RECENT CALIFORNIA DEVELOPMENTS IN ESTATE PLANNING AND ADMINISTRATION

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Filed Between
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Selected cases of interest to trust and estate attorneys filed between September 1, 2011 and August 31, 2012.[1]

Jury Trial Is Not Available after Fully Participating in Bench Trial

Case briefed by Tisa M. Pedersen, Esq.

CONSERVATORSHIP OF JOSEPH W. (2011) 199 Cal. App. 4th 953, 131 Cal. Rptr. 3d 896 [Filed October 3, 2011]

Short Summary: Conservatee objected to the imposition of an LPS conservatorship, and demanded a hearing to determine the issue of whether he was gravely disabled. Even though the trial court erred in holding a bench trial instead of the court hearing as Conservatee requested, the Conservatee fully participated in the bench trial without objecting, and Conservatee therefore was not entitled to a jury trial on the issue.

Facts: At the outset of proceedings to establish an LPS conservatorship, Conservatee objected and filed a demand for a hearing to determine the issue of his grave disability. The court mis-read his demand and scheduled a bench trial instead of a hearing. When the court called the matter as a trial, Conservatee's counsel did not object, and instead proceeded to cross-examine witnesses presented by the county counsel; when called to present defense witnesses, Conservatee's counsel stated he had no witnesses and made closing arguments. The court entered a judgment at the conclusion of the proceedings, finding that Conservatee was gravely disabled, and Conservatee then demanded a jury trial. The court denied this request, as it had already held a trial on the matter. Conservatee appealed.

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[1] The case briefs herein were prepared primarily by Temmerman, Cilley & Kohlmann, LLP ("TCK") associate attorneys and occasionally by TCK law clerks. While the speaker, Bob Temmerman, he did not have an opportunity to review them all. However, all of the comments were reviewed and approved by or provided by Bob Temmerman. No representations or guarantees of any kind are made with respect to the accuracy of these written materials and nothing herein should be relied upon to answer any specific legal questions. The written information provided herein should not be relied upon in dealing with any specific legal matter. Attorneys using the information provided herein in dealing with a specific client or clients or their own legal matters should also read the full published opinions and research other original sources of authority.

Issue: Is a party entitled to a jury trial after requesting a hearing, if the court instead held a bench trial on the issue?

Trial Court Holding: The Imperial County Superior Court denied the conservatee a jury trial on the issue of determining whether the conservatee was gravely disabled.

Appellate Court Holding: The Fourth District Court of Appeal affirmed the trial court's ruling, holding that the conservatee had already had a bench trial, and was therefore not entitled to a trail before a jury.

Appellate Court Rationale: The trial court misinterpreted Conservatee's request for a hearing, reading it as a request for a bench trial. The appellate court acknowledged that a hearing is not the same as a trial, but found that Conservatee had waived that error by not objecting before beginning the trial, but instead appearing at and fully participating in the trial. A party cannot try the case without a jury, and then complain that there was no jury.

Comment: By the time this appeal was heard, Conservatee was no longer conserved, so the court could provide no relief for him. The court heard the case anyway, stating that the issue was of significant public interest, was certain to recur in other cases, and may continue to evade review.

Foreign Estate Representative Must Obtain A California Ancillary Probate For Standing to Pursue Claims on Behalf of Estate in California

Case briefed by Jennifer M. Stier

SMITH v. CIMMET (2011) 199 Cal. App. 4th 1381, 132 Cal. Rptr. 3d 276 [Filed October 18, 2008]

Short Summary: A foreign estate representative lacks capacity to sue in California, but may, if there is estate property in California, obtain an ancillary appointment in California that will vest the representative with capacity. Additionally, a successor estate representative has the powers and duties of his or her predecessor, including the power to sue for the benefit or protection of the estate.

Facts: An Oregon Decedent and his Wife pursued an action against Decedent's former business partner in California. After Decedent's death, Wife was appointed personal representative of Decedent's estate in Oregon, and continued to pursue litigation against Decedent's former business partner in California, both in her representative capacity and on her own behalf. Decedent's children from a former marriage contested Decedent's will that was probated in Oregon, which disinherited both of his children and left everything to Wife, on the basis of undue

influence from Wife. The children succeeded in getting the will thrown out and Wife removed as personal representative, replaced by Son.

Meanwhile, Wife, as representative of the estate, lost the California litigation, owed the business partner about $650,000 in attorney fees, and had paid her own attorneys, Defendants, $1.5 million in attorney fees, all paid out of estate funds. Son pursued a legal malpractice action in California against Defendants, alleging that they advised Decedent and Wife to pursue and did pursue a meritless suit against the business partner. Defendants countered that Son, as an Oregon representative, lacked capacity to sue because his authority did not extend beyond Oregon, and lacked standing to sue because Son was never Defendant's client.

Issues: (1) Whether a foreign estate representative has capacity to sue in California and (2) whether a successor representative may assert a legal malpractice action against attorneys who were retained by a predecessor representative to prosecute litigation on behalf of the estate.

Trial Court Holding: The San Mateo County Superior Court held Oregon law controls the rights of an Oregon estate representative and, under Oregon case law, a successor representative has no standing to prosecute a legal malpractice claim against attorneys retained to represent the predecessor representative.

Appellate Court Holding: The First District Court of Appeal reversed, holding that an Oregon representative lacks capacity to sue in California because his authority does not extend beyond the jurisdiction of the government which vested the person with authority, but that a foreign representative may obtain ancillary appointment in California that will vest him with capacity to sue. Additionally, an estate representative has standing to sue attorneys retained by his predecessor.

Appellate Court Rationale: First, California maintains the common law rule that a personal representative generally cannot sue in his or her representative capacity outside the state of appointment. When a foreign personal representative wants to exercise authority over a decedent's property in California, they must petition a California court for ancillary probate administration under Prob. Code § 12500 *et seq*., which is designed to protect California creditors against foreign administrators taking property out of state. Additionally, though Oregon law expressly authorizes an Oregon representative to prosecute actions in any jurisdiction, California law provides authority for a foreign representative's suit in California. Furthermore, Son could have obtained ancillary administration because California law provides that a cause of action to recover monetary damages on behalf of an estate is a local asset that provides a basis for ancillary administration. Lastly, because Son requested both in pleadings and in oral argument leave to amend if the complaint was found deficient, the court, though granting the motion for judgment on the pleadings, also granted leave to amend so Son could pursue ancillary administration to gain capacity to sue.

Second, the court conducted a governmental interest analysis to determine any conflict of law issues between California and Oregon's interests in having their laws applied. The court determined that both California and Oregon's laws on the issue are the same and, even if they were not, California has the stronger interest in regulating California attorneys. The court then found that, under the California Supreme Court's interpretation of Prob. Code §§ 8524© and 9820 in *Borisoff v. Taylor & Faust* (2004) 33 Cal. 4th 523, a successor representative has the powers and duties with respect to the continued administration that the former personal representative would have had, including the power to commence and maintain actions and proceedings for the benefit of the estate. Thus, the statutes give Son standing to sue Defendants, though generally lack of privity would bar such a suit.

Comment: The court found compelling Son's continued requests for leave to amend the complaint if it was found deficient, and factored that into its decision to grant the motion for judgment on the pleadings with leave to amend. Thus, it is very important for a plaintiff to continuously assert requests for leave to amend so they do not lose the option.

Step-Child Can Be Exempt from Care Custodian Presumption of Undue Influence

Case briefed by Tisa M. Pedersen, Esq.

HERNANDEZ v. KIEFERLE (2011) 200 Cal. App. 4th 419, 132 Cal. Rptr. 3d 725 [Filed October 31, 2011]

Short Summary: Decedent left her entire estate to her Step-Daughter, who had provided care to Decedent during the hours when there were no home healthcare attendants on duty, and Step-Daughter was therefore a care-custodian. Because Decedent's predeceased husband, Step-Daughter's father, had died less than 15 years before Decedent, and Decedent's estate included at least some assets received from her husband's estate, Step-Daughter was an heir of Decedent and was therefore "related by blood or marriage" to Decedent. Step-Daughter was covered by the Prob. Code § 21351(a) exception to Prob. Code § 21350's statutory presumption of undue influence by a care custodian, and could receive transfers from Decedent's estate.

Facts: Decedent had no children, but her predeceased husband had surviving children who were Decedent's step-children. Step-Daughter assisted with providing for Decedent's needs overnight, when the home healthcare attendants were off-duty. Decedent amended her estate plan to leave her entire estate to Step-Daughter. The prior beneficiary had been Decedent's Neighbor. Neighbor challenged the amendment, claiming Step-Daughter had been Decedent's care-custodian, and asserted the statutory presumption that the transfer to Step-Daughter was the product of undue influence. The trial court agreed with Neighbor, finding that Step-Daughter failed to overcome the presumption; Step-Daughter appealed.

Issue: Does a step-child who provides care to a decedent fall under the care-custodian presumption of undue influence?

Trial Court Holding: The Los Angeles County Superior Court invalidated the trust amendment, as the transfers to Step-Daughter failed under § 21350 *et seq.*, because Step-Daughter was a care-custodian for Decedent.

Appellate Court Holding: The Second District Court of Appeal reversed, holding that the trial court failed to apply the exception under Probate Code § 21351(a), where the transferor is related by blood or marriage to the transferee.

Appellate Court Rationale: Probate Code § 21351 provides exemptions from the statutory presumption of undue influence found in Prob. Code § 21350. Subparagraph (a) of § 21351 exempts transferees who are "related by blood or marriage", and under subparagraph (g) "'related by blood or marriage' shall include persons within the fifth degree or heirs of the transferor." Step-Daughter was not related to Decedent within the fifth degree, so this case turned on the definition of "heirs of the transferor." "Heir" is defined in Prob. Code § 44 as "any person, including the surviving spouse, who is entitled to take property of the decedent by intestate succession." Under Prob. Code § 6402.5, if Decedent's predeceased spouse died within 15 years of Decedent, and there is no surviving spouse or issue of Decedent, the surviving issue of the predeceased spouse will take that portion of Decedent's estate attributable to the predeceased spouse. Decedent's spouse, Step-Daughter's father, died 11 years before Decedent, and some of Decedent's estate had come to her from her predeceased husband. The court found Step-Daughter qualified as an heir of Decedent. As a result Step-Daughter was exempted from the care-custodian presumption, and was eligible to receive transfers from Decedent's estate.

Comment: Although the intestate share of a step-child would be limited to assets the decedent received from the predeceased spouse, the court found that, for purposes of § 21351, an heir was a person who was "*capable* of inheriting from the deceased person *generally*" (emphasis in the original), a definition that promotes transfer of property to recipients whom the transferor is reasonably deemed to have favored with a testamentary gift (*citing Fiske v. Wilkie* (1945) 67 Cal. App. 2d 440, *Desplancke v. Wilson* (1993) 14 Cal. App. 4th 631, and *Estate of Burden* (2007) 146 Cal. App. 4th 1021). This incorporates the 2010 revisions to the disqualified person statutes, which seemingly allow for the interpretation that a stepchild remains related to stepparent by "blood or affinity" even though marriage between stepparent and stepchild's parent ended upon the death of stepchild's parent (*See* Prob. Code § 21374(b) (for presumption of fraud or undue influence, the definition of spouse or domestic partner now explicitly includes a predeceased spouse or predeceased domestic partner)).

A Bigamous Marriage Is Void From Inception and Does Not Serve To Void A Later Marriage

Case briefed by Jennifer M. Stier

IN RE MARRIAGE OF SEATON (2011) 200 Cal. App. 4th 800, 133 Cal. Rptr. 3d 50 [Filed November 8, 2011]

Short Summary: Wife married Husband Two while still married to Husband One. After dissolution of Wife's marriage to Husband One, but without annulment of marriage to Husband Two, Wife married Husband Three. The court held that because the marriage to Husband Two was void at inception due to bigamy, it would not stand as a valid marriage to void Wife's marriage to Husband Three as bigamous, thus Wife's marriage to Husband Three was valid.

Facts: Respondent wife married Husband One in 1973. After separating from Husband One in 1987, Respondent began dating Husband Two for several months. After Respondent met Petitioner in 1988, she broke up with Husband Two to date Petitioner, who was also married at the time, but separated from his wife in 1988 to date Respondent. In mid-1998, Respondent drove with Husband Two to Nevada and, after purportedly drinking "several shots of tequila" and falsely stating in the marriage application that her marriage to Husband One had ended, Respondent and Husband Two married. In 1989 Petitioner found pictures of Respondent and Husband Two's marriage and insisted that Respondent annul the marriage, which she agreed to do and claimed to have done, but ultimately never completed. Respondent's marriage to Husband One was dissolved in December 1988 and Petitioner's marriage to his wife was dissolved in April 1991. Petitioner and Respondent married in June 1991.

In November 2008, Petitioner filed for separation, which Respondent responded to by filing a request for dissolution. Petitioner, over Respondent's objection, amended his petition to request a judgment of nullity based on Respondent's former marriage to Husband Two.

Issues: Whether the trial court's reliance on Nevada case law was valid in its determination that a void marriage requires an annulment proceeding to fully terminate the relationship.

Trial Court Holding: The Sacramento County Superior Court held that under Nevada law an annulment proceeding is required to sever a void marriage and, because Respondent had never acquired an annulment of her marriage to Husband Two, her subsequent marriage to Petitioner was void.

Appellate Court Holding: The Third District Court of Appeal reversed, holding that a void marriage is void at its inception and does not need further annulment proceedings, thus Petitioner and Respondent's marriage was valid and should not have been nullified.

Appellate Court Rationale: The appellate court disagreed with the trial court's reliance on a Nevada Supreme Court case, which stated that even though a bigamous marriage is void, an annulment procedure is required legally sever the relationship. The appellate court held that the statement was mere dicta and thus not controlling. The appellate court instead looked to a Nevada statute which provides that a bigamous marriage is "void without any decree of divorce or annulment or other legal proceedings."

Based on the statute, the appellate court held that the Respondent's marriage to Husband Two was void and essentially never existed. Because it did not exist when Petitioner and Respondent married, their subsequent marriage was valid and could not be nullified due to bigamy.

Comment: The court's determination that the marriage between Petitioner and Respondent was valid enabled Respondent to take advantage of divorce proceedings (that would have been unavailable had the judgment of nullity of marriage been allowed to stand) where she may be entitled to spousal support and property rights from Petitioner.

Interesting note: Respondent, at the time she met Petitioner, was a legal secretary and Petitioner was a law student intern, and now a practicing attorney in California. Additionally, Respondent not only won, despite her various deceptions, she was also awarded costs on appeal - an odd bit of salt in Petitioner's wound from a court that "do[es] not condone [Respondent's] conduct."

Judgment for Final Distribution Is Not a Money Judgment on Which Interest May be Charged for Delay in Payment

Case briefed by Jennifer M. Stier

ESTATE OF KAMPEN (2011) 201 Cal. App. 4th 971, 135 Cal. Rptr. 3d 410 [Filed November 14, 2011]

Short Summary: A judgment for final distribution is not a money judgment on which interest may be charged for delay in payment even if the delay lasts a decade.

Facts: In 1996 Attorney became the executor of two estates, and obtained a bond for each. Both estates left all of their assets to Beneficiary, which Beneficiary was aware of in 1996. The probate court entered final order for distribution on one estate in 1999. Attorney failed to distribute the estates. Beneficiary contacted Attorney regarding the estates in late 2008. On January 5, 2009, Attorney sent Beneficiary a check for the bulk of the estate, but not its entirety, because retirement accounts needed to be located. On January 23, 2009, Beneficiary filed petitions against Attorney regarding the estates, asserting that Attorney had breached his fiduciary duties in delaying distribution of the estates. Beneficiary requested distribution of the remaining assets, surcharge against Attorney for the full value of the undistributed assets plus interest, reimbursement by Attorney for all compensation received plus interest, and an order for exemplary damages against Attorney.

Issues: (1) Whether Beneficiary is entitled to interest on the estate assets that Attorney failed to distribute for ten years; (2) whether the trial court erred by refusing to use the alternate measure of damages proposed by Beneficiary; and (3) whether Attorney's defense of laches was properly applied.

Trial Court Holding: The San Francisco City and County Superior Court held that Attorney breached his fiduciary duty and surcharged him for the loss of value to the estates caused by the delay and for compensation he received in 1999 for his services, but declined to order the other damages requested by Beneficiary.

Appellate Court Holding: The First District Court of Appeal affirmed, holding that Beneficiary was not entitled to interest on all of the assets for the period of delay, rejecting Beneficiary's proposed alternative measure of damages, and ruling that the defense of laches was applicable.

Appellate Court Rationale: The court rejected Beneficiary's contention that the 1999 order was a money judgment under Code of Civ. Proc. § 680.270 that should have incurred interest. The court found that the judgment for final distribution was not a money judgment because it was not a fixed and ascertainable amount payable by a particular party. It was a judgment distributing assets. Though the judgment required payment of money, it was because the estates were made up of only cash. Had they contained real or personal property, the judgment would have been an order for distribution of that property as well. Thus, the judgment did not satisfy § 680.270 requirements.

Additionally, the court rejected Beneficiary's contention that it should receive interest on the full value of the estate under Prob. Code § 9601(a)(1) for Beneficiary's loss of use of the assets during the delay in distribution. Section 9601(a)(1) entitles Beneficiary to loss in value of estate resulting from the breach plus interest. Beneficiary received this in the form of surcharge against Executor for lost bond premiums plus interest.

The court denied Beneficiary's request for interest under Civil Code § 3287 because there was no money judgment or contract and Beneficiary did not have a claim for damages. The court further rejected Beneficiary's requests that interest be calculated on (1) the performance of its endowment fund, or (2) the increased costs Beneficiary incurred borrowing funds to replace the amounts not timely received, because the requests were speculative and the measurement of damages were not authorized under the Probate Code.

Lastly, the court rejected Beneficiary's claim that the defense of laches was not applicable. The probate court has the power to apply principles of equity; since laches is an equitable defense, the probate court had the power to consider it. The court found there is nothing inequitable in permitting a defense of laches where the claim is based on delay.

Comment: Do not sleep on your rights. The court may have been more apt to find further damages had the Beneficiary acted quicker.

Temporary Conservator Entitled To Compensation Even If No Permanent Conservator Is Appointed

Case briefed by Mark A. Schmuck, Esq.

CONSERVATORSHIP OF CORNELIUS (2011) 200 Cal. App. 4th 1198, 132 Cal. Rptr. 3d 922 [Filed November 15, 2011]

Short Summary: Temporary conservator is appointed, but the petition was dismissed before a permanent conservator was appointed. Notwithstanding the dismissal of the permanent petition, the temporary conservator and her counsel are entitled to compensation and reimbursement of costs.

Facts: Daughter petitioned the court for the appointment of herself as temporary and permanent conservator of the person for her Father based on Daughter's concern that Father was being neglected and financially abused. The court investigator reported that a temporary conservatorship was necessary and recommended that the petition be granted. The court appointed Daughter as temporary conservator of the person for Father over his objection.

Throughout the proceeding, reports to the court were consistent that a conservator of the person and estate were needed, and that the father was particularly susceptible to undue influence. In fact, a detailed report was made to the court that was of the opinion that Father's condition was improving because of the measures that were being taken by Daughter. Prior to trial, the court terminated Daughter's temporary conservatorship of the person, finding that Father was able to care for himself at least until trial. The court also appointed a private professional temporary conservator of the estate at least through trial. Then, for unknown reasons, Daughter dismissed her conservatorship petition in its entirety.

Following the dismissal, Daughter petitioned the court for payment of fees for her counsel, to other service providers, and reimbursement of costs (she waived payment of fees for herself). Over objection by Father, the trial court granted the fee petition in the approximate amount of $34,000.00.

Issue: Is a temporary conservator entitled to payment of fees and reimbursement of costs when no permanent conservator is ever appointed?

Trial Court Holding: The Sonoma County Superior Court granted the fee petition in the approximate amount of $34,000.00.

Appellate Court Holding: The First District Court of Appeal affirmed, holding that a temporary conservator and her counsel may be entitled to compensation and reimbursement of costs even when a permanent conservator is never appointed.

Appellate Court Rationale: Father argued that payment of fees and reimbursement of costs for a temporary conservator is contingent on the appointment of a permanent conservator. The court rejected this argument. Probate Code sections 2641 and 2642 authorize payment to the "conservator" and the attorney for the "conservator." These statues do not make any distinction between an temporary conservator or permanent conservator. Furthermore, the driving force behind an award of fees to any conservator, whether temporary or permanent, is whether the services rendered and expenses incurred were in good faith and in the best interests of the proposed conservatee. The court went on to explain that the denial or withdrawal of a permanent conservatorship petition after the appointment of a temporary conservator does not prove that the temporary conservatorship was not necessary or in the best interests of the proposed conservatee. Rather, the relevant consideration is whether or not the services rendered and expenses incurred were in good faith and in the best interests of the conservatee.

Here, the trial court found, and the appellate court affirmed, that there was ample evidence that Daughter's actions and expenses incurred were in Father's best interests. In fact, the actions taken by Daughter improved Father's condition, making her fee request entirely proper, notwithstanding the lack of a permanent conservator.

Comment: While success in seeking the appointment of a conservator is a relevant consideration in seeking and awarding fees, the paramount consideration in all things related to a conservatorship is the best interests of the conservatee.

No Statute of Limitations for Action to Determine One's Interest in Community Property When a Marriage Ends Through Litigation or Death

Case briefed by Tricia L. Manning, Esq.

PATRICK v. ALACER CORPORATION (2011) 201 Cal. App. 4th 1326, 136 Cal. Rptr. 3d 669 [Filed November 16, 2011]

Short Summary: No limitations period applies to claims brought pursuant to Family Code § 1101(b), except for laches, when the marriage ends through litigation or death. No creditor's claim is necessary to pursue a spouse's community property interest, as a spouse has a present, existing interest in community property, not a mere money claim. A spouse may show that she had a community property interest in the increased value of her spouse's separate property business, which will support apportioning the business profits to the community estate. Trial

courts have the discretion to pick a method of apportioning business profits.

Facts: Husband founded Corporation in 1972 to manufacture and market vitamin supplements, namely the popular Emergen-C. Husband owned all of the stock. Husband met Wife in 1975 and they married in 1988. In 2000, Husband transferred all of the stock to his revocable trust, which became Corporation's sole shareholder. As amended in 2001, the trust's "Distribution upon Death" provisions stated that "I direct that upon my death, if I am still married to [Wife] and she has at the time of my death a community property interest in the stock of [Corporation], that the trustees distribute not more than 46% of the shares now held in my name to [Wife], as her community share of my entire estate and that the balance of any community property interest that she may have in the [stock of Corporation] or the community property owned by us be distributed to her from my estate as probated by the court and that it not be [the stock of Corporation]. It is my intention that of my entire estate she receive nothing of my separate property and only receive her community share of our community property, if any."

In February 2003, Husband died. In December 2003, Wife filed a shareholder derivative action and direct action against Corporation and the trustees of Husband's trust. In *Patrick v. Alacer Corporation* (2008) 167 Cal. App. 4th 995, 84 Cal. Rptr. 3d. 642 ("*Alacer I*"), Wife alleged that her and Husband had built Corporation together, both before and during their marriage, and that she had a community property interest in its stock. Corporation demurred to the complaint, claiming that Wife lacked standing to bring a shareholder derivative action because she was not a shareholder. The trial court granted the demurrer without leave to amend, and Wife appealed. On appeal, the Fourth District Court of Appeal reversed holding that Wife was a beneficial shareholder in Corporation because she alleged a community property interest in the stock. The court reasoned that the respective interests of the Husband and Wife in community property during the marriage are present, existing, and equal interests, pursuant to Family Code § 751.

After *Alacer I*, the matter returned to the trial court. Wife filed a fifth amended complaint, asserting direct causes of action for impairment of community property, constructive trust, breach of fiduciary duty, and injunctive relief, as well as shareholder derivative causes of action for breach of fiduciary duty and injunctive relief. Plaintiff also reasserted a declaratory relief cause of action seeking declaration of her community property and stock ownership interest in Corporation. Corporation contended that the declaratory relief action was time barred. The trial court bifurcated this cause of action, staying discovery on the others.

Issues: (1) Is there a statute of limitations for an action under Family Code § 1101 seeking a declaration of one's interest in community property when the marriage ends through litigation or death? (2) Did Wife have a community property interest in the stock? (3) Was Wife entitled to receive stock to satisfy her community property interest in the stock? (4) Should Wife's interest be valued through date of death under Probate Code § 100 rather than through date of trial? (5) Was Wife entitled to prejudgment interest?

Trial Court Holding: The Orange County Superior Court held that the declaratory relief cause of action essentially arises out of Family Code § 1101(b), which authorizes it to determine the rights of ownership in community property, and the classification of all property of the parties to a marriage. The trial court concluded that by stating that, upon death, an action may be brought "without regard" to the three-year limitation in § 1101, the language of § 1101 indicates that no limitations period applies. Because no limitation period governed Wife's claim, the only time restriction would be laches, which Corporation failed to establish.

Next, the trial court found that the stock was Husband's separate property, because the evidence showed that Husband founded the company and issued all of the stock to himself before he married Wife. The trial court, however, found further that some portion of the stock's increased value must be equitably apportioned to the community. Corporation indisputably increased in value during the marriage, and Husband "put much more than minimal efforts into the business." His efforts during the marriage were community efforts; therefore, Corporation's value must be apportioned using the method in *Pereira v. Pereira* (1909) 156 Cal. 1, 103 P. 488.

Third, Wife was not entitled to receive stock to satisfy her community property interest. Wife's interest prior to Husband's death was in one half of the profits arising from the skill, efforts and industry he applied during the marriage to increase the value of his separate property business, not in the stock itself.

Next, Husband's date of death would be used to value the community property interest in the stock. While community property is generally valued at the date of trial, Corporation was Husband's separate property. The only community property was the skill, effort and talent of Husband that was expended during the marriage and which ended at Husband's death. Therefore, value is at date of death, not date of trial.

Finally, Wife was entitled to prejudgment interest starting at Husband's death. Her community property interest existed as of the date of Husband's death.

Given those holdings, the trial court granted judgment on the pleadings for Corporation on the remaining causes of action, holding that they were all based on Wife's claimed community property interest in the stock. Because it held that her interest was only in Corporation's increased value, not the stock itself, she had no ability to maintain causes of action resting on shareholder status.

Appellate Court Holding: The Fourth District Court of Appeal affirmed, holding that Wife's declaratory relief action was not time-barred. The court held further that sufficient evidence justified the trial court's holding that a community property interest existed in the increased value of Corporation and its value and apportionment of that interest. The court found that the trial court correctly held that Wife was not entitled to an award of stock in Corporation, as she had no community interest in the stock but only in the increase in value of the stock owned by Husband. Finally, the trial court correctly held that Wife was entitled to prejudgment interest starting at

Husband's death.

Appellate Court Rationale: The court affirmed the trial court's holding that Wife's declaratory relief action was not time-barred, because Family Code § 1101(d) provides that when a marriage ends through "litigation or death," there is no limitations period except for laches, and Wife's declaratory relief action was essentially a claim under Family Code § 1101(b).

The court also held that Wife need not file a creditor's claim before pursuing her community property interest in Corporation. The court noted that a spouse has a present existing interest in community property, not a mere money claim.

The court disagreed with Wife's contention that her community property interest in Corporation's increased value must be satisfied with an award of stock. It held that the stock was Husband's separate property, and Wife only had an interest in its increase in value during marriage, not the stock itself.

Next, it held that the trial court properly valued and apportioned Wife's community interest in Corporation's growth. The court cited *In re Marriage of Dekker* (1993) 17. Cal. App. 4th 842, 21 Cal. Rptr. 2d 642, noting that the necessity of appointment to the community arises when, during marriage, more than minimal community effort is devoted to a separate property business. There are two valuation methods. The *Pereira* method is used where business profits are principally attributed to the efforts of the community. The *Van Camp* method is used where community effort is more than minimally involved in a separate property business; yet, the business profits are attributable to the character of the separate property asset. The trial court applied the *Pereira* method, and the court found no abuse by the trial court.

The court affirmed the trial court's valuation of the community property interest as of Husband's date of death rather than the date of trial. Under Probate Code § 100, upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent. Thus, Wife was entitled to one-half of the community's interest in the increased value through Husband's date of death, not through the date of trial.

The court found no abuse of discretion by the trial court for awarding prejudgment interest to Wife. The court noted that prejudgment interest was properly awarded under Civil Code § 3288 and that Wife's loss of use of a community property interest she owned upon Husband's death sufficiently supports the court's exercise of its discretion to award prejudgment interest.

Comment: A plethora of litigation ensued after the death of Husband, a large majority of which stemmed from Wife. In its final word to the parties, in its last footnote the court said that "(a)fter many years, the parties have made it painfully clear they do not like each other. Less apparent is why they think we care."

Premarital Agreement Will be Upheld If a Party Had Opportunity to Obtain Financial Disclosures, but Did Not Do So

Case briefed by Sara Hire, Law Clerk

MARRIAGE OF HILL AND DITTMER (2011) 202 Cal. App. 4th 1046, 136 Cal. Rptr. 3d 700 [Filed December 19, 2011]

Short Summary: Wife claimed that premarital agreement was invalid partially because of husband's fraudulent representations concerning his personal worth. The court found that Wife had opportunity to obtain financial disclosures and did not do so. The court also found Wife's other argument that new amendments to Cal. Fam. Code § 1615 made the agreement invalid was ineffective because the new amendments were not retroactive.

Facts: Husband and Wife both achieved economic and professional success before their marriage. Husband told Wife that they could not marry unless the entered into a premarital agreement ("the Agreement"). They began discussing the terms of the Agreement several months before the ceremony. Husband and Wife were both individually represented by attorneys who reviewed and discussed numerous drafts of the Agreement. The first draft of the Agreement included provisions waiving spousal support and agreement to full disclosure of the parties' assets and liabilities. Additionally, in one revision, Husband requested was that a recital be added acknowledging that he had provided Wife's counsel with full and complete access to his financial information. Wife did not seek any financial disclosures from Husband. The final Agreement stated that Husband had an approximate net worth of $40,000,000, and waived the provisions of Family Code § 1615. Husband and Wife executed the agreement just prior to their wedding ceremony.

Wife eventually filed a petition to dissolve the marriage, and in the course of dissolution proceedings, Wife alleged that Husband had misrepresented his wealth in the Agreement and commenced discovery attempting to determine Husband's assets. The trial court allowed for limited discovery, but denied a later motion by Wife to compel additional discovery.

Issue: (1) Whether the Agreement was valid, and (2) whether amendments to Fam. Code § 1615 applied retroactively.

Trial Court Holding: The Santa Barbara County Superior Court determined that the Agreement was valid, the current version of Fam. Code § 1615 was inapplicable, and Husband had not misrepresented his wealth in the Agreement.

Appellate Court Holding: The Second District Court of Appeal affirmed, holding that the Agreement was valid, amendment to § 1615 regarding representation by independent legal counsel was not retroactive, and Wife was not entitled to additional discovery.

Appellate Court Rationale: Wife contended that the Agreement was invalid because it falsely stated that Husband had an approximate net worth of $40 million. At the time Husband and Wife signed the Agreement, § 1615 provided that a premarital agreement would not be enforced if the party resisting enforcement can demonstrate that he or she did not enter into the contract voluntarily or that the contract was unconscionable when entered into and that he or she did not have actual or constructive knowledge of the assets and obligations of the other party and did not voluntarily waive knowledge of such assets. (§ 1615(a)(1)-(2).)

Coercion my be shown by considering a number of factors including: "proximity of execution of the agreement to the wedding, or from surprise in the presentation of the agreement; the presence or absence of independent counsel or of an opportunity to consult independent counsel; inequality of bargaining power; whether there was full disclosure of assets; and the parties' understanding of the rights being waived under the agreement or at least their awareness of the intent of the agreement" (*Marriage of Hill & Dittmer*, 202 Cal. App. 4th at 1052-53 (*citing In re Marriage of Bonds* (2000) 24 Cal. 4th 1, 19)). The court determined that the circumstances surrounding the execution of the premarital agreement provide substantial evidence that Wife entered into the agreement voluntarily (e.g., she had advice of two attorneys, her lawyer drafted the agreement, she has a professional background, etc.). The court also noted that there was no evidence that Wife took any steps to obtain financial disclosures from Husband, although she was invited to do so.

Wife argued that she did not see the final draft of the agreement until the date of the wedding, and that the final agreement she signed was incomplete. Given that Wife had extensive education, a business background, and that she had seen previous versions of the full agreement, the court found that any failure to fully understand and ensure that the entire Agreement was there was Wife's fault and not a sufficient basis for invalidating the contract.

Finally, Wife attempted to argue that the amended version of § 1615 applied retroactively, so that the Agreement would be invalid because she was presented with the Agreement on the day of her wedding, and thus, not provided with enough time (at least seven calendar days) to seek independent counsel. The court, however, determined that amendments to § 1615 did not apply retroactively. The court based its determination on case law and that the legislative history of Senate Bill No. 78 (2001-2002 Reg. Sess.), amending § 1615, states that this bill does not contain any provision for retroactive application. The court also reasoned that amendments to § 1615 were substantive and not procedural, and as a result, the trial court correctly determined that § 1615 did not apply retroactively. The court also noted that even if § 1615 was retroactive, it would not apply here because case law indicated that the new § 1615 provision only applies when a party is unrepresented by counsel. Here, Wife was represented throughout the entire negotiation of the Agreement by counsel, and her lawyers prepared all drafts of the agreement.

Comment: A major lesson in this case is to check the version of the statute in effect at the time the premarital agreement was executed. Additionally, a court will not be sympathetic to a client who did not review, understand, or fully research an agreement or obtain financial disclosures

especially when the client was given ample opportunity to do so, was represented by counsel, and was well-educated and business savvy.

Arbitrator's Award Is Unenforceable Against a Trust, Where the Trustees Were Not Parties to the Action

Case briefed by Cathy E. Nelson, Esq.

PORTICO MANAGEMENT v. HARRISON (2011) 202 Cal. App. 4th 464, 136 Cal. Rptr. 3d 151 [Filed December 28, 2011]

Short Summary: Following a breach on a contract for sale of an apartment building, a trust asset, Judgment Creditor brought suit against the Trust and Trustees for specific performance and damages. The matter went to arbitration, resulting in an arbitration award against the Trust only, which was confirmed by the court. Having accepted and confirmed the arbitration award against the Trust without attempting to have either Arbitrator or the trial court correct it to name the trustees as the proper parties, Judgment Creditor was bound by the terms of the arbitration award. The court held that the trust was not a proper judgment debtor, because it was not a person. A judgment against trust assets must be made against the trustees in their representative capacity (Prob. Code § 18004).

Facts: Creditor entered into a contract to purchase an apartment building owned by the trustees of a family trust ("the Trust"). In 2003, when the sale was not completed, Creditor sued Trustees of the Trust for specific performance and damages. The matter went to arbitration, resulting in an award of $1.6M in Creditor's favor. The arbitration award was not against Trustees, but only against the Trust. In 2007, Creditor petitioned to confirm the arbitration award, proposing a judgment that also included Trustees. The trial court declined the proposed judgment against Trustees, and judgment was entered against the Trust only. Creditor never sought to correct or modify the arbitration award nor the judgment to indicate that both were properly against Trustees. Creditor also did not appeal from the judgment against the Trust. Instead, Creditor engaged in protracted litigation to enforce the judgment, by levying funds generated by the apartments and seeking to add Successor Trustees as judgment debtors under a variety of theories.

Issue: What is the effect of the judgment having been entered against the Trust, rather than against its Trustees?

Trial Court Holding: The Sacramento County Superior Court initially held in Creditor's favor adding Successor Trustees as parties and granting other forms of requested relief, later changing its mind, vacating its order amending the judgment and also finding it had no authority to correct Arbitrator's error. The trial court also awarded Successor Trustees attorney fees in the amount of $189,000.00.

Appellate Court Holding: The Third Appellate District Court of Appeal reversed the denial of the motion to add Trustees to the judgment, and remanded with directions to the trial court to vacate its order on that motion and to conduct further proceedings. In all other respects, the court affirmed, holding that the Trust was not a proper judgment debtor, because it was not a person.

Appellate Court Rationale: Unlike a corporation, since a trust is not an entity separate from its trustees, it cannot sue or be sued, and it cannot hold title to property; therefore, the trustee is the real party in interest with standing to sue and defend on the trust's behalf. A judgment against trust assets must be made against the trustees in their representative capacity. Moreover, Portico was aware of the error contained in the arbitration award and had several possible remedies available to it. Creditor could have applied to the arbitrator within 10 days of service to correct the award. It had 100 days to petition the court to correct the award. Further, Creditor could have appealed the 2007 judgment after the trial court rejected the proposed judgment naming the trustees. Having failed to take the appropriate steps, Creditor is bound by the terms of the arbitration award.

Comment: In the words of the Appellate Court: "Formalities matter, particularly when dealing with the informality of arbitration." Whether the courts' insistence that the statutes, as written, prohibited them from amending or correcting the judgment even after the remedial periods had lapsed, seems somewhat misplaced. The outcome, while unfortunate, highlights the need to review and amend the confusing language of the relevant statutes and their commentary.

There is a growing trend in case law and statutes to treat trusts as entities. Much of the confusion in this case might have been avoided if the relevant statutes were amended to follow the modern trend which would allow trusts to be treated as a party entity in a legal proceeding, similar to a corporation. Practitioners, however, cannot rely on changes to statutes to overcome mistakes that arise for failure to attend to the details.

Wife Has No Community Property Interest in Husband's CalSTRS Disability Allowance

Case briefed by Mason L. Brawley, Esq.

MARRIAGE OF WALKER (2012) 203 Cal. App. 4th 137, 137 Cal. Rptr. 3d 611 [Filed January 10, 2012]

Short Summary: Wife claimed a community property interest in Husband's CalSTRS disability allowance. The Court of Appeal held that Wife had no community property interest in the allowance because it did not provide retirement income, but rather, replaced his lost earnings after their separation and prior to his retirement.

Facts: Husband, a public school teacher since 1986, married Wife in 1993. Husband and Wife separated in January 2008, and Wife filed a petition for legal separation two months later. In

January 2008, Husband (then 47 years old) stopped teaching due to a disability, and applied for a CalSTRS disability allowance. CalSTRS granted his application retroactive to December 2008.

In August 2009, the court entered a "Stipulation and Order" under which Husband and Wife agreed to enter a DRO regarding the CalSTRS disability benefits. Husband and Wife jointly engaged an attorney to prepare the DRO. The court issued the DRO as a stipulation and order in September 2009. The DRO provided that Wife shall receive 36.22% of the "disability benefits" that Husband was awarded by CalSTRS.

In August 2010, Husband retained a new attorney and filed a motion to set aside the August 2009 and September 2009 orders on the grounds that they were obtained due to fraud or mistake since he had wrongly believed, based on representations by Wife's attorney, CalSTRS, and the attorney that prepared the DRO, that Wife had a community property interest in the disability allowance.

Issue: Did Wife have any community property interest in Husband's disability allowance?

Trial Court Holding: Yes. The Santa Clara County Superior Court found that Husband's CalSTRS disability benefits were not his separate property and that Wife had a community property interest in them. In the court's view, Husband's disability allowance was "a service-connected disability pension which is meant to replace his retirement pension."

Appellate Court Holding: The Sixth District Court of Appeal reversed, holding that Wife had no community property interest in Husband's disability allowance because it did not provide retirement income but only replaced his lost earnings after their separation and prior to retirement - which were his separate property.

Appellate Court Rationale: The court noted that case law supports a finding of a community property interest in disability benefits where the disabled spouse is eligible for retirement benefits and elects to take disability in lieu or for a reduction in retirement pay. In this case, however, *Husband was ineligible for a service retirement and did not elect to receive a disability pension in lieu of a service pension.* Furthermore, the calculation of Husband's disability allowance was not based on years of service, and he had not yet begun receiving the benefits when he and Wife separated. Finally, the disability allowance would terminate when Husband reached normal retirement age, or sooner if he ceased to remain disabled. Based on these facts, the court held that the disability allowance could only properly be seen as a replacement of Husband's lost earnings during the period of his pre-retirement disability.

Comment: This is a crossover case from family law, but I thought it was important to include in the materials as a reminder that ascertaining a spouse's interest in post-separation pay is not always easy or clear cut. It seemed like the parties' confusion regarding the nature Husband's disability allowance may have stemmed from advice they received from their attorneys, and also from communications they received from CalSTRS.

Trial Court Misapplied the UPA in Its Analysis of a Former Same-Sex Partner's Petition to Establish Parental Relationship With Child

Case briefed by Sara Hire, Law Clerk

E.C. v. J.V. (2008) 202 Cal. App. 4th 1076, 136 Cal. Rptr. 3d 339 [Filed January 19, 2012]

Short Summary: Mother and Same-Sex Partner established a friendship before the birth of Child. After the birth of Child, the relationship became sexual, and Partner and Mother remained in a committed relationship for the next five years, living together with Child as a family unit. After the end of the relationship, Partner petitioned to establish a parental relationship with Child. The trial court denied the petition; however, the appellate court reversed and remanded holding that the trial court misapplied the law to the facts of this case.

Facts: Mother was in a sexual relationship with Father, and after becoming pregnant with Child, ended the relationship. Father had little involvement with Child thereafter. Mother and Same-Sex Partner became good friends. During Mother's pregnancy, Partner took Mother to doctor's appointments, was Mother's Lamaze partner, and Partner and Mother often spent the night at each other's homes. Partner was with Mother during the birth of Child, and even cut the umbilical cord. When Child was three months old, Mother and Child moved into Partner's home. Soon after, Mother and Partner's relationship became sexual, and they remained in a committed relationship for the next five years. Partner took Child to doctor's appointments and attended extracurricular activities. During Partner's service in the Air Force, Mother and Child moved in with Partner's mother. The relationship between Mother and Partner ended in 2008. After communication between Partner and Mother broke down, Partner filed a petition to establish a parental relationship with the child and an order to show cause, seeking joint custody of the minor and visitation.

Issue: Whether the trial court erred in determining that Partner is not a presumed parent of Child under the Uniform Parentage Act ("UPA"), Cal. Fam. Code §§ 7600 *et seq.*.

Trial Court Holding: The San Joaquin County Superior Court denied Partner's UPA petition to established a parental relationship with Child ruling that Partner failed to prove by a preponderance of the evidence that she was presumed a parent under Fam. Code § 7611(d).

Appellate Court Holding: The Third District Court of Appeal reversed and remanded to the trial court for further proceedings, holding that the trial court misapplied the UPA to the facts of the case.

Appellate Court Rationale: The appellate court determined that under the UPA a presumption arises that a woman is the natural mother of a child if she "receives the child into [her] home and openly holds out the child as [her] natural child" (Fam. Code § 7611(d)). The court further established that a woman claiming to be entitled to the presumption must do so by a

preponderance of the evidence. The court noted that although a person does not have to be married or registered as a domestic partner, or even lived with the child's other parent, a presumed parent is more than just a "casual friend of the other parent;" rather, they must be "someone who has demonstrated an abiding commitment to the child and the child's well-being, regardless of the relationship with the child's other parent."

With these standards in mind, the appellate court then determined that Fam. Code § 7611(d) requires that Partner must show whether she (1) received Child into her home, and (2) whether Partner held the Child out to be her natural child. First, the court made clear that the facts were "uncontroverted" that when Child was three months old, Child moved into Partner's home, and Child lived in Partner's mother's home while Partner served in the military. The appellate court indicated that the trial court focused on inessential facts, and that the crucial consideration is whether Partner received the Child into her home, which Partner did. The appellate court also noted that nothing in § 7611(d) requires Partner to receive Child into home immediately after Child's birth. Thus, the court determined that based on the record, Partner established the first element necessary for presumed parent status.

As to whether a person holds a minor out to be her natural child, the appellate court relied on several factors specified in case law. Specifically, in determining whether an alleged parent holds a child out to be his or her natural child, courts look at the conduct of the alleged parent to determine: "whether the man actively helped the mother in prenatal care; whether he paid pregnancy and birth expenses commensurate with his ability to do so; whether he promptly took legal action to obtain custody of the child; whether he sought to have his name placed on the birth certificate; whether and how long he cared for the child; whether there is unequivocal evidence that he had acknowledged the child; the number of people to whom he had acknowledged the child; whether he provided for the child after it no longer resided with him; whether, if the child needed public benefits, he had pursued completion of the requisite paperwork; and whether his care was merely incidental" (*In re T.R.* (2005) 132 Cal. App. 4th 1202, 1211-1212). The court expressed that an alleged parent is not required to show all of these factors.

The appellate court went on to explain that the trial court erred in its analysis of the legal issues. Not only did the trial court consider facts irrelevant to determining Partner's commitment to Child (*e.g.*, facts regarding the relationship between Mother and Partner, whether Mother and Partner told their families they were having sex, whether Mother, Child, and Partner were living together, Mother's intent regarding Partner's status as a parent, and Partner's involvement in Mother's impregnation), but also that even when the trial court considered relevant facts, it only did so in the context of Mother and Partner's relationship, which was error. Finally, the court concluded that given the way the trial court failed to properly balance the relevant factors, the trial court *would* exercise its discretion in a different way given a "clear understanding of § 7611(d) and its purpose." Thus, the appellate court reversed and remanded for further proceedings.

Comment: The appellate court left little room for the trial court to determine that Partner was anything but a presumed parent. Additionally, the appellate court indicated that it would be extremely unlikely that Mother could rebut the presumption with clear and convincing evidence.

Court's Order on Its Own Motion to Produce a Trust Accounting Is Not Subject to Appeal, Even Where Petitioner's Standing to Compel Accounting Is Questionable

Case briefed by Tisa M. Pedersen, Esq.

CHRISTIE v. KIMBALL (2012) 202 Cal. App. 4th 1407, 136 Cal. Rptr. 3d 516 [Filed January 26, 2012] (Opinion following rehearing.)

Short Summary: *"In probate court, nothing speaks more eloquently or provides more insight into factual and legal issues than an accounting."* The probate court, needing more information regarding trust assets before it could rule on any of the issues before it, ordered the Trustee to produce an accounting. Daughter, a presumptive but unconfirmed beneficiary, had petitioned to compel an accounting. Trustee appealed, claiming that the probate court had impliedly held that Daughter was an actual beneficiary with standing to compel an accounting. The Court of Appeal held that the probate court had the inherent authority, as part of its power and duty to supervise the administration of trusts, to order Trustee to produce an accounting on its own motion, and did not need to decide first whether or not Daughter was a beneficiary. An order to compel an accounting, including an order made on the court's own motion, is not subject to appeal where it contains no other order, explicit or implied, that could be subject to appeal.

Facts: Mother created a trust that would distribute all assets to Trustee upon her death, but stated that Trustee was to hold half of the assets "in trust" for Daughter. Mother subsequently transferred her residence out of the trust and to herself as the sole owner. Following Mother's death, Daughter petitioned for Letters of Special Administration to gain control of the residence. Trustee petitioned to have the deed set aside and to return the residence to the trust. Daughter petitioned to have Trustee removed and to compel an accounting. The probate court determined it needed more information to figure out what was a trust asset and what was not. Trustee claimed that she had distributed all the assets to herself and paid attorneys fees, and that approximately $130,000 that had been in the trust was "basically gone now." To sort out what had really happened, the probate court held that the first thing that needed to be done was the accounting, and ordered Trustee to produce one. Trustee appealed.

Issue: Where it is unclear what happened to trust assets and a presumptive beneficiary has petitioned to compel an accounting, is the order to produce an accounting subject to appeal when made by the probate court *sua sponte*?

Trial Court Holding: The Ventura County Superior Court, needing more information before it could rule on any of the questions before it, ordered the Trustee to produce an accounting.

Appellate Court Holding: The Second District Court of Appeal affirmed the order to produce an accounting, holding that the probate court had broad authority to order an accounting *sua sponte*, and by its order did not impliedly order that Daughter was a beneficiary entitled to an accounting; the exception that permits appeal of an order to account when the order expressly or implicitly decides other issues therefore did not apply.

Appellate Court Rationale: Trustee claimed that, by granting Daughter's petition to compel an accounting, the probate court was implicitly ruling that Daughter was a beneficiary of the trust with standing to compel such an accounting. If so, the order to produce an accounting would have been appealable, falling into the exception to the statute that otherwise prohibits appeal, as it would have contained another order that could be the subject of an appealable probate order: determining that Daughter was actually a beneficiary. (*See Esslinger v. Cummins* (2006) 144 Cal. App. 4th 517, 522; 50 Cal. Rptr. 3d 538.) The Court of Appeal, however, found that the probate court, with its power and duty to supervise the administration of trusts, and its inherent power to decide all incidental issues necessary to carry out that function, had the power to order an accounting *sua sponte*. (*Citing Schwartz v. Labow* (2008) 164 Cal. App. 4th 417, 427; 78 Cal. Rptr. 3d 838.) There were sufficient reasons for the probate court to be concerned about the administration of the trust, and it had determined that an accounting would be the first necessary step to sorting things out. It made no finding, implicit or otherwise, that Daughter was or was not a beneficiary of the trust, an issue that the Appellate Court thought likely still needed to be resolved due to ambiguities in the trust language. The probate court's order to produce an accounting, therefore, did not contain any other orders that could have been appealable, and Trustee could not appeal the order to produce the accounting. (Probate Code § 1304(a)(1).)

Comment: This opinion reminds us that the probate court has considerable authority and oversight over trust administrations and may, on its own motion, make orders and require our clients to take actions they were not anticipating. While we may encourage our clients to avail themselves of the power of the court to interpret or instruct, we should also caution them that the court may indeed take it upon itself to order "such other and further orders as the court shall determine are just and proper." In the instance where that further order is to produce an accounting to help the court understand what is going on in the trust administration, that order is not appealable.

Proposition Eight Violates the Equal Protection Clause of the U.S. Constitution, Amendment XIV

Case briefed by Sara Hire, Law Clerk

PERRY v. BROWN (2012) 671 F.3d 1052 [Filed February 7, 2012]

Short Summary: The Ninth Circuit held that there is no legitimate state interest in Proposition 8, and therefore, it violates the Equal Protection Clause.

Facts: Five California residents ("Intervenor-Defendants," "Intervenors," and "Proponents") collected voter signatures and filed petitions with the state government to place an initiative, Proposition 8, on the November 4, 2008, ballot. Proposition 8 ("Prop 8") proposed to add a new provision to the California Constitution stating that only marriage between a man and a woman is valid in California. The intended effect of Prop 8 was to eliminate the right of same-sex couples to marry in California. Following a close election, California voters approved Prop 8, and it took effect the next day, as article I, section 7.5 of the California Constitution. In May 2009, two same-sex couples filed this action under 42 U.S.C. § 1983 (2006), after being denied marriage licenses by the County Clerks of Alameda County and Los Angeles County. The couples alleged that Prop 8 violated the Fourteenth Amendment. The initial defendants (the county clerks and four state officers) filed answers, but refused to argue in favor of Prop 8's constitutionality. As a result, Proponents filed a motion to intervene to defend Prop 8, which lead to questions regarding Proponents' standing.

Issue: (1) Whether Proponents have standing to defend the constitutional validity of Prop 8; (2) whether Prop 8 is unconstitutional because it violates the Equal Protection Clause.

Trial Court Holding: This case was initially filed as **PERRY v. SCHWARZENEGGER** (2010) F. Supp. 2d 921 [Filed August 4, 2010] in the Northern District of California, San Francisco. The court determined Proposition 8 was unconstitutional under the Due Process Clause because no compelling state interest justifies denying same-sex couples a fundamental right to marry. Additionally, the court held that Proposition 8 was unconstitutional under the Equal Protection Clause, because there is no rational basis for limiting the designation of 'marriage' to opposite-sex couples. Finally, the court ordered a permanent injunction of Proposition 8's enforcement.

<u>Other Procedural History</u>
Before deciding the appeal on the Trial Court's decision, the United States Court of Appeals for the Ninth Circuit certified a question to the California Supreme Court regarding whether or not Intervenor-Defendants could appeal. The California Supreme Court answered the Ninth Circuit's question in the affirmative–that the Intervenors had standing to appeal. Also, the case name became **PERRY v. BROWN**.

Appellate Court Holding: The United States Court of Appeals, Ninth Circuit affirmed holding that (1) the people of California, through the proponents of the ballot measure had standing to defend the validity of Proposition 8 and (2) Proposition 8 violates the Equal Protection Clause.

Appellate Court Rationale: Proposition 8's Constitutionality–The Ninth Circuit chose to apply the Supreme Court's reasoning in *Romer v. Evans* (1996) 517 U.S. 620, and focused on whether Prop 8 violates the Equal Protection Clause because it singles out same-sex couples for unequal treatment by taking away from them alone the right to marry without a legitimate reason. In *Romer*, the Supreme Court affirmed the Supreme Court of Colorado's decision that a statewide referendum that withdrew specific legal protection from injuries caused by discrimination only from homosexuals, violated the Equal Protection Clause because the classification was unrelated to any legitimate state interest (*See Romer*, 517 U.S. 620). Thus, the Ninth Circuit, utilizing *Romer*, sought to determine whether any legitimate state interest constitutes a rational basis for Prop 8.

The Ninth Circuit determined that (1) furthering California's interest in child rearing and responsible procreation, (2) proceeding with caution before making significant changes to marriage, (3) protecting religious freedom, nor (4) preventing children from being taught about same-sex marriage in schools were legitimate interests furthered by Prop 8. First, the court determined furthering California's interest in child rearing and responsible procreation is not rationally related to Prop 8 because Prop 8 did not change any laws governing parentage, current policy indicates gay individuals are fully capable of responsibly raising children, and taking a something away just because it was not needed in the first place is not a legitimate reason for revoking a right. Second, the court found that since Prop 8 imposes a total ban that is not time-specific, such a permanent ban cannot be rationally related to an interest in proceeding with caution. Third, the court found that Prop 8 does nothing to affect anti-discrimination laws and other government policies concerning sexual orientation that amici fear would inhibit religious freedom, thus, since this is no way addressed by Prop 8, it cannot have been a reason for Prop 8. Finally, the court determined that Prop 8 does not require schools to teach anything about same-sex marriage. The Court also noted that tradition alone is not a justification for taking away a right that had already been granted, and thus, is not a sufficient justification for Prop 8.

The Ninth Circuit determined that there were no other interests rationally related to supporting Prop 8. It indicated that neither a desire to do harm, nor a more basic disapproval of a class of people is a legitimate interest. Looking at the context and the campaign in which Prop 8 was passed, the Court found that Prop 8 operates with no apparent purpose but to impose on gays and lesbians a majority's private disapproval of them. As a result, the Ninth Circuit determined that Prop 8 violates the Equal Protection Clause.

Comment: Although the holding in this case is narrow, it can be viewed as an indicator of where courts, and perhaps federal law are headed. It may mean that the U.S. Supreme Court will be more willing and ready to hear arguments on the constitutionality of the Defense of Marriage Act ("DOMA"). This may mean that same-sex couples will be entitled to a variety of federal benefits

(*See Gill & Letorneau v. Office of Personnel Mgmt*. (2010) 699 F. Supp. 2d 374, 396 (D. Mass 2010); affirmed 682 F. 3d 1 (1st Cir. 2012) the First Circuit held that the definition of "marriage" in Section 3 of DOMA is unconstitutional); *Dragovich v. United State Dep't of the Treasury* (2012) U.S. Dist. Lexis 72745 (the Northern District of California held that DOMA and § 7702B(f) of the tax code are unconstitutional)).

Proof of Financial Need or Actual Injury Not Required for Sanctions Under Fam. Code § 271

Case briefed by Scott A. Fraser

MARRIAGE OF FALCONE & FYKE, (2012) 203 Cal. App. 4th 964, 138 Cal. Rptr. 3d 44 [Filed February 23, 2012]

Short Summary: Husband and Wife were involved in a litigious divorce in which Wife filed numerous appeals, and multiple motions to vacate trial court decisions and for a new trial. In five consolidated appeals the Court awarded attorneys fees, costs, and sanctions against Wife in the amount of hundreds of thousands of dollars. The Appellate Court found that the sanctions were not an unreasonable burden against Wife in light of real estate equity available to her and her potential share of marital property. In addition, Husband was not required to show evidence of financial need.

Facts: Husband and Wife were involved in a contentious divorce in which Wife represented herself *in propia persona*. During the course of litigation Wife filed approximately thirteen appeals, eleven motions to vacate trial court decisions, eight motions for a new trial and "objections to virtually every single court order that was filed." The Appellate Court decision consolidated five appeals filed by Wife, four of which are pertinent here: (1) a post-judgment order awarding attorney's fees and sanctions; (2) a post-judgment order confirming an accounting and distribution of funds; (3) a post-judgment order awarding sanctions against Wife for appealing an order awarding sanctions against her; and (4) a prejudgment order awarding sanctions against Wife for her misconduct in her effort to obtain a trial continuance.

In the first action, Husband sought attorney fees, costs and sanctions under Cal. Fam. Code § 271 pursuant to a statement of decision issued by the trial court ordering that the matters of attorneys fees and costs be handled by means of written declaration and supporting documentation. In the second action, Husband filed an Order to Show Cause (OSC) seeking $5,000 in sanctions pursuant to § 271 for Wife's failure to pay one-half of the family residence equity to him, and approximately three weeks later Husband filed another OSC seeking an addition $15,000 in sanctions because Wife was in violation of the court's order directing her to pay Husband one-half equity in the house, and that her failure to comply led to the necessity of filing the motions. In the third action, Husband filed an OSC seeking sanctions under § 271 for defending two appeals filed by Wife earlier in the litigation. In the fourth action, Husband sought an order awarding sanctions against Wife for her misconduct in her effort to obtain a trial continuance.

During the trial setting conference, Wife claimed to be experiencing chest pains, to be under medications, and left the courtroom.

Issue: Whether the four separate court orders awarding sanctions were proper?

Trial Court Holding: The Santa Clara County Superior Court awarded sanctions in the following amounts for each of the above respective actions: (1) $833,025 in attorneys fees, costs and sanctions to be paid from Wife's portion of the remaining funds from the sale of the family home that was as a result of Wife's frustration of the policy to reduce litigation and promote settlement throughout the litigation; (2) $20,000 in sanctions for wife's failure to comply with the court order directing her to pay Husband one half of the equity in the house; (3) $25,792 in attorneys fees, costs and sanctions for Wife's appeal of an earlier sanctions award, and; (4) $16,284 in attorneys fees, costs, and actions for Wife's misconduct at a trial setting conference.

Appellate Court Holding: The Sixth Appellate District affirmed all four orders for sanctions.

Appellate Court Rationale: While the court addressed each consolidated appeal individually, its reasoning for awarding each of the four sanctions was the same. First, the court found that the sanctions awarded were not an unreasonable burden on Wife. The court took into account the fact that Wife had several hundred thousand dollars in real estate equity available to her. In addition, the largest award for $833,025 was paid from her share of the remaining funds from the sale of the family home. Second, the court found that the amount of the sanctions awarded was not excessive. For certain awards Wife had claimed that the hourly rate of the attorneys multiplied by the hours worked was less than the sanction award. The Court rejected Wife's argument, stating that a sanction under § 271 need not be limited to the cost to the other side resulting from the bad conduct. Third, the Court held that the award of sanctions to Husband did not have to be need based. Therefore, Husband was not required to submit a current income and expense declaration and did not have to demonstrate his current financial situation. Fourth, the Court found that it was not an abuse of discretion to award each sanction to Husband. The Court stated that it had broad discretion under § 271 to award sanctions against a party who frustrated the policy to promote settlement and cooperation in family law litigation, and that the only limit on this broad discretion was that the sanction not impose an unreasonable financial burden. Having found earlier that there was no unreasonable financial burden, the Court found that there was no abuse of discretion.

Comment: First, it should be noted that the Appellate Court emphasized that a document making "a laundry list of 52 demands" will not be sufficient as a request for a statement of decision. A proper request for a statement of decision must "specify those controverted issues as to which the party is requesting a statement of decision." (Cal. Code Civ. Proc. § 632.)

Second, in addition to the sanctions entered against Wife, the Appellate Court found that Wife was a vexatious litigant under Cal. Code Civ. Proc. § 391. Aside from the above conduct, the court also described how Wife had fraudulently prepared the proofs of service on each of her

court filings, by filing proofs of service under the name of a person who could not be found at the address provided and, whose signature an expert forensic document examiner testified was 95% likely to have been written by Wife herself. In applying to a court for sanctions under § 271 in the future, keep in mind the extent by which the court can find that sanctions are not an unreasonable burden. Here, the fact that Wife had several hundred thousand dollars in equity, in real estate and funds from the sale of a family home, was enough to show that the burden was not unreasonable.

Constitutional Due Process Rights of Conservatees Before Imposition of Medical Decisional Authority Include Proper Notice and Judicial Determination of Decisional Incapacity

Case briefed by Tisa M. Pedersen, Esq., and Jennifer M. Stier

K.G. v. MEREDITH (2012) 204 Cal. App. 4th 164, 138 Cal. Rptr. 3d 645 [Filed March 8, 2012]

Short Summary: The Public Guardian's regular practice of obtaining medical decisional authority over LPS conservatees was a violation of their due process rights, as it did not provide proper notice that the Public Guardian could be granted medical decisional authority, including authority to administer antipsychotic medications, if the proposed LPS conservatees failed to object at the hearing, and did not include obtaining a judicial determination of decisional incapacity. The trial court must determine (1) whether the patient is aware of the nature of his grave disability; (2) whether the patient is able to understand the benefits and the risks of, as well as the alternatives to, the proposed intervention; and (3) whether the patient is able to understand and knowingly and intelligently evaluate the information required to be given to patients whose informed consent is sought, and otherwise participate in the treatment decision by means of rational thought process.

Facts: Petitioners were determined to be gravely disabled under the Lanterman-Petris-Short (LPS) Act, and the Public Guardian obtained orders divesting them of the right to make their own decisions regarding medical treatment, and gave the Public Guardian authority for the involuntary administration of antipsychotic medication. Petitioners claimed that the Public Guardian had a "customary practice" to seek and obtain orders imposing such a legal disability without appropriate judicial determination of decisional incapacity and without proper notice and opportunity to be heard. The Public Guardian gave notice that the disability might be imposed, but the notice was served without a copy of the petition alleging the decisional incapacity, without declarations offering evidence in support of a finding on the incapacity issue, without legal representation for the proposed LPS conservatees, without a hearing, and without an affirmative indication of the proposed LPS conservatee's consent to imposition of the disability. The notice provided phone numbers for the public defender and patient advocate, but did not guarantee representation for the proposed LPS conservatees, did not state the date, time, and

place for the hearing, and did not state a date on which an LPS conservator would be appointed if there was no objection.

Issue: Did the Public Guardian's regular practice of seeking medical decisional disabilities on LPS conservatees, without a hearing and with minimal notice, violate the conservatees' due process rights?

Trial Court Holding: The Marin County Superior Court held the petitions were moot because the LPS conservatorships at issue had expired.

Appellate Court Holding: The First District Court of Appeal found the issues were not moot and reversed the trial court, holding that the issues were capable of repetition yet evading review. Further, the court held that medical decisional disabilities may not be imposed upon a conservatee without proper notice and the opportunity for a hearing, or without a judicial determination of decisional incapacity based on several factors.

Appellate Court Rationale: Although there is no clear statutory requirement for an express finding of decisional incapacity before imposing medical treatment disabilities, constitutional due process rights override any omission of the statutes. Involuntary administration of antipsychotic medication infringes on an individual's right to privacy and personal autonomy; and therefore, a proposed conservatee has a right to due process before such medical decisional disability may be imposed. Further, the court held that the lack of an objection by an unrepresented and ill-informed proposed LPS conservatee is not equivalent to an express waiver and consent.

Before a court may impose a medical disability on an LPS conservatee, the court must find that the conservatee lacks the mental capacity to rationally understand the nature of the medical problem, the proposed treatment, and the attendant risks. In doing so, the court must consider the following factors, from *Riese v. St. Mary's Hospital & Medical Center* (1987) 209 Cal. App. 3d 1303: (1) whether the patient is aware of the nature of his grave disability; (2) whether the patient is able to understand the benefits and the risks of, as well as the alternatives to, the proposed intervention; and (3) whether the patient is able to understand and to knowingly and intelligently evaluate the information required to be given to patients whose informed consent is sought, and otherwise participate in the treatment decision by means of rational thought process.

Comment: Even though this decision only addressed LPS conservatorships, the *Riese* factors could also be considered when petitioning for exclusive authority to give consent for medical treatment in probate conservatorships.

Service of Post-Probate Contest on Executor's Attorney

Case briefed by Erin N. Kolko, Esq.

ESTATE OF MOSS (2012) 204 Cal. App. 4th 521, 139 Cal. Rptr. 3d 94 [Filed March 20, 2012]

Short Summary: Service of a post-probate contest on the executor's attorney of record was proper under Code of Civil Procedure § 416.90, because it was highly probable the attorney would inform the executor of the service. The post-probate contest was not barred under Probate Code § 8270, because the trial court never adjudicated the pre-probate contest.

Facts: Decedent's wife ("Wife") filed a petition to probate Decedent's will, and had herself appointed as executor. Decedent's Son and Grandchildren filed pre-probate contests. The trial court admitted the will to probate without adjudicating the pre-probate contests. The trial court stated "If the validity of the will is an issue, I think you still have the ability to challenge that, but I do think we need...an executrix in place, and I'm going to go ahead and grant the request." Decedent's Grandson ("Grandson") then filed a post-probate contest, and effectuated personal service on Wife's Attorney of record ("Attorney") in the action. Attorney filed a declaration in which she asserted that the time for filing a demurrer had not expired because the attorney was not authorized to accept service on Wife's behalf. Wife subsequently filed a demurrer to the post-probate contest, more than 30 days after service on Attorney, claiming Grandson was precluded from bringing the post-probate contest because he had already brought a pre-probate contest.

Issue: Was service of the post-probate contest on Attorney effective? Is there a bar against a post-probate contest if the court never adjudicated the pre-probate contest?

Trial Court Holding: The San Diego County Superior Court sustained Wife's demurrer holding that the bar against successive probate contests precluded the post-probate contest.

Appellate Court Holding: The Fourth District Court of Appeal reversed holding that the demurrer was untimely because service on Attorney was proper, and the post-probate contest was not barred because the trial court never adjudicated the pre-probate contest.

Appellate Court Rationale: Where a party and her attorney have already appeared in an action, and a new process against that party related to that same action is issued, service of process on the party's attorney of record in that same case is sufficient under Code of Civil Procedure § 416.90. The relevant inquiry is whether it is reasonably certain and highly probable that the attorney will inform the party of the service. In this case, the post-probate contest was filed in the very same action in which Attorney was already representing Wife. Attorney had a statutory duty to apprise her client of significant developments in the subject matter. Because it was highly probable that Attorney would inform Wife of service of the post-probate contest, Attorney was Wife's "ostensible agent to receive service of process." As such, service on Attorney was

proper and the demurrer was untimely as it was filed more than 30 days after service. The appellate court further held that the post-probate contest was not barred under Probate Code § 8270, even though the Grandson filed a pre-probate contest, because the trial court never adjudicated the pre-probate contest.

Comment: The appellate court expressly recognized the narrowness of its holding in stating, "In this case we consider only whether service of process on a party's attorney of record is sufficient where the process is issued *in the same case* as that in which the attorney is already representing the party."

Disbarment Recommended for Attorney Who Falsely Married an Elderly Client and Misappropriated Client's Savings

IN RE LOWNEY (2012) State Bar Ct Review Dep't, No. 07-O-11504 [Filed April 5, 2012]

Summary: Client hired Attorney in order to help him plan his estate. Attorney drafted estate planning documents for Client in 2002. By August 2005, Attorney and Client became romantically involved. Around this time Client's health deteriorated, and Attorney promised to take care of him. Client already gifted $10,000 to Attorney, and transferred more funds to Attorney to use for Client's care. Client's health continued to worsen, but Attorney and Client married under a confidential license on January 23, 2006. The confidential license required the Attorney and Client live to together. As a result, Attorney and Client falsely stated that they were living together and filed the application. By Fall of 2006, Client became frustrated with Attorney, telling his family that he could not reach her, and she did not follow her promise to care for him. Client soon moved into a senior care facility, and died a short time later. Client's neighbors notified his family about his death, and when they came to tend to Client's affairs, they discovered that Attorney had taken Client's financial binders, and cremated Client against his testamentary wishes.

The hearing judge determined that Attorney obtained an interest adverse to her client, failed to comply with the law, maintained an unjust action, and committed acts of moral turpitude (misappropriation and filing of a false marriage license). Upon review, the State Bar Court of California, Review Department found attorney culpable for failing to comply with the law, maintaining an unjust action, and moral turpitude for filing a false marriage license and misappropriating Client's savings. The Review Department's opinion noted that "[i]n simple terms, [Attorney] took financial advantage of a sick, elderly client–conduct the hearing judge rightly called 'heartless and egregious.'" The Review Department recommended Attorney be disbarred and that her name be stricken from the roll of attorneys. Attorney was ordered inactive to practice as of March 7, 2011, and remains inactive pending the consideration and decision of the Supreme Court on the Review Department's recommendation.

Amendment in a Manner Other Than Specified by Trust is Invalid

Case briefed by Mason L. Brawley, Esq.

KING v. LYNCH (2012) 204 Cal. App. 4th 1186, 139 Cal. Rptr. 3d 553 [Filed April 10, 2012]

Short Summary: Husband and Wife created a revocable trust, which allowed for revocation by one spouse unilaterally, but required both spouses to amend. The Court of Appeal held that where the trust provides a method of amendment, the trust can only be amended in that manner. As a result, the amendments signed only by Husband were invalid.

Facts: Husband and Wife created a revocable trust ("Trust") as settlors and initial trustees in 2004. The Trust provided that either settlor could unilaterally revoke the Trust by a writing signed by a settlor and delivered to the trustee. The Trust, however, provided that it could only be amended by a writing signed by both settlors and delivered to the trustee (with respect to any jointly owned property), or by a writing signed by the settlor who contributed the property and delivered to the trustee (for any separately owned property). It appears that all property was jointly owned by Husband and Wife.

The Trust provided that upon the death of both settlors, each of their four children would receive pecuniary gifts of $100,000 and their two grandchildren (from a predeceased child) would each receive $50,000. The residue was distributable to one child ("Son"). In 2005 and 2006, Husband and Wife executed three amendments to the Trust which added specific gifts of real property to Son. The validity of these three amendments was not challenged.

Wife suffered a brain injury in 2006 leaving her incompetent. Subsequently, Husband executed three further amendments to the Trust. The fourth amendment appointed Husband as sole trustee. The fifth amendment reduced the pecuniary gifts to 50% of the amounts in the original Trust, and the sixth amendment reduced the pecuniary gifts to 10% of the amounts in the original Trust. Each of the amendments left intact the specific gifts of real property and the residue to Son.

Husband died in January 2010 and Wife died in August 2010. Thereafter, Son, as successor trustee, gave notice of the administration of the Trust pursuant to Probate Code § 16061.7. The other beneficiaries filed a petition seeking an order that the fourth, fifth, and sixth amendments were invalid since they were signed by only Husband in contravention of the terms of the Trust.

Issue: Where a revocable trust provides a method of modification, is that method the only method that may be used to modify the trust, even where the trust does not state that such method is exclusive?

Trial Court Holding: Yes. The Tulare County Superior Court held that the amendments signed by only Husband were invalid since they were in contravention of the express terms of the Trust.

Appellate Court Holding: The Fifth District Court of Appeal affirmed, holding that if any modification method is specified in the trust, that method must be used to amend the trust.

Appellate Court Rationale: The Court of Appeal relied on Probate Code § 15402 which provides, "Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation." The court's decision hinged upon its interpretation of the clause "unless the trust provides otherwise." Son acknowledged that the Trust provided a method of modification (by both settlors), but he asserted that because the Trust did not make that method explicitly exclusive - borrowing language from § 15401, the Trust could be modified by the procedure for revocation (by Husband alone). The Court of Appeal rejected Son's argument, and held that under § 15402, if <u>any</u> modification method is specified in a trust, that method <u>must</u> be used to amend the trust. Accordingly, the court held that the Trust could not be amended by Husband unilaterally.

Comment: If the Trust could be modified in the manner of revocation (by only one settlor), then the Trust provision regarding amendment would have no effect. Probate Code § 21120 provides that the words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative. The majority determined that the Trust provided a method of amendment and that it was not followed. The result is not surprising. However, it is interesting to me that Husband tried to amend the Trust when he could have just revoked it. This also seemed to be a sticking point for the dissent.

Also, as the Court of Appeal noted, there were options (such as conservatorship) to properly make the amendment despite Wife's lack of competence. Other options could have been drafted into the Trust or granted to Husband as attorney-in-fact for Wife. For additional flexibility (particularly for a joint trust created by a husband and wife), our clients will typically give their spouse or an attorney-in-fact the power to amend or revoke the trust.

Division of the Community Estate Occurs Upon Date of Execution of Marital Settlement Agreement Even If Marital Settlement Agreement Was Incorporated into Judgment for Final Dissolution Filed at a Later Date

Case briefed by Tricia L. Manning, Esq.

LITKE O'FARRELL, LLC V. TIPTON (2012) 204 Cal. App. 4th 1178, 139 Cal. Rptr. 3d 548 [Filed April 10, 2012]

Short Summary: Judgment Creditor could not satisfy its judgment against Debtor Spouse with a charging order against Nondebtor Spouse's interest in property that had been confirmed as Nondebtor Spouse's separate property pursuant to a marital settlement agreement effective before the charging order was filed.

Facts: In August 2009, the trial court entered a judgment for approximately $525,000 in favor of Judgment Creditor and against Debtor Spouse and others.

On January 18, 2011, Judgment Creditor commenced serving a motion to charge the interests of Debtor Spouse and others in certain partnerships and limited liability companies, but actual service on Debtor Spouse was not effected until January 24, 2011, the same date that Judgment Creditor filed the motion in court. Meanwhile, on January 21, 2011, notice was given that an action for dissolution of Debtor and Nondebtor Spouse's marriage was filed December 15, 2010, and that Debtor Spouse and Nondebtor Spouse had executed a Marital Settlement Agreement ("MSA") on January 18, 2011, with the effective date of January 18, 2011. The MSA divided the community property assets of Debtor Spouse and Nondebtor Spouse, confirming half to Debtor Spouse and half to Nondebtor Spouse as their sole and separate property. Under the MSA, Debtor Spouse had the sole responsibility for the judgment debt owed to Judgment Creditor. The MSA also provided that at the time judgment of dissolution was obtained, the original date of the MSA would be attached to the stipulated judgment and the court was requested to (1) approve the agreement as fair and reasonable, (2) order the parties to comply with its executory provisions, and (3) incorporate the MSA into the judgment of dissolution. The MSA further provided that it would be independently valid and binding whether or not it was incorporated into a final judgment of dissolution.

On January 28, 2011, Judgment Creditor served a second motion on Debtor Spouse and Nondebtor spouse, specifically charging the interest of Nondebtor spouse in the various partnerships and limited liability companies subject to the first motion.

On January 31, 2011, the court entered a judgment of dissolution incorporating the MSA.

Nondebtor Spouse opposed Judgment Creditor's motion for a charging order arguing that division of the community estate occurred when Debtor Spouse and Nondebtor Spouse executed the MSA, which was effective prior to the date Judgment Creditor filed its second motion charging Nondebtor's spouse's interest. Therefore, Nondebtor Spouse's interest in the property was her separate property, and Judgment Creditor could not charge her separate property with a debt that was charged solely against Debtor Spouse under the MSA.

Issue: Is Judgment Creditor entitled to a charging order that was filed against Nondebtor Spouse's interest in property after Nonndebtor Spouse and Debtor Spouse executed a marital settlement agreement effective before the charging order was filed providing that Nondebtor Spouse's interest in the property was her sole and separate property?

Trial Court Holding: The San Francisco County Superior Court granted Judgment Creditor a charging order against Nondebtor Spouse.

Appellate Court Holding: The First District Court of Appeal reversed, holding that the MSA transmuted Nonndebtor Spouse's community property interest in the property to separate

property prior to the time Judgment Creditor pursued its motion for a charging order against the property. Therefore, the charging liens did not attach, and Judgment Creditor was not entitled, to orders charging Nondebtor Spouse's confirmed separate property.

Appellate Court Rationale: The charging order was designed to satisfy Judgment Creditor's judgment against Debtor Spouse. Although, in general, under Family Code § 902, the community estate is liable for debts incurred by either spouse before or during the marriage and prior to dissolution of marriage or legal separation, property received by a nondebtor spouse escapes liability for the debtor spouse's debt after division of the community property pursuant to Fam. Code § 916(a)(2).

Section 2550 provides that "*[e]xcept upon the written agreement of the parties* . . . in a proceeding for dissolution of marriage or for legal separation of the parties, the court shall, either in its judgment of dissolution of the marriage . . . , in its judgment of legal separation of the parties, or at a later time if it expressly reserves jurisdiction to make such a property division, divide the community estate of the parties equally." [Emphasis added]. In general, the Family Code empowers a husband and a wife to alter their property rights by a marital property agreement. Thus, a husband and a wife can at any time contract with each other regarding property.

The MSA was a property agreement between Debtor Spouse and Nondebtor Spouse, and in the absence of fraud or other invalidity, property provisions of a MSA are valid and binding on the court. Court approval of a dissolution proceeding is not a prerequisite to the enforcement of an MSA in an independent action, unless the agreement requires such approval.

Here, the MSA was effective as of January 18, 2011 regardless of whether it was incorporated into the judgment for final dissolution. Debtor Spouse and Nondebtor Spouse had agreed in writing to the division of the community estate, as allowed by § 2550, and the effective date of the division of the community estate was the effective date of the MSA, not the date the court entered the judgment of dissolution incorporating the MSA. Since the division occurred prior to the date of the charging order, Judgment Creditor could not satisfy its judgment against Debtor Spouse with Nondebtor Spouse's interest in her separate property.

Comment: Creditor missed an opportunity, because the court failed to take notice that a marital property agreement is subject to the Uniform Fraudulent Transfer Act ("UTFA"), Cal. Civ. Code §§ 3439, *et seq.*. Creditor could have shown that the MSA violated provisions in the UTFA, and ultimately could have prevented the transfer. (*See* Civ. Code § 3439.04(a) (transfer was made "with actual intent to hinder, delay, or defraud any creditor of the debtor), and § 3439.07(a)(1) (creditor can avoid transfer "to the extent necessary to satisfy the creditor's claim).)

Additionally, subject to the UTFA, this case indicates that spouses who create a property agreement between themselves during marriage or upon termination of marriage, such as the MSA in this case, may utilize such an agreement as a tool for protection against creditors.

Where the Subject of a Lawsuit is a Community Property Asset, a Code Civ. Proc. § 998 Offer to Compromise Made Jointly to Both Spouses is Valid

Case briefed by Sondra J. Allphin, Esq.

FARAG v. ARVINMERITOR, INC. (2012) 205 Cal. App. 4th 372, 140 Cal. Rptr. 3d 320 [Filed April 24, 2012]

Short Summary: A Code Civ. Proc. § 998 offer to compromise made jointly to both spouses is valid because, under California's community property law, a cause of action for personal injury damages is community property (Fam. Code, § 780) and under Fam. Code § 1100(a), either spouse has the power to accept the offer on behalf of the community.

Facts: Husband was diagnosed with mesothelioma, a cancer linked to asbestos exposure. Following Husband's diagnosis, Husband and Wife sued numerous defendants, claiming Husband was exposed to asbestos-containing vehicles and vehicle parts and seeking damages for personal injury and loss of consortium. One of the defendants ("Defendant") was a manufacturer and distributor of asbestos-containing brake linings during the relevant years.

Prior to trial, Defendant served a § 998 offer to compromise jointly on Husband and Wife. Asserting that there was no evidence that Husband had been exposed to any Defendant product, Defendant offered Husband and Wife one cent ($0.01) in exchange for a dismissal with prejudice and a mutual waiver of costs. The offer did not specify either that both spouses must accept the offer, or that the offer was capable of acceptance by either spouse without the consent of the other spouse. The offer was not accepted; the case proceeded to trial; and the jury returned a verdict in favor of Defendant.

Defendant then submitted a memorandum of costs, including requests for $11,033 for expert witness fees and $2,173 in expert travel costs, due to the rejected § 998 offer. Husband and Wife filed a motion to tax these costs.

Issue: Whether a § 998 offer to compromise made jointly to spouses is void in the absence of a showing of fair and reasonable value as described in Fam. Code § 1100(b).

Trial Court Holding: The Los Angeles County Superior Court denied Husband and Wife's motion to tax the expert witness costs.

Appellate Court Holding: The Second District Court of Appeal affirmed, holding that a § 998 offer to compromise made jointly to spouses is valid, whether or not there is a showing of fair and reasonable value as described in Fam. Code § 1100(b).

Appellate Court Rationale: The court first explained that § 998(c)(1) provides that if an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer including, at the court's discretion, the costs of the services of expert witnesses. The court further explained that the general rule for a joint § 998 offer made to coplaintiffs is that such an offer does not qualify as a valid § 998 offer. However, there is an exception to the general rule for coplaintiffs who are spouses.

After an extensive review of California case law on joint § 998 offers made to spouses, the court explained that the § 998 offer to compromise made jointly to Husband and Wife is valid because, under California's community property law, a cause of action for personal injury damages is community property (Fam. Code § 780), and under Fam. Code § 1100(a), either spouse has the power to accept the offer on behalf of the community.

Finally the court rejected Defendant's argument that as a result of Fam. Code § 1100(b), a § 998 offer to compromise made jointly to spouses should be void in the absence of a showing of fair and reasonable value. Section 1100(b) provides that a spouse may not dispose of community personal property for less than fair and reasonable value without the consent of the other spouse. The court explained that although § 1100(b) may give a spouse a claim for breach of fiduciary duty against the other spouse who improperly accepted a § 998 offer for less than fair and reasonable value, § 1100(b) has no bearing on a third party such as Defendant. Defendant has no duty to enforce a managing spouses's compliance with his or her fiduciary duties.

Comment: This case will be helpful to any practitioner making a joint § 998 offer to spouses where the lawsuit involves community property because it explains numerous relevant California cases that the practitioner may find useful to include in its legal argument. Be careful, though. This reasoning and result only applies when the subject of the lawsuit is community property. If the subject of the lawsuit is separate property, the general rule that a joint § 998 offer made to coplaintiffs does *not* qualify as a valid § 998 offer would be applicable instead. One example of how this could happen is if the spouses had entered into a prenuptial agreement that specified that everything would be separate property, including any cause of action for personal injury damages.

Orders Approving Conservatorship Accountings Have a Res Judicata Effect as to Matters Disclosed in the Accountings

Case briefed by Mark A. Schmuck, Esq.

KNOX v. DEAN (2012) 205 Cal. App. 4th 417, 140 Cal. Rptr. 3d 569 [Filed April 24, 2012]

Short Summary: Three of four conservatorship accountings were approved by the trial court. While claims attacking those three accountings were barred by res judicata, summary judgment was not properly granted when the claims covered the fourth, non-approved accounting.

Facts: Former Conservator initially became the conservator of the person and estate of the Conservatee in 2003, and resigned in 2007 in favor of Successor Conservator, who is also the Conservatee's daughter. At the time that the conservatorship was established, the Conservatee's assets were worth approximately $1.5 million.

During the course of the conservatorship, Former Conservator filed four accountings, all of which were served on Successor Conservator. The first two accountings were approved without objection. The third accounting was approved over Successor Conservator's objection. Successor Conservator filed objections to the fourth account. Those proceedings were stayed by the trial court.

Approximately eight months after Former Conservator resigned, Successor Conservator, both in her individual and fiduciary capacities, filed a complaint against Former Conservator alleging causes of action for financial elder abuse, physical neglect, breach of fiduciary duty, fraud, and constructive fraud. Successor Conservator alleged that the Former Conservator engaged in financial self-dealing, neglected the Conservatee's physical needs, and generally mismanaged the Conservatee's estate. Successor Conservator also alleged that, even though the first three accountings were approved, Former Conservator omitted material facts in those accountings, including personal relationships with service providers, payments for services that were never rendered, that Former Conservator committed waste and churned the estate for his own benefit.

Former Conservator filed a motion for summary judgment or summary adjudication. He argued that the orders approving the first three accountings were *res judicata* as to matters encompassed in those accountings. He also argued that Successor Conservator had an opportunity to object to the first two accountings, but that she failed to do so, and that the third accounting was approved over the objections. Finally, he argued that the Successor Conservator failed to allege facts sufficient to support her causes of action.

Issue: Did the trial court properly grant summary judgment in Former Conservator's favor?

Trial Court Holding: The San Bernardino County Superior Court granted summary judgment in Former Conservator's favor.

Appellate Court Holding: The Second District Court of Appeal reversed and remanded to the trial court with an order directing it to deny summary judgment, but instead to enter summary adjudication in Former Conservator's favor only as to the fraud and constructive fraud causes of action.

Appellate Court Rationale: As to the financial elder abuse cause of action, Former Conservator alleged that Successor Conservator failed to allege a cause of action because she failed to show that he "took" any property from the Conservatee, as required by Welfare and Institutions Code § 15610.30. In response Successor Conservator alleged that the Conservatee's care giver was allowed to live rent-free in one of the Conservatee's apartments, that the Former Conservator

allowed two of his friends to rent apartments at below-market rents, and overcharged the estate for conservator services that were never performed or were unnecessary, among other things. The Court of Appeal found that, if proved, these allegations would be sufficient to establish a cause of action for financial elder abuse.

However, the orders approving the first three accountings have *res judicata* effect on the complaint to the extent that the complaint pleads facts that occurred during the first three accounting periods. Probate Code § 2103 states that orders approving conservatorship accountings are *res judicata* as to the matters disclosed in the accounting unless the order was obtained by fraud, conspiracy, or a misrepresentation as to any material fact. Successor Conservator argued the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) supercede the provisions of § 2103, and that it was error for the trial court to not allow her to challenge the prior accounting orders. The Court of Appeal rejected this argument because the purposes of both the conservatorship provisions of the Probate Code and the EADACPA are the same – to protect vulnerable or incapacitated adults. There would be no legitimate policy reason for EADACPA to supercede § 2103, and the legislative history does not support such a conclusion.

Successor Conservator then raised several factual issues that she contended showed a triable issue of material fact that the Former Conservator committed extrinsic fraud in obtaining approval for his first three accountings. In order for Successor Conservator to be successful in this argument, she must show not only that material facts were concealed, but also that the true facts could not have reasonably been discovered by her. In reviewing these allegations, the Court of Appeal found that none of her allegations with regard to the first three accountings established extrinsic fraud either because there was no duty for the Former Conservator to make certain disclosures (for example, that a housemate was hired to provide services), or that the true facts could not have been independently discovered (such as waste of the Conservatee's estate when rents for the Conservatee's apartments was disclosed).

However, Former Conservator acknowledged that matters arising during the *fourth* accounting (which had not yet been adjudicated) were not precluded by *res judicata*. In independently reviewing the facts put forth by Successor Conservator regarding financial elder abuse, the Court of Appeal found that a triable issue of material fact existed and that summary adjudication was improper.

As to the elder neglect cause of action, the Court of Appeal held that the orders approving the first three accountings did have *res judicata* effect on this cause of action. However, the factual showing by Former Conservator only contained ultimate facts and legal conclusions, such as the statement that he "carefully monitored" the Conservatee's health, which are insufficient to support a grant of summary judgment or summary adjudication. Therefore, summary adjudication was improper.

As to the breach of fiduciary duty cause of action, the facts to support were incorporated from the financial elder abuse cause of action. Therefore, summary adjudication in the breach of fiduciary duty cause of action was improper for the same reasons why summary adjudication was improper for the elder abuse cause of action.

As to the fraud and constructive fraud causes of action, the Court of Appeals found that the Successor Conservator failed to plead specific facts of an act taken in reliance on an alleged nondisclosure by the Former Conservator. Therefore, summary adjudication was proper as to these causes of action.

Finally, the Successor Conservator alleged that the trial court erred in transferring the case to the probate department of the court so that counsel could be provided to the Conservatee in order to review the accountings on his behalf. Failing that, according to the Successor Conservator, the Conservatee was denied his due process rights. The Court of Appeal rejected this argument because there was nothing on the record to show that any request to transfer the matter to the probate department was ever made to the trial court, nor is there any authority to support the argument that the trial court has the *sua sponte* duty to transfer the case to probate.

Comment: This case is a good example and reinforcement of the general rule that orders approving accountings are *res judicata* as to matters disclosed in the accountings. Note that the only reason why summary judgment/adjudication as to the elder abuse/breach of fiduciary duty claims was reversed was because the claims included facts that were not disclosed until the fourth accounting, which had not yet been adjudicated. Had the claims been limited to only facts during the first three accounting periods, summary judgment/adjudication would likely have been affirmed.

Intentional Interference with Expected Inheritance Recognized in California

Case briefed by Mark A. Schmuck, Esq.

BECKWITH v. DAHL 205 Cal. App. 4th 1039, 141 Cal. Rptr. 3d 142 [Filed May 3, 2012]

Short Summary: Decedent's intent was to leave his estate in equal shares between his partner and sister. But for the actions of the sister, the Decedent would have signed a will or trust to that effect. After demurrer, the Fourth District Court of Appeal recognized the tort of Intentional Interference with Expected Inheritance.

Facts: Decedent and his partner, Plaintiff, were in a committed relationship for almost 10 years. Decedent also had a sister, Defendant, who was his only living family, from whom he was estranged. At some point during the relationship, Decedent showed Plaintiff a will that he had saved on his computer, which provided that the Decedent's estate was to be divided equally between Plaintiff and Defendant. This will was never executed.

When Decedent was in the hospital with failing health, he asked Plaintiff to print the will on the computer so he could execute it, but Plaintiff could not find it. Later that day, Plaintiff created a new will from pre-printed forms at Decedent's request. That will provided for the same equal distribution of the Decedent's assets between Plaintiff and Defendant. Before taking the new will to the Decedent, Plaintiff called Defendant to tell her about the new will and also e-mailed her a copy. In response, Defendant stated that it would be better for Decedent to execute a trust and that she would have a lawyer friend of hers draft one in the next couple of days.

Two days later, Decedent had surgery. The doctors told Defendant that there was a significant risk that the Decedent would not survive the surgery, but the doctors would not discuss the matter with Plaintiff because he was not family under the law. Six days later, Decedent died intestate, never having executed any will or trust.

Two weeks after Decedent's death, Defendant opened a probate in Los Angeles County. Plaintiff was never given any notice of the probate proceeding. The petition alleged that the Decedent died intestate and that Defendant was entitled to the entire estate. During the probate administration, Plaintiff asked Defendant for information regarding the estate, but Plaintiff would not respond for several months, when she revealed that she would was appointed administrator of the estate and that she would receive the entire estate. Plaintiff opposed the petition for final distribution, but the probate court found that he lacked standing to object, because he was not a creditor and he was not an intestate heir of the Decedent.

Plaintiff then filed a civil action against Defendant alleging causes of action for Intentional Interference with Expected Inheritance, deceit by false promise and negligence. Plaintiff alleged that Defendant interfered with his inheritance by lying to him about her intention to prepare a living trust for the Decedent to sign in order to cause sufficient delay to prevent the Decedent from signing before his surgery. Defendant demurred, alleging, among other things, that California does not recognize the tort of interference with inheritance.

Issue: Is Intentional Interference with Expected Inheritance a valid cause of action in California?

Trial Court Holding: The Orange County Superior Court sustained the demurrer without leave to amend.

Appellate Court Holding: The Fourth District Court of Appeal reversed and remanded, holding that Intentional Interference with Expected Inheritance is a valid cause of action in California, but Plaintiff had not pleaded sufficient facts to raise the cause of action.

Appellate Court Rationale: The threshold question for this Court of Appeal is whether or not the tort of Intentional Interference with Expected Inheritance should be recognized in California. The appellate court first recognized that twenty-five of forty-two states that considered the issue have recognized the tort. Also, the Restatement Second of Torts recognizes it. The Court discussed two cases, *Hagen v. Hickenbottom* (1995) 41 Cal. App. 4th 168 and *Munn v. Briggs*

(2010) 185 Cal. App. 4th 578, as examples of the discussion regarding the validity of the tort. In *Hagen*, the tort was only briefly discussed, but left open the possibility of validating it in the future. In *Munn*, the same Fourth District declined to adopt the tort because the plaintiff in that case had an adequate remedy in probate. The Supreme Court has not ruled on the issue of the validity of the tort.

In deciding whether or not to recognize a new tort, the courts must consider the relevant policy considerations, and balance the potential burdens and costs that recognition of the tort would bring. Here, the Court stated that recognition of the tort would advance the principal of providing a legal remedy for another's wrongdoing. On the other hand, recognition of the tort could undermine the probate system. This concern is alleviated by prohibiting the cause of action when there is an adequate remedy under the probate law, which is a requirement in most of the states that have adopted the tort. Also, recognizing the tort goes against the general principal that gratuitous promises (such as promises to make a gift) are generally not enforceable against the transferor. However, there are other areas of California law that provide a remedy for damages to economic expectancies (such as interference with prospective economic advantage). In the end, all factors being considered, the court can recognize the tort of Intentional Interference with Expected Inheritance.

Applying the tort to the instant case, Plaintiff must allege five elements: (1) expectancy of inheritance (not necessarily that the plaintiff is a beneficiary of a will); (2) causation, or proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator but for the interference; (3) intent, or knowledge of the plaintiff's expectancy of inheritance and took deliberate action to interfere with it; (4) the interference was conducted by independently tortuous means, i.e., the conduct must be independently wrong for some reason other than the fact of the interference; and (5) damages. In addition, the conduct of the alleged defendant must be alleged to be on the testator/donee, not the plaintiff/beneficiary. This requirement addresses the issue that the plaintiff would have no independent remedy in tort (because the wrongful act was against the testator, not the plaintiff), and that the plaintiff had no adequate remedy in probate. Plaintiff's complaint failed to allege all five causes of action in that he failed to allege that the allegedly tortious conduct was against the Decedent. The only wrongful conduct alleged in the Plaintiff's complaint were false promises to him. Under the circumstances, the Court found that the Plaintiff did not have a fair opportunity to plead facts to allege this new cause of action. Therefore, leave to amend should have been granted.

Comment: Do not be surprised to see the Supreme Court take a good, hard look at this case and consider hearing it, especially since the facts are so unique. The Fourth District's reading of *Hagen* and *Munn* might make it enough for the Court to take a look at these facts given that *Munn* and the holding in this case seem to indicate that the tort may be available in other instances when there is a failure of execution. Also, the requirement that the plaintiff show that tortious conduct be against someone other than the plaintiff makes this almost a derivative action for a tort against a third party. Finally, one reason the Court may not look at this case and review

is because there were other estate planning alternatives available, such as a simple holographic will.

Definition of Child is Defined by State Intestacy Law in order to Determine the Status of a Posthumously Conceived Child for Purposes of Determining Social Security Survivors Benefits for Children

Case briefed by Tricia L. Manning, Esq.

ASTRUE v. CAPATO (2012) 132 S. Ct. 2021, 182 L. Ed. 2d 887 [Decided May 21, 2012]

Short Summary: 42 U.S.C. §416(e)(1)'s definition of child is completed by § 416(h)(2)(A), which refers to state law to determine the status of a posthumously conceived child. Thus, in this case, if the lower court determines on remand that Father was domiciled in Florida, children conceived after Father's death through in vitro fertilization would be denied survivor's benefits based on Florida law.

Facts: Eighteen months after Father died, Mother gave birth to twins conceived through in vitro fertilization using Father's frozen sperm. Mother applied for Social Security survivors benefits for the twins. The Social Security Administration (SSA) denied Mother's application reasoning that although 42 U.S.C. § 416(e) defines child as "the child or legally adopted child of an [insured] individual," § 416(h)(2)(A) provides: "[i]n determining whether an applicant is the child or parent of [an] insured for purposes of this subchapter, the Commissioner of Social Security shall apply [the intestacy law of the insured individual's domiciliary state]." Father died in Florida, and under Florida intestacy law, a posthumously conceived child is not eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will. (Florida Stat. Ann. §732.106.) Father's will made no provision for children conceived after his death, although Father and Mother told their attorney to treat future children the same as existing.

Issue: Must state intestacy law under § 416(h)(2)(A) be applied in determining Social Security survivors benefits for posthumously conceived children rather than §416(e), which allows Social Security benefits to be provided to any child or legally adopted child of an insured individual?

Trial Court Holding: The United States District Court for the District of New Jersey affirmed the SSA's decision holding that the twins would qualify for benefits only if, as § 416(h)(2)(A) specifies, they could inherit from Father under state intestacy law, and under Florida law, a child born posthumously may inherit though intestate succession only if conceived pre-death.

Appellate Court Holding: The United States Court of Appeals for the Third Circuit reversed, holding that under § 416(e) the undisputed biological children of an insured and his widow qualify for survivors benefits without regard to state intestacy law.

Supreme Court Holding: The United States Supreme Court reversed, holding that the definition of "child" for determining Social Security survivors benefits is supplied in § 412(h)(2)(A), which requires that the intestacy law of the insured individual's domiciliary state be applied. The Court remanded to determine whether Father was domiciled in Florida at his death, which has not been definitively determined at the District Court level.

Supreme Court Rationale: Writing for unanimous Court, Justice Ginsburg wrote that the SSA acted reasonably in looking to state intestacy laws to define the term "child," and in this case, Florida's intestacy laws did not give the twins any rights under Father's estate. The Court explained that the definition of "child" in § 416(e) is of scant utility without aid from neighboring provisions. That aid is supplied in § 416(h)(2)(A), which completes the definition of "child" for purposes of the subchapter, as § 416(h)(2)(A)'s opening instruction provides: "In determining whether an applicant is the child . . . of [an] insured individual *for purposes of this subchapter*." Under the completed definition, § 416(h)(2)(A) refers to state law to determine the status of a posthumously conceived child. The SSA's interpretation of the relevant provisions, adhered to without deviation for decades, was reasonable and was entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837.

Comment: Under California intestacy law, a posthumously conceived child can inherit from a deceased parent if, among other things, the decedent authorized in writing the use of his or her genetic material for posthumous conception and the child is conceived and in utero within two years of the decedent's death. (Prob. Code § 249.5.) Specifically, § 249.5 provides, in part:

> For purposes of determining rights to property to be distributed upon the death of a decedent, a child of the decedent conceived and born after the death of the decedent shall be deemed to have been born in the lifetime of the decedent, and after the execution of all of the decedent's testamentary instruments, if the child or his or her representative proves by clear and convincing evidence that all of the following conditions are satisfied:
>
> (a) The decedent, in writing, specifies that his or her genetic material shall be used for the posthumous conception of a child of the decedent, subject to the following:
>
> (1) The specification shall be signed by the decedent and dated.
>
> (2) The specification may be revoked or amended only by a writing, signed by the decedent and dated.
>
> (3) A person is designated by the decedent to control the use of the genetic material.
>
> (b) The person designated by the decedent to control the use of the genetic material has given written notice by certified mail, return receipt requested, that the decedent's genetic material was available for the purpose of posthumous conception . . . .
>
> (c) The child was in utero using the decedent's genetic material and was in utero within two years of the date of issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever event occurs first . . . .

Estate planning attorneys should inquire into whether their clients have frozen their eggs or sperm. If the clients have done so, the attorney needs to discuss with the clients their intentions regarding inheritance by those children conceived after their death through in vitro fertilization. If the clients want the children to inherit, language should be added to the clients' trust or will. For example, the definition of "children" should include those children conceived after their death by use of the clients' eggs or sperm through in vitro fertilization.

DOMA & IRC § 7702B(f) Violate the Equal Protection Clause Because Same-Sex Spouses/Domestic Partners are Excluded from the CalPers Long-Term Care Plan

Case briefed by Tricia L. Manning, Esq.

DRAGOVICH v. U.S. DEPT. OF THE TREASURY (2012) 2012 U.S. Dist. LEXIS 72745; 2012-1 U.S. Tax Cas. (CCH) P50,369; 109 A.F.T.R.2d (RIA) 2286 [Filed May 24, 2012]

Short Summary: California employees with same-sex spouses or domestic partners prevailed in their action against the U.S. Department of the Treasury and the Board of Administrators of the California Public Employees' Retirement System (CalPERS). The District Court found in favor of Same-Sex Spouses/Domestic Partners holding that Section 3 of the Defense of Marriage Act (DOMA) and Section 7702B(f) of the Internal Revenue Code violate the equal protection rights of Same-Sex Spouses and Same-Sex Domestic Partners, respectively, by excluding same-sex spouses and same-sex domestic partners from enrolling in CalPERS' long-term care plan.

Facts: California employees with same-sex spouses or domestic partners filed a class action lawsuit in the U.S. District Court against the U.S. Department of the Treasury and the Board of Administrators of CalPERS. Same-Sex Spouses/Domestic Partners sought declaratory and injunctive relief, alleging violations of the Fifth and Fourteenth Amendments. Specifically, they claimed that Section 3 of DOMA, which defines "marriage" as a legal union between one man and one woman, and "spouse" as a person of the opposite sex, violates the equal protection and substantive due process rights of Same-Sex Spouses. They also argued that IRC § 7702B(f) violates the equal protection and substantive due process rights of Same-Sex Domestic Partners by excluding same-sex domestic partners as eligible relatives under CalPERS. The initial complaint included only claims by Same-Sex Spouses. The District Court denied the government's motion to dismiss, finding that the Same-Sex Spouses had "sufficiently stated a claim that the laws at issue…do not bear a rational relationship to a legitimate government interest." (*See Dragovich v. U.S. Dept. of the Treasury*, 764 F. Supp. 2d 1178 (N.D. Cal. 2011).) The Department of Justice, representing the federal government, then notified the court that it had come to the conclusion that Section 3 of DOMA is unconstitutional and that it would cease to defend the provision. In response, the House Bipartisan Legal Advisory Group (BLAG) intervened to provide a defense. Same-Sex Spouses/Domestic Partners then submitted an amended complaint including claims by Same-Sex Domestic Partners. The DOJ moved to

dismiss these claims. The District Court denied this motion, finding Same-Sex Spouses/ Domestic Partners had sufficiently stated a claim for same-sex domestic partners as well. (*See Dragovich v. U.S. Dept. of the Treasury*, No. C 10-01564 CW, 2012 WL 253325 (N.D. Cal. Jan. 26, 2012).) Meanwhile, Same-Sex Spouses/Domestic Partners moved for summary judgment, and the DOJ submitted a brief supporting the motion pertaining to Same-Sex Spouses, and made a cross-motion for summary judgment as to the Same-Sex Domestic Partners claims.

Issue: Should summary judgment be granted for Same-Sex Spouses/Domestic Partners alleging Section 3 of DOMA and IRC § 7702B9(f)(c) violate the equal protection rights of Same-Sex Spouses and Same-Sex Domestic Partners, respectively, by excluding Same-Sex Spouses/Domestic Partners from enrolling in the CalPERS long-term care plan?

Trial Court Holding: The United States District Court for the Northern District of California held that Section 3 of DOMA and IRC § 7702B9(f)(c) violate the equal protection rights of Same-Spouses and Same-Sex Domestic Partners, respectively, and issued an injunction prohibiting CalPERS from denying enrollment based on those provisions. The District Court also enjoined the federal government from disqualifying CalPERS's plan from beneficial tax treatment following its order. The order would be stayed pending a timely appeal.

Trial Court Rationale: BLAG's arguments were based almost entirely on two cases. First, in *Baker v. Nelson*, 409 U.S. 810 (1972), the Supreme Court issued a summary dismissal to an appeal of a Minnesota Supreme Court upholding the state's marriage equality ban. The District Court found *Baker* to not be controlling since it involved the constitutionality of a state ban on same-sex marriage, which was not the case in *Dragovich*.

Second, in and *Adams v. Howerton*, 673 F.2d 1036 (9th Circuit 1982), same-sex spouses comprised of a U.S. and non-U.S. citizen sued the Immigration and Naturalization Service after a request by the U.S. citizen seeking permission for his partner to remain in the country as an "immediate relative" was denied. The Immigration and Nationality Act ("INA") excluded gays and lesbians as "inadmissible aliens." The District Court wrote that *Adams* is not controlling precedent because of judicial and legislative developments since the decision, predominantly *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down sodomy laws criminalizing gay sex, and a 1990 act by Congress that removed the INA provision cited in *Adams*.

The District Court then discussed the standard of review. It found that gay men and lesbians do not constitute a suspect or quasi-suspect class, and, therefore, neither a strict scrutiny nor an intermediate scrutiny standard should be applied. The District Court found that if a law does not burden a protected class, as is the case here, then the law is subject to rational basis review, which means that law need only bear a rational basis to some legitimate government end.

In applying rational basis review to Section 3 of DOMA for same-sex spouses, the District Court found that BLAG failed to establish with any of its arguments that the law was rationally related to a legitimate government interest. For example, preserving the status quo and desiring to save

money by denying coverage to same-sex spouses are not legitimate interests.

In applying rational basis review to IRC § 7702B(f), the District Court held that none of the arguments advanced by BLAG satisfy the rational basis test, and in fact, § 7702B(f)'s exclusion of domestic partners show anti-gay animus.

The District Court did not address the substantive due process claims because the motion for summary judgment with respect to the equal protection claims was granted.

Comment: Judge Wilken, the District Court judge who decided *Dragovich*, joins a growing group of federal judges to find DOMA unconstitutional. However, because of the indirect nature of the constitutional challenges involved in this case, the case was unlike many of the other direct challenges to Section 3, and may not be a case that the Supreme Court takes on review. As of August 24, 2012, no appeal has been filed in the Ninth Circuit for this matter.

A Holder of a Power of Appointment Cannot Exclude Permissible Appointees When Law Changes from Creation Date to Exercise Date

Case briefed by Cathy E. Nelson, Esq.

SEFTON v. SEFTON (2012) 206 Cal. App. 4th 875, 142 Cal. Rptr. 3d 174 [Filed May 31, 2012]

Short Summary: Father was a lifetime beneficiary of the income from a testamentary trust created by his Grandfather, who died prior to the enactment of the California Powers of Appointment Act (Probate Code §600, *et. seq.*). Grandfather's will granted Father a non-exclusive power of appointment, requiring that a portion of the assets be distributed to all of Father's three children as appointed in Father's will. At Father's death, his will excluded one of the children, who filed a lawsuit alleging that Father exceeded the scope of the power of appointment and that the child was entitled to at least a "substantial" portion of the estate.

Facts: Great-Grandfather, was a founding member of San Diego Trust & Savings Bank in 1889. Grandfather was Great-Grandfather's sole heir, and inherited a controlling interest in the bank worth hundreds of millions of dollars upon Great-Grandfather's death. Grandfather executed a will on September 7, 1955. The will created a trust designating Father as the lifetime beneficiary of income from the trust estate. Father had three children, Son One, Daughter, and Son Two. Grandfather's will provided that, if Father died leaving any issue,"3/4 of the trust estate was to be divided among the then living issue as my said son shall by his Last Will and Testament appoint...." Grandfather died in 1966. Father died in 2006. Father's will allocated the residue between Son 2 and Daughter, leaving Son 1 nothing.

At the time Grandfather executed his will, since it did not state a minimum or maximum amount to be appointed to any person, as a matter of law in effect at that time, the power of appointment was considered non-exclusive, meaning Father could not exclude any of his three children from receiving a portion of the appointed assets (Probate Code § 601). At the time Father executed his will, the law had changed (the California Power of Appointment Act "CPAA"); former Civil Code § 1387.3, now Probate Code § 652)) to make the power of appointment "exclusive," meaning Father could exclude one or more of this children from receiving a portion of the appointed assets. Son One filed a petition on June 10, 2010, alleging that Father's attempted exercise of the power of appointment by excluding him from any share of the appointed property exceeded the authority Grandfather gave Father and sought a constructive trust over the portion of the estate to which Son One was entitled. Trustee, Wells Fargo Bank, filed a demurrer asserting that the 1970 CPAA permitted Father to exclude Son One, even if not, Son One 1's claim was barred by the statute of limitations under Code Civ. Proc. § 366.2.

Issues: 1) Whether the former non-exclusive power of appointment law that was in effect at the time of Grandfather's death (Probate Code § 601) or the 1970 CPAA (Probate Code § 652), which permits exclusion that was in effect at the time of Father's death was controlling. 2) Whether the claim is barred by the Statute of Limitations (Code Civ. Proc. § 366.2).

Trial Court Holding: The San Diego County Superior Court sustained Wells Fargo Bank's demurrer without leave to amend and dismissed the petition. Based upon the ruling, the court found the statute of limitations defense moot.

Appellate Court Holding: The Fourth District Court of Appeal reversed and remanded to the trial court for further proceedings to determine what would constitute a "substantial share" of the estate.

Appellate Court Rationale: Probate Code § 601 contains a retroactivity provision which reconciles the conflict between the law existing at the time of the creation of a power of appointment and the law existing at the time of the release or exercise of the power of appointment, if the laws differ - if the power of appointment created before July 1, 1970 was valid under the law in existence at the time it was created, the law existing at the time of the release, exercise or assertion of a right controls. The "paramount rule" is that the testator's intent [here, Grandfather's] should be given effect as far as possible and, it is presumed that the testator was aware of the law at the time his will was executed and intended that law to govern the construction of the will. To do otherwise, would be to assume that a testator, who is presumptively aware of the current law, intends to permit a future legislature to change the pattern of distribution through a post-mortem amendment of the law. Moreover, the court held that any legislation that retroactively changes a donor's intent and a substantive part of the will after it has been created and, in this case, after the donor has died, would raise serious constitutional issues, which is why the statute included language which ameliorated interfering with a donor's original intent expressed in a will that became irrevocable before the CPAA's effective date. As to the statute of limitations issue, the court held that § 366.2 was inapplicable,

because 1) Son One's action was not a claim for personal liability of Father or against *his* assets and 2) it could not be filed before his death - § 366.2 specifically contemplates a cause of action that might be brought against a person prior to his death. Son One's claim was also not barred by § 16460, because the claim was not based upon Father's duties as trustee; but rather, his exercise of a power of appointment in his capacity as donee.

Comment: Apart from their usefulness in minimizing death taxes, powers of appointment make it possible for a testator to flexibly dispose of his property in a manner that comports with future circumstances that a testator cannot foresee. They add flexibility and potential transfer tax savings to estate plans and should be discussed with the client more often in the design stage of estate plans. In appropriate circumstances, a power of appointment can also enable the power holder to substitute his or her dispositive intentions from those of the grantor/testator.

A Qualifying Personal Representative, or If None, a Successor in Interest Must Represent A Decedent's Estate in an Action on Behalf of the Estate

Case briefed by Sara Hire, Law Clerk

ESTATE OF MOHAMMED v. CITY OF MORGAN HILL (2012) 2012 U.S. Dist. LEXIS 81378 [Filed June 12, 2012]

Short Summary: Plaintiffs brought a civil rights action on behalf of Decedent's estate; however, none were qualified as either the Decedent's personal representative or the Decedent's successor in interest to maintain the action.

Facts: According to allegations filed in the second amended complaint ("SAC"), Decedent was arrested by Morgan Hill police officers, and eventually charged with residential burglary. Decedent was later moved to the Santa Clara County main jail, where he was incarcerated for eleven months. During Decedent's incarceration, the SAC alleges that there was no investigation as to the proof of his innocence, no warrant, no complaint against him, no due process, no medical treatment for his worsening headaches, etc.. Decedent was released from custody on March 9, 2009. On December 13, 2012, Decedent and his Mother commenced this civil rights action. Decedent, however, was ultimately diagnosed with brain cancer, and passed away on August, 21, 2011. Upon Decedent's death, previously-submitted motions were terminated, and Mother was ordered to file an amended complaint. Plaintiffs eventually filed the SAC on January 30, 2012.

Issue: Whether Plaintiffs may maintain this action as representatives of Decedent's estate under their Second Amended Complaint as it stands.

Trial Court Holding: The United States District Court, Northern District of California held that as Plaintiffs' SAC, as it stands, they cannot maintain the action against Defendants because none of the Plaintiffs qualified under California law as either Decedent's personal representative or Decedent's successor in interest.

Trial Court Rationale: The court determined that the capacity of Decedent's estate to litigate in federal court is designated by California law. The court found that under California law, an "estate" is not a legal entity, and therefore, can neither sue or be sued. As a result, this rule requires that someone qualified to represent the Decedent's estate must appear on behalf of the estate. The court ascertained that California law identifies who may represent an estate in court as someone who is either the decedent's personal representative, and if there is none, by the decedent's successor in interest. (Cal. Civ. Proc. Code § 377.30; *See* Cal. Prob. Code § 58(a) for definition of "personal representative.") In addition, a person seeking to file for an estate as a personal representative or successor in interest must also file an affidavit that attests to certain facts that show that the person is in fact entitled to maintain the action on behalf of a decedent's estate. (Civ. Proc. Code § 377.32.) The court determined, that although a review of the SAC indicates that Plaintiffs appear in a representative capacity on behalf of Decedent's estate, the SAC does not contain facts that allege sufficient support to meet the requirements of Civ. Proc. Code § 377.32 or Prob. Code § 58(a). Thus, the SAC must be dismissed in its entirety. The court also noted that in California, a person who is unlicensed to practice law and who purports to represent a decedent's estate cannot appear *in propria persona* on behalf of the estate in matters outside of probate hearings. Thus, even if Plaintiffs were able to show capacity, none were able to show that they were licensed attorneys in their own right, and thus needed to obtain legal representation if this case were to proceed. Finally, the court noted a variety of other dismissal issues that would affect the viability of Plaintiffs' SAC even if capacity and representation were not issues.

Comment: This case makes clear that an estate cannot sue or be sued under California law, and requires a proper representative to pursue any court action on its behalf. This case also illustrates the importance of competent representation. Although the alleged facts indicate that the Decedent likely suffered some injury, without competent representation, Plaintiffs were unable to even get beyond the pleading stage, and the court made it clear their SAC was a mess (*i.e.*, improper defendants, misunderstanding of the law, failure to meet basic requirements, etc.).

A Written Fee Agreement Is Not Mandatory for Engagement by Personal Representative in a Probate Case (...but it's still a good idea!)

Case briefed by Tisa M. Pedersen, Esq.

ESTATE OF WONG (2012) 207 Cal. App. 4th 366, 143 Cal. Rptr. 3d 342 [Filed June 27, 2012] (Petition for review was filed with the California Supreme Court on August 6, 2012.)

Short Summary: An executor was unsuccessful in her attempt to overturn an award of statutory compensation to her prior attorney. The executor claimed that employment of the attorney was voidable under Business & Professions Code § 6148 because there was no written fee agreement. The probate court held, and the Court of Appeal affirmed, that § 6148 did not apply, since it only requires a written fee agreement where the client herself is likely to pay total costs exceeding $1,000, and probate statutory fees are paid by the estate, not the client. Moreover, under Probate Code § 10810, the award of statutory fees for ordinary services is mandatory according to the formula provided in the statute, and the court does not have discretion to disallow those fees.

Facts: Executor engaged Attorney to begin administration of the decedent's trust and probate of substantial real property that was never transferred to the decedent's trust. Attorney agreed to handle the trust administration for $5,000 but did not have Executor sign a fee agreement for the probate case. When the probate work was nearly completed, Executor informed Attorney that she was engaging another lawyer to finish the probate. Attorney invoiced Executor for the trust administration work and informed her he would be contacting her new lawyer to work out apportionment of the statutory probate fee. Nearly five years later, Executor filed her first and final report and petition for settlement, claiming she and all of her lawyers had waived their statutory compensation even though Attorney had not agreed to any such waiver. The value of the estate was reported in the petition at $8,347,800.86, and the statutory fees were calculated to be $96,478.01. Attorney filed a petition for statutory fees, documenting the work he'd performed for Executor, reporting that he had nearly completed the final petition when Executor discharged him, and requesting 75% of the statutory fee. The probate court awarded Attorney his requested 75% of the statutory fee ($72,358.51) and $10,134.95 in costs. Executor appealed, claiming Attorney had violated Business & Professions Code § 6148 by not obtaining a written fee agreement, and therefore was not entitled to any compensation.

Issue: Is a written fee agreement per Business & Professions Code § 6148 required where an attorney represents the personal representative of a decedent's estate in his or her capacity as personal representative?

Trial Court Holding: The San Francisco County Superior Court, following a hearing on Executor's motion to vacate the award of statutory attorney fees, entered a detailed order denying the motion to vacate, finding that attorney fees for ordinary services in probate matters are purely

statutory in nature and are not based on contract, and therefore a written fee agreement is not required.

Appellate Court Holding: The First District Court of Appeal affirmed the award of statutory fees, holding that Business & Professions Code § 6148 did not apply to statutory fees for the attorney of an estate's personal representative, as it is not only unlikely but impossible that the costs to the client (the personal representative) will exceed $1,000, as the statutory fee is charged to the decedent's estate, not to the client personally.

Appellate Court Rationale: The court reiterated that having a written fee agreement for a probate case, although not required, is still a really good idea. The court delved into the legal principals and statutory framework for statutory fees in a probate case, and admonished Executor for largely ignoring them. In creating the statutory fee structure, the Legislature examined probate fees extensively and finally settled on the percentage framework currently detailed in Probate Code §§ 10800 (personal representative) and 10810 (personal representative's attorney). The Legislature determined that the present system is both cost-effective and fair. The public's interest is served where the bereaved are insulated from negotiating attorney fees during the traumatic post-death period, and a fixed fee encourages efficiency and economy by the attorney. Judicial time is conserved by preventing trials over questions of time, need, and reasonableness of attorneys' hourly rates. Under § 10810, the award of compensation for routine probate services rendered by the personal representative's attorney is mandatory, and must be ordered paid from the decedent's estate. Where two or more attorneys represent the personal representative, the statutory compensation shall be apportioned among them by the court according to the services actually rendered by each, or as agreed to by the attorneys (§ 10814), and attorneys are prohibited from negotiating a fee higher than the statutory amount (§ 10813). Executor argued that Bus. & Prof. Code § 6148 requires a written fee agreement, and because there was no written contract she was entitled to void her agreement to retain Attorney in the probate case; since he was therefore not employed as attorney for an executor, he was not entitled to any statutory compensation under Prob. Code § 10810. The Appellate Court reviewed the State Bar Act, including Bus. & Prof. Code § 6148, and concluded that the requirement for a writing, which applies when the total expense *to the client* is likely to exceed $1,000, does not apply since the statutory fees are paid from the estate, and not by the client (the personal representative). It is not just *unlikely* that the client would be required to pay over $1,000, it was *impossible* that she would personally have to pay anything at all. A written fee agreement, therefore, is not required for representation of the personal representation of a decedent's estate. But it's still a good idea so the client will not be caught by surprise.

Comment: The Court of Appeal also admonished Executor for not doing her homework before filing her appeal. She clearly had no understanding of the definition of and requirements for rescission (when claiming that she had rescinded her agreement with Attorney - a secondary and much weaker claim in her appeal). Moreover, she cited to and relied upon a secondary source that was unpersuasive, contradicted case law, provided no support for its statement that a written fee agreement was required, and contradicted other secondary sources that provided supporting

citations refuting her arguments. Surprisingly, Executor has petitioned the California Supreme Court for review of this case; it remains to be seen whether review will be granted.

Probate Court Can Make Findings in Guardianship Matters For Federal Immigration Purposes

Case briefed by Christine M. Kouvaris, Esq.

B.F., A MINOR, ETC., ET AL., v. SUPERIOR COURT OF LOS ANGELES COUNTY
(2012) 207 Cal. App. 4th 621, 143 Cal. Rptr. 3d 730 [Filed July 2, 2012]

Short Summary: The probate court was ordered to reconsider a request for findings under federal immigration law made by minor children in a guardianship matter, which would allow the children to apply for special immigration juvenile status and thus remain in the United States.

Facts: Three minor children, born in and citizens of Honduras, were brought to the United States by their mother, who later died (their father was already deceased). The minors successfully petitioned to appoint their paternal aunt and uncle as temporary guardians. The minors desired to seek special immigrant juvenile status (SIJ Status) pursuant to title 8 U.S.C. § 1101 and 8 C.F.R. pt. 204.11 (2012). The guardians later filed a request, on the minors' behalf, with the LA County Superior Probate Court, asking the court to make several findings to support the minors' quest for SIJ Status, including that they are "dependent upon the court" and that they "have been placed in the custody of an individual appointed by a juvenile court." The probate court refused to make the findings on the basis that § 1101(a)(27)(J) did not authorize it to make the findings and that even if this section permitted state court findings for federal immigration purposes, only a "Juvenile Court" exercising the jurisdiction given to it in the Cal. Welf. & Inst. Code could do so.

Issue: Does the superior court, sitting as a probate court, have authority to make findings relating to both minor children and to federal immigration law?

Trial Court Holding: The Los Angeles County Superior Probate Court argued that it did not have authority to make the findings requested by the minors for two reasons: (1) that § 1101 only defined terms relating to SIJ Status; and (2) that even if § 1101 permitted a state court to make findings for federal immigration purposes, that it would have to be done by a Juvenile Court, not a Probate Court.

Appellate Court Holding: The Fourth District Court of Appeal reversed, holding that the superior court sitting as the probate court has the authority and duty to make findings under § 1101(a)(27)(J) and 8 C.F.R pt. 204.11.

Appellate Court Rationale: The state constitution of California provides for one superior court in each county and that jurisdiction is vested in no particular judge or department in that county,

but rather the court is divided into departments for convenience only. While it might be irregular for one department to exercise authority in a matter which might properly be heard by another, it does not cause a defect in the jurisdiction. Furthermore, Prob. Code § 2102 authorizes the superior court to make judicial determinations about the care and custody of juveniles, therefore, where the superior court sitting as the probate court makes a determination about a juvenile, it is acting as a juvenile court.

Comment: If you have a guardianship case involving an immigration issue where a "juvenile court" must hear the issue, the issue can be presented to the probate court for a determination.

Although Victim's Estate Was Not a "Direct Victim," Restitution for Pre-Death Losses Due to Defendant's Crime Payable to Victim Are Payable to Victim's Estate After Victim's Death

Case briefed by Sara Hire, Law Clerk

PEOPLE v. RUNYAN (2012) 54 Cal. 4th, 849, 143 Cal. Rptr.3d 674 [Filed July 16, 2012]

Short Summary: Driver, while driving intoxicated, killed Victim, and was ordered by the trial court to pay restitution to Victim's estate. The appellate court affirmed, however, the Supreme Court reversed, holding that an estate was not a direct victim of defendant's crime, and thus was not entitled to restitution for its own expenses incurred as a result of the decedent's death; however, had there been economic losses as a result of the accident incurred by Victim pre-death, then Victim's estate representative would have been able to recover those.

Facts: After driving while intoxicated and killing Victim instantly in a collision, Driver was convicted of gross vehicular manslaughter, driving under the influence causing injury, and driving under the influence with a blood alcohol level of 0.08 percent or greater causing injury. The evidence indicated that Driver, while intoxicated, drove onto the freeway the wrong direction for more than three miles before colliding with Victim. Driver was sentenced to six years in state prison and was ordered to pay $446,486 to the Victim's estate for the economic loss (including loss for Victim's rare coin collection, Victim's fencing equipment, net loss in value of Victim's residence, probate costs, and funeral expenses) suffered as a result of Driver's criminal actions.

Issues: (1) Whether Victim's Estate is a "direct victim" of a crime that caused decedent's death; (2) whether restitution may be payable to the estate on the decedent's behalf; and (3) whether after victim has died, if he or she may incur, or continue to incur, personal economic loss subject to mandatory restitution.

Trial Court Holding: The Los Angeles County Superior Court conducted a restitution hearing after Driver's conviction, and ordered Driver to pay $446,486 to the estate of Victim.

Appellate Court Holding: The Second District Court of Appeal affirmed, holding that the Victim's estate was a "direct victim" entitled to restitution.

California Supreme Court Holding: The California Supreme Court reversed, holding that the estate was not a "direct victim" of defendant's crime, and thus was not entitled to restitution for its own expenses incurred as a result of the decedent's death. It also held that although a personal representative is authorized to receive, on the decedent's behalf, restitution for economic losses the decedent personally incurred prior to death as an actual victim of defendant's crime, here there were no pre-death losses; thus, the Court of Appeal erred in upholding any part of the restitution award.

California Supreme Court Rationale: The court noted that "direct victim," as used in several restitution statutes and interpreted by case law, has a distinct meaning. Specifically, the court determined that a statute that allows an entity to recover restitution as a "direct victim," must be an entity that is the "immediate object[] of the defendant's offences." Here, the Victim's estate was not a "direct victim" of the car crash that killed Victim. Thus, it is not entitled to restitution on its own behalf as a "direct victim." The court reasoned that it would be unjust, however, to allow a person's death to eliminate the person as a crime "victim" entitled to restitution. As a result, the court concluded that when a crime victim has died, under both Marsy's Law (also known as Proposition 9, which amended Cal. Const., Art. I, 28 to make clear that a victim is entitled to restitution) and Cal. Penal Code § 1202.4 (restitution for victims), the crime victim, or rather the victim's personal representative, may recover restitution for economic losses *personally* incurred by that victim as a result of the crime. Here, since Victim died instantly in the crash, there were no economic losses incurred as a result of the crime before Victim's death. Finally, there are no constitutional or statutory provisions that expand a victim's ability to recover any kind of loss covered by restitution after the victim's death. Therefore, since there were no pre-death losses as a result of the Driver's crime, and no portion of the trial court's award to the estate was authorized by Marsy's Law or by § 1202.4, the court determined that the court of appeal erred in upholding the trial court's judgment.

Comment: The court noted that there were concerns expressed by both lower courts that the denial of restitution to a deceased Victim's estate and allowing Driver to escape without paying was not what the Legislature intended. The court, however, articulated that a rule against post-death restitution on a deceased victim's personal behalf is consistent with rules that have been in place for "more than 60 years." Yet, the court effectively invited the Legislature to amend the laws to allow for post-death recovery by pointing out that the Constitution "does not preclude the Legislature from providing such recovery."

Awarding Guardianship to Non-Parent is Based on Child's Best Interest, Stability of Placement, and Detriment to Child

Case briefed by Christine M. Kouvaris, Esq.

GUARDIANSHIP OF AVERY VAUGHAN, ET AL. (2012) 207 Cal. App. 4th 1055, 144 Cal. Rptr. 3d 216 [Filed July 18, 2012]

Short Summary: The trial court added a precondition to finding that stable placement of children in a guardianship with their grandparents be granted: that the children must first be abandoned by the parents to the non-parents before the guardianship can be granted under Fam. Code § 3041©.

Facts: Husband and Wife met as teens, wed, and had two children. They had a very unstable relationship, with history of domestic violence. They divorced, and custody of the young children were awarded to the Wife. Wife suffered from PTSD and personality disorder. After the divorce, she took the children to therapy to address behavioral issues. Wife eventually checked herself into a mental health center. She took the children to the Husband's parents' house to be cared for while she was undergoing treatment. Husband's parents filed for temporary custody the next day. Soon after they filed petitions for guardianship and temporary guardianship on the basis that both parents were unsuitable to be custodial parents. The temporary was granted in May 2009, and the permanent hearing was continued several times until June 2010, during which time the children lived with the grandparents, went to therapy, and essentially showed improved behavior and temperament. After significant testimony at trial from the various therapists and parties involved, the court found that the grandparents assumed the role of parents, had done so for a significant period of time, and had fulfilled the children's physical and emotional needs. This satisfied the rebuttable presumption, under Fam. Code § 3041©, that it would be detrimental to remove the children to the mother. Once making these findings, the court then had to determine if the mother had rebutted the presumption by a showing of the preponderance of the evidence that custody of her children with the grandparents was not in their best interests, and that custody with the mother would not be detrimental to the children. However, the court instead denied guardianship to the grandparents on the basis that they did not qualify for a guardianship under § 3041© as there was no showing of abandonment by the mother of the children to the grandparents (because she voluntarily took the kids to them), and the children then appealed.

Issue: Did the trial court err as a matter of law when it concluded that the stable placement provisions of Fam. Code § 3041© did not apply because the mother had not abandoned her children with the grandparents?

Trial Court Holding: The Trinity County Superior Court held that the grandparents could not be awarded guardianship over the children because (1) they did not qualify for the guardianship under the "stable placement" provisions of Fam. Code § 3041©, which the court interpreted to

apply only when parents abandon their children with family or friends and years later return and demand their children be returned; and (2) that if this case had been a child protective services case, there was not enough detriment to the children if they stayed with their mother.

Appellate Court Holding: The Fourth District Court of Appeal reversed the trial court, holding that whether the mother abandoned the children to the grandparents was not relevant to consider when determining whether the children's placement is stable under § 3041© and remanded the case to a new trial court to finish addressing the procedural requirements of § 3041© and (d). As the appellate court reversed on this ground, it did not consider the second issue on appeal.

Appellate Court Rationale: As the trial court failed to fully comply with the procedural requirements of § 3041(c) and (d), the case must be remanded to allow the mother to rebut the presumption of stable placement before the trial court can determine whether to grant guardianship to the grandparents.

Comment: The court confirmed throughout its opinion that the real issue in guardianship matters is whether the new placement is stable for the child, whether returning the child to his/her parents would be detrimental to the child, and what is in the child's best interest.

Bankruptcy Estate Entitled to No More Than 25% Of Debtor's Beneficiary Interest in Spendthrift Trust

Case briefed by Jennifer M. Stier

IN RE REYNOLDS (2012) 2012 Bankr. LEXIS 4023 [Filed August 24, 2012]

Short Summary: Debtor beneficiary was to receive payments of principal from two spendthrift trusts created by his parents. Court resolved a conflict between Probate Code §§ 15306.5 and 15307, holding that Probate Code § 15307 applies only to distribution of income and is inapplicable in this case, so bankruptcy estate is limited to recovery under § 15306.5, entitling it to 25% of Debtor's interests in the trusts, less any amount necessary for the beneficiary's education and support.

Facts: Mother and Father established a family trust. Upon Mother's death, the trust was split into three sub-trusts: the Bypass Trust, the Marital Trust, and the Survivor's Trust (Marital and Survivor's Trusts are, together, the Family Trust), all of which are spendthrift trusts. Father then died. Son, Debtor, was entitled to receive $250,000 from the Family Trust. Debtor was also a one-third beneficiary, along with his siblings, of the Survivor's Trust and entitled to receive $100,000 per year for 10 years. The only assets in the Survivor's Trust were interests in undeveloped real property, which do not generate income, so distributions were expected to be of trust principal. Additionally, if Debtor survived Father by 10 years, he would be entitled to receive one-third of the remaining principal of the Survivor's Trust. Debtor filed for voluntary Chapter 7 bankruptcy and the trustees of the Trusts filed an adversary proceeding seeking a

declaratory judgment determining whether and to what extent the bankruptcy estate held an interest in the Trusts.

Issue: Whether the bankruptcy court erred in determining that the bankruptcy estate was entitled to a maximum of 25% of the Debtor's interests in the Family Trust and the Survivor's Trust.

Trial Court Holding: The United States Bankruptcy Court for the Central District of California held that the Probate Code allowed the bankruptcy estate a maximum of 25% of a debtor's interest in a spendthrift trust, less any amount the debtor needed for his support or support of his dependants.

Appellate Court Holding: The United States Bankruptcy Appellate Panel for the Ninth Circuit affirmed, holding that the bankruptcy estate is entitled to no more than 25% of the debtor's beneficiary interest in a spendthrift trust.

Appellate Court Rationale: The court analyzed the spendthrift provisions under Probate Code §§ 15300, 15301 and the exceptions under §§ 15304-15307. The court disagreed with the bankruptcy Trustee's ("Trustee") assertion that the exceptions were independent and alternate means for a creditor to seek the maximum amount of a beneficiary's interest. First, the court analyzed Probate Code § 15301 and concluded that, contrary to the Trustee's assertion, § 15301(b) does not allow a creditor the ability to satisfy its judgment in full from the principal amount that has become due and payable to the beneficiary, because such an interpretation would render the other exceptions inapplicable and superfluous and would effectively eviscerate the spendthrift protections under § 15301(a). The court held that § 15301(b) is not an exception itself, but simply sets out the procedure a creditor must follow to satisfy her claim, then the court has the discretion to satisfy the claim to the extent allowable under the §§ 15304-15307 exceptions.

Next, the court analyzed Probate Code §§ 15304-15306 and determined that the exceptions under these sections are permitted under public policy reasons only for very specific creditors, not just any creditor and were inapplicable to the Trustee's claims.

Lastly, the court analyzed Probate Code §§ 15306.5 and 15307. It held that, contrary to the Trustee's assertion, a bankruptcy estate is limited to the 25% recovery under § 15306.5 and may not alternately use § 15307 to reach any amount (principal or income) to which the beneficiary is entitled in excess of what the beneficiary needs for his own education and support. The court found that there was an ambiguity in § 15307 in that its apparent allowance for a money judgment creditor to satisfy its claim from any amount, whether income or principal, that is in excess of the beneficiary's needs contradicted the limit under § 15306.5 to 25% of a beneficiary's interest in a spendthrift trust. If read as the Trustee argued, a judgment creditor would always choose to enforce under the limitless § 15307 rather than § 15306.5. The court found that giving literal meaning to the statute would result in an absurd consequence and looked to legislative history to resolve the ambiguity. The court found that legislative history read § 15307 as limiting

a non-preferred creditor to only income payments that are in excess of what is necessary for the beneficiary's support. Thus, because the Debtor's distributions are only from principal and not income, § 15307 does not apply to the facts at issue and the Trustee may not receive more than 25% of the Debtor's interests in the trusts.

Comment: This case underscores the usefulness and importance of spendthrift trusts as an estate planning tool to protect assets from the creditors of spendthrift beneficiaries. The debtor in this case was to receive an estimated several million dollars upon the distribution of the principal remainder after 10 years and the trust spendthrift provisions limited his creditors to recovering only 25% of the distributions.

Where Trust Requires Survival Past Distribution Plaintiff Bears Burden of Proving Trustee Unreasonably Delayed Distribution

Case brief by Jennifer M. Stier

EDWARDS v. GILLIS (2012) --- Cal. App. 4th ---, --- Cal. Rptr. 3d --- [Filed August 29, 2012]

Short Summary: Under a trust that requires beneficiaries to survive past distribution of trust assets, a beneficiary, or their heirs, who claims that the trustee unreasonably delayed in distribution, thus causing distribution to occur after the death of the beneficiary, has the burden to prove the trustee's delay was unreasonable.

Facts: Decedent created a trust, naming Daughter successor trustee and distributing the trust equally amongst her five children. The trust contained a clause requiring all beneficiaries to survive distribution of the trust in order to receive their share. Otherwise, their share would be distributed equally amongst the other beneficiaries. Three years later, Decedent amended her trust to remove Daughter as both a beneficiary and successor trustee. Decedent executed a Second Amendment 10 years later to appoint her husband (Trustee), from whom she was legally separated, as successor trustee and to specifically disinherit Daughter, stating that Daughter was to receive nothing whatsoever from her estate. Decedent died in February 2007. In June 2007, Daughter filed a petition to void the trust amendments, claiming Decedent was ill and weak and that Trustee induced Decedent to execute the amendments using undue influence. Daughter died in May 2008 and Trustee made a preliminary distribution in July 2008. Daughter's husband (Petitioner) was appointed executor of Daughter's estate and continued Daughter's claim. Trustee moved for a bifurcated trial to first determine whether or not Daughter had standing to challenge the amendments because she predeceased distribution and thus would not have inherited from the trust even if the amendments were invalid.

Issue: Whether Plaintiff bears the burden of proving that Trustee unreasonably delayed in distribution of the trust assets.

Trial Court Holding: The Riverside County Superior Court held that Plaintiff failed to demonstrate Trustee had unreasonably delayed distribution of the trust assets and therefor lacked standing to challenge the amendments, because, even if they were invalidated, Daughter would not have stood to inherit from the trust.

Appellate Court Holding: The Fourth District Court of Appeal affirmed, holding that any contingent beneficiary who petitions the court contending a preliminary distribution of the assets of an estate or trust could or should have been made at an earlier date has the burden of establishing that the executor or trustee unreasonably delayed such distribution.

Appellate Court Rationale: The court looked to prior case law that discussed whether a trustee had unreasonably delayed in making preliminary distributions, which impacted whether a beneficiary's interest had vested under a survival past distribution clause. The court found that, though the cases had differing holdings on whether or not the delay had been reasonable, they had all placed the burden of establishing unreasonable delay on the beneficiary plaintiff who claimed that the delay had been unreasonable. To do otherwise would render virtually every distribution survivorship clause found in any trust completely meaningless because it is almost always the case that some small distribution can be made almost immediately after the trustor's death. The court further stated that a survival of distribution clause does not require that a trustee administer a trust any different from generally accepted reasonable trust practices, under which a trustee should not unreasonably delay, but do not mandate a trustee to act as quickly as possible. Thus, the court found that under a trust requiring surviving distribution a contingent beneficiary's interest vests only when she meets the contingency, distribution actually occurs, or when that beneficiary, or her heirs, can prove a time, before her death, beyond which any distribution was unreasonably delayed. In determining whether distribution was unreasonably delayed, the court stated that several issues should be examined: the assets of the trust, the health and financial condition of the contingent beneficiaries, and any personal interest the trustee might have in delaying distribution.

The court found Trustee's CPA's testimony compelling in its finding that Trustee had not unreasonably delayed. The CPA testified that it was common practice to wait until after receiving an IRS closing letter before distributing trust assets and that she had advised Trustee to not distribute until after receiving the letter, which was not actually received until after Daughter's death.

Comment: As trust and estate practitioners are well aware, trusts and estates is an area ripe with litigation. There are many valid reasons outside of a trustee's control or caused by a trustee's valid exercise of discretion that cause delay of distribution of trust assets. When drafting a trust, including a survivorship requirement of a specified number of days, rather than "beyond distribution," would help avoid litigation over the reasonableness of delays by creating a bright line that is less easily argued over.

Judicial Estoppel Prevents Asserting Posthumous Right of Publicity

Case briefed by Mark Schmuck, Esq.

MILTON H. GREENE ARCHIVES, INC. v. MARILYN MONROE LLC (9th Cir. 2012) – F3d --- [Filed August 30, 2012]

Short Summary: Successors to Marilyn Monroe's estate are judicially estopped from asserting Marilyn's posthumous right to publicity because, as she was a domiciliary of New York at the time of her death, no such right existed. The argument that she was, in fact, a California resident at the time of her death and was, therefore, entitled to such a right is judicially estopped by 40 years of representations by the estate executor to the contrary.

Facts: This case involves the will of Marilyn Monroe, which was executed in New York City approximately 20 months prior to her death in Brentwood, California in 1962. Marilyn moved to California shortly after she executed the will, and eventually purchased her home in Brentwood, but always maintained an apartment and staff in New York. The will was admitted to probate in New York. The will provided that the residue (after payment of a $40,000.00 bequest) is to be distributed to two individuals. Over the course of time, those individuals died and left their interests in Marilyn's estate to their successors. The estate was finally settled in 2001, with the residue being distributed to the Appellant limited liability company, as authorized by the beneficiaries of the estate.

During the administration of the estate, the executor consistently represented that Marilyn was domiciled in New York when she died. The executor also represented to the California taxing authorities that Marilyn was a resident of New York. In ancillary probate proceedings in California, the executor was able to avoid paying substantial California estate taxes by successfully proving that Marilyn was a New York resident. In support of that position, the executor's counsel submitted evidence showing that Marilyn would temporarily live in California only while she was working and that her permanent residence was her New York apartment, among other things. In particular, the only reason why Marilyn purchased a home in California was because she did not like to live in hotels while she was working.

In 2005, Marilyn Monroe LLC (the "LLC") sued Milton Greene ("Greene") in the Southern District of Indiana claiming ownership of Marilyn's right of publicity and alleging that Milton Greene was violating that right by using Marilyn's likeness for unauthorized commercial purposes, including the advertising and sale of Marilyn's image. Shortly thereafter, Greene sued the LLC in the Central District of California seeking a declaration that the LLC does not own Marilyn's right of publicity. The cases were then consolidated in California.

Greene moved for summary judgment, asserting that, at the time of Marilyn's death, neither California, Indiana nor New York recognized a "descendable, posthumous right to publicity." In California, that right was granted by statute in 1984 (Civil Code section 3344.1), but there was no

indication of whether or not the statute was retroactive. The District Court granted summary judgment, stating that, at the time of Marilyn's death, under either California or New York law, the right to publicity ceased at death. Following that ruling, the California legislature amended Section 3344.1 specifically in response to this decision, and made the statute retroactive.

The LLC moved for reconsideration in light of the amendment of Section 3344.1, which the District Court granted. However, the District Court again granted summary judgment, finding that New York law applied, not California law because Marilyn was a New York resident at the time of her death, based on the numerous judicial and non-judicial representations made by her executor over the 40-year administration of her estate. Since New York law did and does not recognize a posthumous right to publicity, no such right exists and summary judgment was granted.

Issue: Is the LLC judicially estopped from asserting that Marilyn was a California resident and had the posthumous right to publicity when the executor of her estate consistently represented that she was a resident of New York, which does not recognize that right?

Trial Court Holding: The United States District Court, Central District of California granted summary judgment in favor of Greene, finding that Marilyn was a resident of New York and that the LLC was judicially estopped from arguing otherwise.

Appellate Court Holding: The Ninth Circuit Court of Appeals affirmed, holding that the LLC was judicially estopped from arguing that Marilyn was a California resident at the time of her death.

Appellate Court Rationale: While the Ninth Circuit reviews the granting of summary judgment on a *de novo* standard of review, it also reviews the application of judicial estoppel on an abuse of discretion standard. Judicial estoppel prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. Application of the doctrine prevents a party from gaining an advantage by taking inconsistent positions, but also preserves the orderly administration of justice and protects against a litigant from playing "fast and loose" with the courts. In order to apply judicial estoppel, the court must find (1) a later position clearly inconsistent with an earlier position; (2) success in persuading the court in accepting the earlier position such that acceptance of a later would give the impression that the court was misled; and (3) unfair advantage. The Court does not require a knowing misrepresentation or fraud on the court in order to apply judicial estoppel, though those factors are considered in determining whether or not to apply the doctrine. Furthermore, judicial estoppel is not applicable when the positions are based on inadvertence or mistake.

In finding that the District Court did not abuse its discretion in applying judicial estoppel, the Ninth Circuit found the LLC's argument that the executor was mistaken about Marilyn's domicile to be dubious. The executor had full access to Marilyn's friends, family, associates and documents during his lengthy administration, and presented that evidence to support the position

that Marilyn was a New York domiciliary. Furthermore, the LLC presented insufficient evidence sufficient to overrule the District Court to support a finding that the executor misrepresented Marilyn's true domicile during his administration.

Furthermore, even though the LLC was not an actual party to the administration of Marilyn's estate, judicial estoppel also applies to those in privity. Here, the Ninth Circuit found that the LLC was in sufficient privity to impose the representations of the executor on it because the interests of both were substantially identical.

The Ninth Circuit also found that the District Court did not abuse its discretion in finding that the estate was able to convince both the court and quasi-courts (such as the California taxing authorities) that Marilyn was a New York resident and not a California resident and that changing that position was unfair to Greene. Therefore, the LLC was judicially estopped from asserting that Marilyn Monroe was a California resident and had a posthumous right to publicity.

Comment: Quote from the opinion: "This is a textbook case for applying judicial estoppel. Monroe's representatives took one position on Monroe's domicile at death for forty years, and then changed their position when it was to their great financial advantage; an advantage they secured years after Monroe's death by convincing the California legislature to create rights that did not exist when Monroe died. Marilyn Monroe is often quoted as saying, 'If you're going to be two-faced, at least make one of them pretty.' [Footnote omitted] There is nothing pretty in Monroe LLC's about-face on the issue of domicile."

Formalities Must Be Followed to Obtain a Valid Domestic Partnership

Case briefed by Sara Hire, Law Clerk

BURNHAM v. CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM (2012) -- Cal. 4th, --, -- Cal. Rptr.3d –, 2012 Cal. App. LEXIS 942 [Filed August 31, 2012]

Short Summary: Decedent and Appellant signed a declaration for domestic partnership in front of a notary; however, Decedent died before Appellant filed the declaration with the Secretary of State. Appellant then tried to apply for Decedent's state pension survivor benefits. CalPERS determined that Decedent and Appellant were not domestic partners, but the CalPERS board ultimately decided to provide benefits based on the putative spouse doctrine. Decedent's children appealed. The trial court ruled in favor of Decedent's children. Appellant then appealed, and the Court of Appeal affirmed the trial court.

Facts: After Decedent divorced Wife, Decedent and Real Party in Interest/Appellant ("Appellant") began living together in 1969. In 2006, Decedent developed cancer. By October 2007, Decedent became extremely ill. Appellant was caring for him while working, but Decedent

needed more care due to the severity of his illness. Both Decedent and Appellant realized that Appellant could take time off work if the two were spouses or domestic partners. Appellant and Decedent signed the declaration for domestic partnership in their house at approximately 9:00 a.m. on Saturday, October 27, 2007, in front of a notary. At 4:30 p.m. decedent died.

The following Monday, October 29, 2007, Appellant hand delivered the declaration of domestic partnership to the Secretary of State's Office. Appellant applied for Decedent's state pension survivor benefits. CalPERS staff denied the application, reasoning that Decedent and Appellant were not registered domestic partners at the time Decedent died. It determined that benefits were properly payable to Decedent's surviving children as Decedent's intestate heirs. Appellant appealed, but an administrative law judge ruled in favor of CalPERS determination. The CalPERS board ultimately decided Appellant was entitled to benefits under a putative spouse theory. Decedent's Children/Plaintiffs filed a petition for writ of administrative mandamus challenging the CalPERS board's determination. The trial court ruled in favor of Children. Appellant appeals.

Issues: (1) Whether Decedent and Appellant were domestic partners at the time Decedent died; (2) whether the putative spouse doctrine applies; and (3) whether the law as applied here violated state equal protection principles.

Trial Court Holding: The Superior Court of Sacramento County ruled that (1) Decedent and Appellant were not domestic partners at the time of Decedent's death; (2) the putative spouse doctrine did not apply; and (3) the law as applied did not violate equal protection principles.

Appellate Court Holding: The Third District Court of Appeal affirmed, holding that (1) Decedent and Appellant were not domestic partners at the time of Decedent's death; (2) the putative spouse doctrine did not apply; and (3) the law as applied did not violate equal protection principles.

Appellate Court Rationale: The court began by establishing what California law requires persons to do in order to establish a domestic partnership. Specifically, the court determined that a domestic partnership is established when both persons file a Declaration of Domestic Partnership with the Secretary of State, and at the time of filing all of the following requirements are met: "(1) Neither person is married to someone else or is a member of another domestic partnership[;] (2) The two persons are not related by blood[;] (3) Both persons are at least 18 years of age[;] (4) Either of the following: (A) Both persons are members of the same sex. (B) One or both of the persons meet the eligibility criteria under ... the Social Security Act ... [and] one or both of the persons are over 62 years of age[;] (5) Both persons are capable of consenting to the domestic partnership" (Family Code § 297). The court also noted that there are *two* steps in filing: (1) parties relinquish control, and (2) the clerk receives the declaration and files it. The court concluded that because Appellant did not present the declaration for filing before Decedent's death, they were not domestic partners.

The court also determined that the putative spouse doctrine did not apply. The court of appeal relied on the California Supreme Court's determination that the putative spouse doctrine applies "where persons..., believing themselves to be lawfully married to each other, acquire property as the result of their joint efforts, they have impliedly adopted...the rule of an equal division fo their acquisitions, and the expectation of such division should not be defeated in the case of innocent persons" (*Schneider v. Schneider* (1920) 183 Cal. 335, 339-340). The court of appeal determined that unlike *Schneider*, Appellant did not accumulate assets with Decedent during a seemingly valid domestic partnership, and then try to invoke the putative spouse doctrine to protect her loss of those assets. Rather, she tried to use the doctrine "to look forward," instead of a situation where she believed that the partnership was valid and *then* accumulated property only to learn the union was void or voidable. Thus, the putative spouse doctrine does not apply.

Finally, the court determined that Appellant's contention that her rights were violated under the state's equal protection clause fails because she made no effort to persuade the court that the remedy she was seeking (the CalPERS benefits) is appropriate for the alleged equal protection violation.

Comment: This case illustrates the importance of following formalities, and the amount of weight courts ultimately give them. Additionally, Decedent had time and opportunity to implement an estate plan if he wanted to leave any portion of his estate to Appellant.

B.
Cases Pending Before the California Supreme Court

Selected Cases of Interest to Trust and Estate Attorneys That Are Pending Before the California Supreme Court as of August, 31, 2012

Cases Pending Before the California Supreme Court

By Robert E. Temmerman, Jr., Esq.
San Jose, CA[2]

Trust Beneficiary Who Did Not Agree To Arbitrate Disputes Arising Under the Trust May Not Be Compelled to Arbitrate

Case briefed by Sondra J. Allphin, Esq.

DIAZ v. BUKEY (2011) 195 Cal. App. 4th 315, 125 Cal. Rptr. 3d 610 [Filed May 10, 2011]. California Supreme Court granted review on August 10, 2011.

Short Summary: Beneficiary petitioned to remove her sister ("Trustee") as trustee of their parents' trust. Trustee responded by seeking to compel arbitration of their dispute as provided by the trust documents. Though the sisters are beneficiaries of the trust, neither was a party to any agreement that such disputes would be resolved by arbitration. The appellate court held that a trust beneficiary who did not agree to arbitrate disputes arising under the trust may not be compelled to do so.

[2] The case summaries herein were prepared primarily by Temmerman, Cilley & Kohlmann, LLP ("TCK") associate attorneys and occasionally by TCK law clerks. While the speaker, Bob Temmerman, he did not have an opportunity to review them all. However, all of the comments were reviewed and approved by or provided by Bob Temmerman. No representations or guarantees of any kind are made with respect to the accuracy of these written materials and nothing herein should be relied upon to answer any specific legal questions. The written information provided herein should not be relied upon in dealing with any specific legal matter. Attorneys using the information provided herein in dealing with a specific client or clients or their own legal matters should also read the full published opinions and research other original sources of authority.

Life Insurance Policy Purchased by Husband With Community Property Funds is Wife's Separate Property Because Husband Put the Policy in Wife's Name

Case briefed by Cathy E. Nelson, Esq. and Jennifer M. Stier

MARRIAGE OF VALLI (2011) 195 Cal. App. 4th 776, 124 Cal. Rptr. 3d 726 [Filed May 18, 2011]. California Supreme Court granted review on August 24, 2011.

Short Summary: Husband purchased a life insurance policy with community property funds and put the policy in Wife's name. In this dissolution action, the appellate court held that the policy is Wife's separate property because the form of title presumption controls and Husband failed to rebut the presumption with clear and convincing proof that the title reflected on the policy was not what the parties intended.

Standings of Remainder Beneficiaries to Challenge Trustee's Actions When Settlor Alive and Trust Revocable

ESTATE OF GIRALDIN (2011) 199 Cal. App. 4th 577; 131 Cal. Rptr. 3d 799 [Filed September 26, 2011] California Supreme Court granted review on December 21, 2011

Short Summary: Because a trustee's duties as trustee were owed solely to the trust settlor during the period in which the settlor retained the right to revoke his family trust, and not to the trust beneficiaries, the beneficiaries lacked standing to complain of any alleged breaches of those duties occurring prior to the settlor's death.

No Extrinsic Evidence Allowed Where a Will Unambiguously Failed to Include a Testamentary Provision for the Circumstances That Occurred.

Case briefed by Scott A. Fraser

ESTATE OF DUKE (2011) 201 Cal. App. 4th 559, 133 Cal. Rptr. 3d 845 [Filed December 12, 2011] California Supreme Court granted review on March 21, 2012.

Short Summary: Decedent Husband's holographic will provided for testamentary gifts if Husband died first or if he and Wife died simultaneously; instead, Wife died five years before Husband. The Court of Appeal held that where the will unambiguously failed to include a testamentary provision for the disposition of Decedent Husband's estate under the circumstances which actually occurred, no extrinsic evidence was admissible, and the estate passed to Decedent Husband's Nephews under intestate succession.

The"Safe Harbor" Provisions of the Former No Contest Laws Applied to Petition Pending When the Law Changed

Case briefed by Cathy E. Nelson, Esq.

DONKIN v. DONKIN (2012) 204 Cal. App. 4th 622, 139 Cal. Rptr. 3d 126 [Filed March 12, 2012] California Supreme Court granted review on June 13, 2012.

Short Summary: In an action related to a no contest provision in a trust, plaintiff beneficiaries filed a 2009 safe harbor petition. While the petition was pending, the relevant law changed. The trial court ruled on the petition [apparently] under the former law, finding that the challenges would not constitute a contest. The Court of Appeals affirmed, in part, holding that applying the new law would have penalized the beneficiaries for following the law in effect at the time the petition was filed.

Military Service Credit Earned Before Marriage Is Mere Expectancy; Purchase During Marriage With Community Funds Creates Community Property

Case briefed by Jennifer M. Stier

MARRIAGE OF GREEN (2012) 2012 Cal. App. LEXIS 660, --- Cal. Rptr. 3d --- [Filed June 6, 2012] California Supreme Court granted review on August 29, 2012.

Short Summary: During marriage and using community funds Husband exercised right to buy service credit for four years of pre-marriage military service to apply to his CalPERS pension. In dissolution action, court held that the military service credit was a community asset, though earned before marriage, because until the purchase option was exercised it remained a mere expectancy and Husband had no contractual right to the credit until he purchased it during the marriage.

C.

California 2012 Chaptered Legislation Affecting Probate, Trust, and Conservatorship Matters

Chaptered Bills

As of August 31, 2012

California 2012 Legislation Affecting Probate, Trust, and Conservatorship Matters

Chaptered Bills

As of August 31, 2012

By Robert E. Temmerman, Jr., Esq.[3]

San Jose, CA

AB 1337 (Alejo) Parent and Child Relationship

Status: 7/23/2012 Chaptered by the Secretary of State, Chapter Number 155, Statutes of 2012

SUMMARY: This bill amends Family Code § 7630 to resolve the problem of establishing paternity when one parent has died and the surviving parent seeks to establish custody. Specifically, existing law allows a child, and the child's natural mother or the child's presumed father to bring an action to establish legal parentage, but the procedure to bring that action generally requires that the other parent be a party to the action and served with notice. If the other parent is dead, however, notice is impossible, and prior to this bill, was no clear procedure in place to establish parentage. This bill provides a clear procedure in this situation as long as there are no existing orders or pending actions involving custody or guardianship before the court. Now, a person seeking to establish paternity must provide notice to persons having physical custody of the child at least 15 days prior to the hearing, either by mail or in any manner authorized by court, and if such person or persons cannot be located, the court shall proscribe the manner of providing notice. Additionally, notice shall be given to relatives within the second degree of the child if known to the person bring the parentage action either by mail or in any

[3]The summaries of legislation herein were prepared primarily by Temmerman, Cilley & Kohlmann, LLP law clerks. While the speaker, Bob Temmerman reviewed and revised the summaries, he did not have an opportunity to review the original sources of authority corresponding with every detail in some of the summaries. However, all of the comments were reviewed and approved by or provided by Bob Temmerman. No representations or guarantees of any kind are made with respect to the accuracy of these written materials and nothing herein should be relied upon to answer any specific legal questions. The written information provided herein should not be relied upon in dealing with any specific legal matter. Attorneys using the information provided herein in dealing with a specific client or clients or their own legal matters should also read the full text of the bills and research other original sources of authority.

manner authorized by the court. If such relatives cannot be located, then the court shall determine the manner of giving notice, or dispense with notice to such relatives entirely. Finally, proof of notice must be filed with the court before proceeding to determine parentage. The bill adds the following language was to Fam. Code § 7630 to achieve these objectives:

> *(g)(1) In an action to determine the existence of the father and child relationship brought pursuant to subdivision (b), if the child's other parent has died and there are no existing court orders or pending court actions involving custody or guardianship of the child, then the persons having physical custody of the child shall be served with notice of the proceeding at least 15 days prior to the hearing, either by mail or in any manner authorized by the court. If any person identified as having physical custody of the child cannot be located, the court shall prescribe the manner of giving notice.*
>
> *(2) If known to the person bringing the parentage action, relatives within the second degree of the child shall be given notice of the proceeding at least 15 days prior to the hearing, either by mail or in any manner authorized by the court. If a person identified as a relative of the second degree of the child cannot be located, or his or her whereabouts are unknown or cannot be ascertained, the court shall prescribe the manner of giving notice, or shall dispense with giving notice to that person.*
>
> *(3) Proof of notice pursuant to this subdivision shall be filed with the court before the proceeding to determine the existence of the father and child relationship is heard.*

COMMENT: In support of this bill, the author stated that by providing a new process, this bill should help ensure that children who have lost one parent can still have a parent who is legally responsible to care for them and support them. The Judicial Council, regarding this provision, observed that a clear procedure will allow court self-help center staff to provide legal information on this issue to self-represented litigants, and thereby allow them to access the courts and obtain relief in an efficient and just manner. The Judicial Council also noted that by providing notice to those with custody of the child as well as to the child's surviving family will ensure the interests of the child are represented in the parentage action. Additionally, having all interested parties before the court allows judges to craft custody and support orders that take into account the unique situation and capacity of all parties. Thus, not only does the bill provide persons who seek to establish paternity in this situation a process by which to do so, but it also ensures that all parties likely to be interested in the child's welfare have notice and opportunity to participate.

AB 1683 (Hagman) Revocable Trusts

Status: 7/9/2012 Chaptered by the Secretary of State, Chapter Number 55, Statutes of 2012

Sponsored by the Executive Committee of Trusts and Estates Section of the State Bar.

SUMMARY: This bill amends Probate Code §§ 15401 and 15410. First, this bill expands existing law that provides that a revocable trust may be revoked by the settlor in whole or part by either compliance with any method of revocation provided in the trust instrument or by a writing, other than a will, signed by the settlor and delivered to the trustee during the settlor's lifetime, as specified to allow revocation not only by the settlor, but also by *any person* holding the power of revocation as long as the revocation is made by a signed writing delivered to the trustee during the lifetime of the settlor or the person holding the power of revocation. Specifically, the language was amended as follows:

> (a) A trust that is revocable by the settlor *or any other person* may be revoked in whole or in part by any of the following methods:
>
> (2) "By a ~~writing (other than a will)~~ *writing, other than a will,* signed by the settlor *or any other person holding the power of revocation* and delivered to the trustee during the lifetime of the settlor *or the person holding the power of revocation*."

Prob. Code § 15401(a)(1).

Second, the bill makes clear that a settlor may grant to another person (including his or her spouse) a power of revocation to revoke all or part of the portion of the trust contributed by the settlor (regardless of whether the portion contributed was separate or community property) if the revocation is delivered to the trustee during the lifetime of either the settlor, or the person with the power of revocation. . Specifically, the language was amended to include the following language:

> *Notwithstanding paragraph (1), a settlor may grant to another person, including, but not limited to, his or her spouse, a power to revoke all or part of that portion of the trust contributed by that settlor, regardless of whether that portion was separate property or community property of that settlor, and regardless of whether that power to revoke is exercisable during the lifetime of that settlor or continues after the death of that settlor, or both.*

Prob. Code § 15401(b)(2).

Finally, this bill amends Prob. Code § 15410 to provide explicit rules defining the priority of distribution of trust property after a trust has been revoked in whole or in part by the settlor or the

person with the power of trust revocation. Specifically, if the trust is revoked by the settlor, the trust property will be disposed of in the following order: (1) as directed by the settlor; (2) as provided by the trust instrument; or (3) to the extent that there is no direction, to the settlor, or his or her estate. Additionally, if the trust is revoked by a person holding the power of revocation other than the settlor, the trust property will be disposed of in the following order: (1) as provided in the trust instrument; (2) as directed by the person exercising the power of revocation, or (3) to the extent that there is no direction available, to the person exercising the power of revocation; or his or her estate.

COMMENT: According to the bill's author, this bill was needed in order to clarify Probate Code §§ 15401 and 15410 to prevent incorrect interpretations by courts regarding the power to revoke a trust in order to ensure that persons (often married) who combine their properties through joint revocable trust documents can grant a spouse or other party a power of revocation, or the ability to change a trust, upon the death of a spouse. TEXCOM, as sponsor of the bill, states that *Estate of Powell* (2000) 83 Cal. App. 4th 1434, and some other subsequent unpublished cases created confusion as to whether or not a settlor can grant a power of revocation over that settlor's property that is in a joint trust to a spouse after the death of the settlor. In *Powell*, the court limited a surviving spouse's power to revoke the trust to only his half of the community property so that he no longer had any ability to revoke the trust as to his deceased spouse's share of the property. This bill would have allowed the surviving spouse in *Powell* to revoke the entire trust. Furthermore, this bill clarifies what happens if a power of revocation is exercised and allows the settlor the ability to control the power of revocation, which ensures that the settlor's wishes are honored. Alternatively, in the absence of guidance from the settlor, the bill provides that the instructions of the power holder are to be followed, which is logical given that a power of revocation has typically been viewed as virtual ownership of the property.

ESTATE OF POWELL (2000) 83 Cal. App. 4th 1434, 100 Cal. Rptr. 2d 501 [Decided September 29, 2000]

Short Summary: In a proceeding to probate a will, the trial court entered a judgment providing that Decedent-Wife's share of community property shall remain in a revocable trust created by Decedent and her Husband. Husband appealed claiming that he revoked the trust after Wife's death, and is therefore entitled to the entire estate. The Court of Appeal affirmed concluding that the trust assets, which were community property of the trustors, were transmuted to separate property upon Wife's death. As a result, Husband's revocation of the trust resulted in one-half of the trust assets being returned to Husband and the other half being disposed of according to Wife's will.

AB 1985 (Silva) Trusts and Estates: Construction of Instruments

Status: 8/27/2012 Chaptered by Secretary of State-Chapter 195, Statutes of 2012

SUMMARY: This bill would amend Probate Code § 21134 to extend protections provided under existing law to recipients of specific gifts under a will against ademption of the gift after the donor becomes incapacitated, and his or her conservator or agent sells or encumbers the property to beneficiaries of specific gifts under revocable trusts as well. Thus, this bill amends the language in § 21134(a) to read as follows:

> Except as otherwise provided in this section, if, after the execution of the instrument of gift, specifically given property is sold, or ~~mortgaged~~ *encumbered by a deed of trust, mortgage, or other instrument,* by a ~~conservator or~~ *conservator,* by an agent acting within the authority of a durable power of attorney for an incapacitated principal, *or by a trustee acting for an incapacitated settlor of a trust established by the settlor as a revocable trust,* the transferee of the specific gift has the right to a general pecuniary gift equal to the net sale price of *the property unreduced by the payoff of any such encumbrance,* or the amount of the unpaid ~~loan on,~~ *encumbrance on* the property *as well as the property itself.*

This bill also makes it clear that if an eminent domain award for taking of specifically given property, proceeds from fire or casualty insurance, or recovery for injury to specifically gifted property is paid to a conservator, to an agent acting within the authority of a durable power of attorney for an incapacitated principal, or to a trustee acting for an incapacitated settlor of a trust established by the settlor as a revocable trust, then the recipient of the specific gift has the right to a general pecuniary gift equal to the eminent domain, the insurance proceeds, or recovery unreduced by the payoff of any encumbrance placed on the property by the conservator, agent, or trustee, after the execution fo the gift.

COMMENT: The Conference of California Bar Associations and TEXCOM support the bill on the grounds that the bill ensures the same degree of protection of specific gifts in the context of revocable trusts that now exists in the context of wills. This bill would make it easier for courts faced with this issue to apply the statute without having to "rely heavily on inference." (*See Brown v. LaBow* (2007) 157 Cal. App. 4th 795 (deciding the issue of whether an ademption occurred for a beneficiary's gift of stock under a revocable trust that was sold by an individual, who was both the conservatee and the trustee of the incapacitated principal).) Flowing from this, TEXCOM notes that "[a]s the use of trusts in estate planning has become more pervasive, the lack of references in the current statute to trusts, to specific gifts in trust by settlors, and to the

possible effects on specific gifts of actions by trustees during a settlor's incapacity are glaring omissions that rightly deserve to be corrected."

AB 2683 (Committee on Judiciary) Probate Matters: Guardianships: Estates

Status: 8/27/2012 Chaptered by Secretary of State - Chapter 207, Statutes of 2012

SUMMARY: This bill would amended Probate Code §§ 2204, 8100, and 9052 of the Probate Code. Specifically this bill**:**

2 Corrects an incorrect cross-reference in Probate Code § 2204. Subdivision (b) of Section 2204 governs procedure for courts to follow regarding venue in guardianship cases where a prior custody action involving the proposed ward has already been filed in a county other than the county where the guardianship petition was filed cases. Specifically the amended § 2204(b)(4) reads:

> The provisions of subdivisions (b) to (e), inclusive, of Section ~~3140~~ *3410* of the Family Code shall apply to communications between courts under this subdivision.

4 Clarifies the time requirements in Probate Code § 8100 to creditors contained in the notice of hearing and notice of administration of the estate with the following language:

> IF YOU ARE A CREDITOR or a contingent creditor of the deceased, you must file your claim with the court and mail a copy to the personal representative appointed by the court within *the later of either (1)* four months from the date of first issuance ~~of letters as provided in Section 9100 of the California Probate Code. The time for filing claims will not expire before four months from the date of the hearing noticed above to~~ *a general personal representative, as defined in subdivision (b) of Section 58 of the California Probate Code, or (2) 60 days from the date of mailing or personal delivery of the notice to you under Section 9052 of the California Probate Code*.

COMMENT: This bill is the Assembly Judiciary Committee's omnibus bill. To be considered for inclusion, each provision must be non-controversial and not be so substantive as to be more appropriate for a stand-alone bill.

SB 1021: New Fee for Lodging a Will

Status: 6/27/2012 Chaptered by the Secretary of State, Chapter Number 41, Statutes of 2012

SUMMARY: This bill amends Government Code § 70626(d) to provide that courts will charge a $50 fee to lodge a will. Specifically, this bill adds the following language to section 70626:

> *The fee for delivering a will to the clerk of the superior court in which the estate of a decedent may be administered, as required by Section 8200 of the Probate Code, is fifty dollars ($50).*

Additionally, this bill amends the language in Probate Code § 8200(a)(1) to reflect this fee:

> (a) Unless a petition for probate of the will is earlier filed, the custodian of a will shall, within 30 days after having knowledge of the death of the testator, do both of the following:
>
> (1) Deliver the will to the clerk of the superior court of the county in which the estate of the decedent may be administered. ~~No fee shall be charged for compliance with the requirement of this paragraph.~~

Under Probate Code § 8200(a), the custodian of the will remains obligated to lodge the will within 30 days of learning of the decedent's death. Probate Code §8200(b) provides that a custodian who fails to do so "is liable for all damages sustained by any person injured by the failure."

COMMENT: In order to avoid the broad liability imposed for failing to lodge a will, a custodian of a will must pay the $50 fee. Attorneys who retain the original will for their clients may want to adjust their fee schedules to take this requirement into account.

D.
California 2012 Enrolled Legislation Affecting Probate, Trust, and Conservatorship Matters

Enrolled Bills

As of August 31, 2012

California 2012 Legislation Affecting Probate, Trust, and Conservatorship Matters

Enrolled Bills

As of August 31, 2012

By Robert E. Temmerman, Jr., Esq.[4]

San Jose, CA

AB 40 (Yamada) Elder and Dependent Adult Abuse: Reporting

Status: 8/29/2012 Assembly Rule 77 suspended. Senate amendments concurred in. To Engrossing and Enrolling.

SUMMARY: This Bill amends Welfare and Institutions Code §§15630 and 15631, and adds § 15610.67. Specifically, this bill:

- Adds § 15610.67 to define "serious bodily injury" as "an injury involving extreme physical pain, substantial risk of death, or protracted loss or impairment of function of a bodily member, organ, or of mental faculty, or requiring medical intervention, including, but not limited to, hospitalization, surgery, or physical rehabilitation."

[4]The summaries of legislation herein were prepared primarily by Temmerman, Cilley & Kohlmann, LLP law clerks. While the speaker, Bob Temmerman reviewed and revised the summaries, he did not have an opportunity to review the original sources of authority corresponding with every detail in some of the summaries. However, all of the comments were reviewed and approved by or provided by Bob Temmerman. No representations or guarantees of any kind are made with respect to the accuracy of these written materials and nothing herein should be relied upon to answer any specific legal questions. The written information provided herein should not be relied upon in dealing with any specific legal matter. Attorneys using the information provided herein in dealing with a specific client or clients or their own legal matters should also read the full text of the bills and research other original sources of authority.

- Amends § 15630 to require that if the suspected or alleged abuse is "physical abuse" and occurred in a long-term care facility, except a state mental health hospital or a state developmental center the following shall occur:
  - When "*the suspected abuse results in serious bodily injury, a telephone report shall be made to the local law enforcement agency immediately, and no later than within two hours of the mandated reporter observing, obtaining knowledge of, or suspecting the physical abuse, and a written report shall be made to the local ombudsman, the corresponding licensing agency, and the local law enforcement agency within two hours of the mandated reporter observing, obtaining knowledge of, or suspecting the physical abuse*."

  § 15630(b)(A)(I) (as amended on 8/23/2012)
  - If the suspected abuse does not result in serious bodily injury, "*a telephone report shall be made to the local law enforcement agency within 24 hours of the mandated reporter observing, obtaining knowledge of, or suspecting the physical abuse, and a written report shall be made to the local ombudsman, the corresponding licensing agency, and the local law enforcement agency within 24 hours of the mandated reporter observing, obtaining knowledge of, or suspecting the physical abuse*."

  § 15630(b)(A)(ii) (as amended on 8/23/2012)
- Would delete the local ombudsman from the list of persons to whom the mandated reported may report where a mandated reporter who has knowledge, or reasonably suspects, that types of elder or dependent adult abuse for which reports are not mandated occurred in a state mental hospital or a state developmental center.

COMMENT: The author of this bill states that due to two conflicting mandates from federal and state law governing the Long-term Care Ombudsman program, criminal abuse and neglect are allowed to occur because client consent requirements prevent omnibudsman employees and volunteers from sharing the content of reports with law enforcement. The situation is made even worse given the high number of long-term care facility residents who have diminished capacity, and even if they are willing, cannot provide consent. As result, the purpose of mandated reporting is effectively defeated. The California Advocates for Nursing Home Reform (CANHR) further notes that since existing law provides a choice of agencies to report abuse to has resulted in situations where notification about criminal activity does not reach law enforcement. CANHR believes that this bill would be a major advancement to California's mandated reporting law.

AB 1624 (Gatto) Multiple-Party Accounts

Status: 8/20/2012 Enrolled and presented to the Governor at 5 p.m.

SUMMARY: This bill amends Probate Code §§ 5301, 5303, and 5401 in order to restore the original intent of California's Multi-Party Accounts Law ("CAMPAL") prior to the holding in *Lee v. Yang* (2003) 111 Cal. App. 4th 481. First, this bill makes clear that during the lifetime of all parties to a multi-party account, the account belongs to the parties in proportion to the net contributions of each, unless there is clear and convincing evidence of a different intent. Specifically, this bill amends § 5301(a) to state:

> An account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each ~~to the sums on deposit~~, unless there is clear and convincing evidence of a different intent.

Second, this bill provides that if a party makes an excess withdrawal from an account, the other parties to the account shall have an ownership interest in the excess withdrawal in proportion to the net contributions of each to the amount on deposit in the account immediately following the excess withdrawal, unless there is clear and convincing evidence of a different agreement between the parties. To achieve this objective, this bill adds the following language to Prob. Code § 5301(b):

> *If a party makes an excess withdrawal from an account, the other parties to the account shall have an ownership interest in the excess withdrawal in proportion to the net contributions of each to the amount on deposit in the account immediately following the excess withdrawal, unless there is clear and convincing evidence of a contrary agreement between the parties.*

This bill defines "excess withdrawal" as the amount of a party's withdrawal that exceeds that party's net contribution on deposit in the account immediately preceding the withdrawal. (*See* Prob. Code § 5301(f).) Finally, this bill allows only a living party, or a conservator, guardian, or agent acting on behalf of a living party to make a claim to recover the living party's ownership interest in an excess withdrawal. It also allows a court, at its discretion, and in the interest of justice, to reduce any recovery under this section to reflect funds withdrawn and applied for the benefit of the claiming party. Thus, this bill adds the following language to Prob. Code §5301©:

> *Only a living party, or a conservator, guardian, or agent acting on behalf of a living party, shall be permitted to make a claim to recover the living party's ownership interest*

in an excess withdrawal, pursuant to subdivision (b). A court may, at its discretion, and in the interest of justice, reduce any recovery under this section to reflect funds withdrawn and applied ~~solely~~ for the benefit of the claiming party.

COMMENT: The author of this bill, supporters of this bill, and the California Law Revision Commission believe that *Lee v. Yang* (2003) 111 Cal. App. 4th 481 overturned the long-standing interpretation of CAMPAL that a party retained a proportional ownership interest in any funds withdrawn by another party. In *Lee v. Yang*, after the ending her engagement to Mr. Lee, Ms. Yang withdrew money from the couple's joint bank accounts. The appellate court in *Lee v. Yang* held, by a very strict reading of the statute, that the ownership interest of the parties only applied to the "sums on deposit;" meaning that once funds were withdrawn, they were no longer subject to the proportional interest rule. The court reasoned that withdrawal from an account effectively makes a "gift" to the withdrawing party, and the depositing party no longer has any claim to it. Thus, Ms. Yang was permitted to retain all the money, over $340,000 of commingled funds.

The Trusts & Estates Section of the State Bar of California, the Conference of California Bar Associations (CCRA), and the American Association of Retire Persons (AARP) all supported this bill. Support for this bill was strong since it not only created a "race to the bank" to be the first to withdraw funds after the end of a relationship, but it made senior citizens vulnerable. Specifically, the Trusts and Estates Section noted that with respect to a parent who may add a child to his or her account in anticipation of that parent's incapacity or death, without the intent that the child be able to access and withdraw funds for the child's personal use before the parent's actual incapacity or death, the parent would have no recourse to get the money back if the child chose to access the funds under *Lee v. Yang*. This bill would prevent such a situation from occurring, while at the same time protecting care givers from liability who legitimately withdrew funds for the benefit of another party to the account.

AB 1670 (Lara) Estates: Administration

Status: 8/27/2012 Assembly Rule 77 suspended. Senate amendments concurred in. To Engrossing and Enrolling. (Ayes 54. Noes 20.).

Sponsored by the Executive Committee of Trusts and Estates Section of the State Bar.

SUMMARY: Under current law, when a decedent dies intestate, the court must appoint an administrator as a personal representative. A personal representative must meet several

qualifications, including being a U.S. citizen. Current law also provides that an heir otherwise entitled to appoint a personal representative cannot do so if he or she is not a U.S. resident, even though a decedent could have provided heir with the power to do so in a will. This bill amends Probate Code § 8465 to:

- Expand a court's appointment authority to allow the court to appoint an administrator who is nominated by a person who would be entitled to appointment, but is not a United States resident.

- Require that an administrator nominated by a non-United States resident reside in California, and if said administrator leaves the state, he or she will be deemed to have resigned as administrator.

- Allow the court discretion in deny the appointment of an administrator nominated by a non-United States resident and appoint another person. In making a decision a court may consider, but is not limited to the following:

  (1) Whether the nominee has a conflict of interest with the heirs or any other interested party.

  (2) Whether the nominee had a business or personal relationship with the decedent or decedent's family before the decedent's death.

  (3) Whether the nominee is engaged in or acting on behalf of an individual, a business, or other entity that solicits heirs to obtain the person's nomination for appointment as administrator.

  (4) Whether the nominee has been appointed as a personal representative in any other estate.

  Prob. Code § 8465(d) (as amended on 6/25/2012)

- Provide that if a court does appoint a nominee of a non-United States resident, the court shall required the nominee to obtain bond, unless the court orders otherwise for good cause.

COMMENT: The author of this bill asserts that this bill seeks to provide "non-residents with the ability to appropriately manage their inherited estates by giving them the ability to nominate a qualified person to act as administrator and care for their inherited estate in the best manner they see fit. Under existing law, courts had difficulty interpreting the current statutory scheme, leading to inconsistent results (*See Estate of Kaussen* (1987) 190 Cal. App. 3d 1644 (court determined that non-residents were not barred from nominating an administrator), *Estate of Damskog* (1991) 1 Cal. App. 4th 78 (court denied non-resident the ability to nominate an

administrator). Current law also provides that a nonresident heir is currently prohibited from nominating an administrator when a decedent dies intestate, even if such an heir stands to receive all the assets. As a result, the public administrator is appointed, and would take its fees out of the assets to be received by decedent's heirs. TEXCOM argues that this situation is intolerable by noting that "[r]edirecting assets that would otherwise pass to families who reside outside of the United States, merely because the decedent did not have a will, creates a fundamental unfairness," and current law "deprives families of the right to select the person best suited to manage the assets they stand to receive."

AB 1700 (Butler) Property Taxation: Change in Ownership: Exclusion: Cotenancy Interests

Status: 8/20/2012 Enrolled and presented to the Governor at 5 p.m.

SUMMARY: This bill would add Section 62.3 to the Revenue and Taxation Code to provide that on or after January 1, 2013, if certain conditions are met, a transfer of a cotenancy interest in a principal residence from one co-tenant to the other upon a co-tenant's death, does not constitute a change in ownership, and thus, does not trigger reassessment of the property value or property tax reassessment. Specifically, transfers of a cotenancy ownership interest will be exempt from a"change in ownership" requiring reassessment if all of the following are met:

(1) The transfer is solely owned by two individuals who together own 100% of the property in joint tenancy, or as tenants in common,

(2) As a result of the death of one co-owner, the surviving owner holds 100% interest in the property,

(3) Both tenants were co-owners of record and continuously resided at the property for the one-year period prior to the death,

(4) The property was the principal residence for both co-owners immediately prior to the transferor cotenant's death, and

(5) The surviving tenant signs an affidavit under penalty of perjury certifying that the co-owners continuously resided at the property for the one-year period prior to the death.

COMMENT: Supporters of this bill believe that it will protect surviving co-owners from the financial hardship of property reassessment when a loved one passes away. Existing law only protects transfers of real property between married people, registered domestic partners, parents,

and their children, grandparents and their children, and joint tenants who are "original transferors" from property tax increases. This bill would "widen the net" beyond family members, to any two people who live together, including unmarried people, persons who are not registered domestic partners, siblings, friends, etc.. The sponsor, Equality California, believes that this bill would benefit many Californians, including same-sex couples, seniors, and families.

It should also be noted that this bill does conflict with laws and rules that differentiate between tenants in common and joint tenancy as the bill essentially combines the two concepts for a specified set of taxpayers. Supporters, however, contend that this bill extends joint tenancy benefits in very limited situations where co-owners either did not create a joint tenancy, or are deemed to be tenants in common because they have unequal ownership shares. Governor Arnold Schwarzenegger vetoed a prior bill, SB 153 (Midgen, 2008) for the above reason.