discretion, grant the fiduciary or designated recipient full or partial access to the user’s account or provide “a copy in a record of any digital assets” the user could have accessed if the user were alive and had full capacity.
 - Upon request, the personal representative may obtain the content of electronic communications sent or received by the user if the user consented to disclosure in a will, trust, durable power of attorney, or other record or a court order.
 - A custodian may seek a court order that disclosure of a user’s electronic communications would not violate specified provisions of federal law.
- ✚ § 880 – The same legal duties imposed on a fiduciary with respect to tangible personal property apply to the management of digital assets.
- ✚ § 881 – Custodians are immune from liability for an act or omission done in good faith. They are not immune in cases of gross negligence or willful or wanton misconduct. VI. Qualifications for appointment as personal representative.

PART TWO: DEVELOPMENTS IN RESIDENTIAL REAL ESTATE

I. Developments in disclosure requirements

A. Practical matters

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- II. Residential Markets
 - A. San Francisco – City
 - 1. SFRs
 - 2. Multi-Unit
 - B. Bay Area Generally
 - 1. SFRs
 - 2. Multi-Unit
 - C. Other California
- III. Commercial Markets (office, retail, warehouse)
- IV. Land, vineyard, ranch and farm

PART THREE: PUTTING IT ALL TOGETHER: INTER-DISCIPLINARY COLLABORATION IN WEALTH PLANNING, 21ST CENTURY-STYLE

3 Key Concepts common to all successful teams

- Reverence
- Quiet confidence
- Quarterback

Choosing a process

- Process & benefit *versus* product & strategy
- Options for process
- Handling conflicts/multiple teams
- General Meeting Process
- Translation tools
- Revenue Models

Introducing Each Other

- Client & other advisor “measuring sticks”
- Handling referrals
- Support each other and own practice through subtlety
- Technical ability is only “ticket-to-play”
- What do you want your friends to say about you?

Developing Business Together

- Programming

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- Publications, books, and large successful cases
- Concept of “yes, we can help”