

Recent California Case Law Developments

**Selected Cases of Interest to Trust and Estate Attorneys
Filed Between
September 1, 2010 and July 31, 2011**

**By Robert E. Temmerman, Jr., Esq.
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Recent California Case Law Developments

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Selected cases of interest to trust and estate attorneys filed between September 1, 2010 and July 31, 2011.¹

Allocation of Receipts From Entities To Principal or Income Under the UPIA

MANSON v. SHEPHERD (2010) 188 Cal. App. 4th 1244, 116 Cal. Rptr. 3d 1 [Filed September 3, 2010] Publication status was changed from unpublished to published on September 30, 2010.

Short Summary: Where a trust instrument was silent on the issue, the UPIA required that a \$3 million dividend be allocated entirely to principal as a partial liquidation under Prob. Code § 16350 where the corporation “made it known in some manner” that the dividend was the result of the corporation selling an asset in order to achieve a better cash position, despite direct testimony and evidence that the corporation was *not* liquidating and *not* in partial liquidation.

Facts: Husband’s and Wife’s estate plan consists of a postnuptial agreement that provides that all their assets will be held as separate property (two-thirds belonging to Husband and one-third belonging to Wife) and a revocable ABC trust (“Admin Trust”). Following Husband’s death in 2005, Wife became the sole trustee and sole income beneficiary of Trust A (“QTIP Trust”) and Trust B (“Bypass Trust”), both of which were to be funded with Husband’s separate property. Wife is entitled to principal distributions from the QTIP and Bypass Trusts if she deems the income from those trusts to be insufficient for her accustomed standard of living. The remainder beneficiaries of the QTIP and Bypass Trusts are Husband’s four daughters from a previous marriage (Daughters).

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, or Sondra Allphin reviewed and revised most of the case briefs, they did not have an opportunity to review them all. However, all of the comments were reviewed and approved by or provided by Bob Temmerman or Sondra Allphin. 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.

The Admin Trust's primary asset is a 100% ownership interest in a real estate corporation ("Corp") created by Husband and Wife which had a value of approximately \$41 million at the time of Husband's death. After Husband's death, Wife continued to work at Corp and served as Corp's president and chair of Corp's board of directors. Wife filed her first accounting, reporting a \$3 million dividend from Corp (the first dividend in the company's history), which was allocated \$561,000 to principal and \$2,439,000 to income, based upon an earnings and profits analysis dating back to the formation of Corp prepared by a third-party accountant.

Daughters objected and contended that the dividend was derived from the sale of one of Corp's real properties, and therefore a return of capital and partial liquidation which should have been allocated entirely (or at least in a greater percentage) to principal.

Wife contended that, although the sale of the real property did provide the cash for the dividend, the sale was merely part of a series of strategic events to improve Corp's cash flow, which led to the dividend. At trial, a document prepared by an accounting consultant ("CPA"), hired by Admin Trust and Corp, was admitted to evidence. The document stated, in part, "Board Declares Dividend to [QTIP, Bypass & Survivor's Trusts] of \$3 million from [real property] sale," "[QTIP and Bypass Trust] gets \$2 million," and "[Survivor's Trust] gets \$1 million." Wife and CPA testified that the sale of the property was part of a cumulative strategic plan (including the repayment of substantial debts that the Admin Trust owed Corp) and not directly linked to the dividend.

Issue: What level of "indication" is required to trigger the partial liquidation exception of Prob. Code § 16350(d)(1)(A)?

Trial Court Holding: The Santa Cruz County Superior Court held that the dividend was a distribution of principal. The court noted that because the Trust did not provide any direction regarding the allocation of receipts, the allocation was governed by Prob. Code § 16350. While the general rule under Prob. Code § 16350(b) is that a distribution from a corporation should be allocated to income, the court ruled that, based on the evidence at trial, the "indication of partial liquidation" exception of § 16350(d)(1)(A) applied, and that the dividend must be allocated entirely to principal. The trial court disregarded the earnings and profits analysis because it was completed *after* the dividend was issued and not "at or around" the time the dividend was issued.

Appellate Court Holding: The Sixth District Court of Appeal affirmed the trial court order.

Appellate Court Rationale: The appellate court noted that under the Uniform Principal and Income Act ("UPIA"), a fiduciary's allocation of receipts to or between principal and income must be made in accordance with the provisions of the recipient trust, or if the trust is silent, in accordance with the UPIA. The court noted that (1) a trustee shall allocate money received in partial liquidation of an entity to principal and (2) money is received in partial liquidation to the extent the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation (Prob. Code §§ 16350(c)(3) and (d)(1)(A)). Upon analyzing the meaning of "indicate" and "liquidation," the court determined that the partial liquidation exception of § 16350(d)(1)(A) applies where the "entity has

made known in some manner that the distribution to a trust was the result of the entity selling an asset or assets in order to achieve a better cash position, and not to terminate the business.” The court concluded that the trial court must determine on a case by case basis whether the entity’s indication was sufficient to trigger the partial liquidation exception. The court determined that substantial evidence supported the trial court’s finding that Corp indicated, within the meaning of § 16350(d)(1)(A), that the \$3 million dividend was a distribution in partial liquidation.

Comment: A few points here. This case takes a different approach to the entity indication exception of § 16350 than *Hasso v. Hasso* (2007) 148 Cal. App. 4th 329, which provided that some degree of specificity is necessary to advise the shareholders that the entity is being partially liquidated. It expands the application of the exception to cases where the entity has made known in “some manner” that the distribution was a partial liquidation in order to achieve a better cash position. Here, the trial court disregarded the evidence presented by CPA and Wife that the distribution was not a liquidation. The court’s scrutiny of the characterization seemed to arise from Wife having so much control (as sole trustee of the Admin Trust, president of Corp, and chair of Corp’s board of directors), perhaps out of concern that someone in her positions would abuse the power. But don’t many of our married clients who have jointly created a closely-held business give this type of control to the surviving spouse? In order to avoid a similarly unexpected result, the closely-held entity should make it very clear (with carefully crafted language) *at the time the dividend is issued* what it is doing and complete any earnings and profits analysis before the dividend is issued.

The California State Bar Board of Governors has approved a legislative proposal to amend § 16350 developed by the Executive Committee of the Trusts and Estates Section of the State Bar (“TEXCOM”) for possible introduction in the California Legislature during the 2011-2012 session. The proposed amendment would clarify the statute and replace “entity indicates” with language that a trustee “may rely, without independent investigation, on a statement made by the entity about the source or character of the receipt or any other information which is actually known by the trustee about the source or character of the receipt.” However, TEXCOM was unable to find a legislator to carry the proposal in time to be introduced during 2011. If TEXCOM is able to find a legislator willing to carry the proposal, it will be introduced as a bill in the Legislature in 2012. Stay tuned.

Neighbor Who Merely Prepared Meals for Decedent and Drove Him to Doctor Appointments Held Not to Be a Prohibited Transferee Under Probate Code § 21350

ESTATE OF AUSTIN (2010) 188 Cal. App. 4th 512, 115 Cal. Rptr. 3d 481 [Filed September 15, 2010]

Short Summary: Decedent’s Daughter sought to invalidate pre-death gifts made by Decedent to a his next-door neighbor who was formerly his stepdaughter before he divorced his former wife (“Former Stepdaughter”), on the grounds that she was a care custodian, and therefore a prohibited

transferee under Prob. Code § 21350. The full extent of her services included taking Decedent to his doctor appointments, preparing meals for him, and helping out wherever she could during a limited period of time after he broke his hip. The court held that based on the limited services Former Stepdaughter provided to Decedent, she was not a care custodian, thus the gifts were valid.

Facts: Decedent was married to his Former Wife from 1986 to 1994, but they divorced in 1994 “for Medi-Cal reasons.” Decedent and Former Wife continued to live together after their divorce and Former Stepdaughter lived next-door to them for 22 years. Decedent broke his hip and three weeks later, in November 2006, was in a nursing home recovering from triple bypass surgery. He subsequently returned home until he was unable to care for himself and then was readmitted to a nursing home where he stayed until his death in December 2007. Former Stepdaughter did not start taking care of Decedent until he broke his hip. The full extent of her services included taking Decedent to his doctor appointments, preparing meals for him, and helping out wherever she could while he resided in his home. Former Wife also prepared some of Decedent’s meals but Former Stepdaughter took him to all of his doctor appointments.

Decedent’s mother died and in April or May of 2007 Decedent’s Brother (as trustee of his mother’s trust) learned that Decedent would receive funds from the trust. Brother visited Decedent in the nursing home and asked him what he wanted to do with the funds. During Brother’s third visit to Decedent in the nursing home in three weeks, Decedent told Brother that he wanted Former Stepdaughter to have the money. Thereafter, on two separate occasions, Brother gave insurance company checks to Decedent and Decedent signed them over to Former Stepdaughter. In addition, Decedent wrote four more of his own checks to Former Stepdaughter. There were a total of six checks dated between April 5 and July 10, 2007, and the amount of the checks totaled approximately \$185,000.

Daughter argued that Former Stepdaughter was a “care custodian of a dependent adult,” as that term is used in Prob. Code § 21350, and is therefore disqualified from receiving the transfers from Decedent. Former Stepdaughter did not dispute that Decedent was a dependent adult for purposes of § 21350.

Issue: Whether Former Stepdaughter was Decedent’s care custodian and therefore presumptively disqualified from receiving the gifts from Decedent.

Trial Court Holding: The Fresno County Superior Court held that the gifts to Former Stepdaughter were valid because Daughter failed to prove Former Stepdaughter was Decedent’s care custodian.

Appellate Court Holding: The Fifth District Court of Appeal affirmed the judgment, holding that the services provided by Former Stepdaughter could not be reasonably characterized as substantial, ongoing health or social services.

Appellate Court Rationale: Daughter, as the party asserting invalidity, had the initial burden to prove Former Stepdaughter was a care custodian, one of the disqualified persons listed in § 21350(a).

A care custodian includes persons providing care or services to elders or dependent adults. This definition is not limited to paid professional care givers; it includes a person who provides health services or social services to a dependent adult as a result of a preexisting personal friendship with the dependent adult. *Bernard v. Foley* (2006) 39 Cal. 4th 794. In *Bernard*, two lifelong friends of the decedent had her move in with them for two months before her death. During that time she was dependent on them for her daily needs. The *Bernard* court held that there is no preexisting friendship exception to the classification as a care custodian and found that the level of substantial, ongoing health services provided by the two friends made them care custodians. The appellate court pointed out that in *Conservatorship of Davidson* (2003) 113 Cal. App. 4th 1035, the types of household tasks performed by the alleged care custodian did not qualify as “health or social services” for purposes of § 21350. Those services included cooking, gardening, running errands, assisting with banking, and driving to doctor’s appointments.

In this case, Decedent made the gifts to Former Stepdaughter while he was residing in a nursing home, at which time Former Stepdaughter was providing no health or social services to him. Further, the appellate court found that services previously provided by Former Stepdaughter (driving Decedent to the doctor, preparing some of his meals, and unspecified helping out) could not be characterized as substantial and were significantly less than the services provided in *Bernard* and *Davidson*. Therefore, Daughter failed to carry her burden of proving Former Stepdaughter was a disqualified transferee as defined by § 21350.

Comment: This case was decided under the old donative transfer statute. It appears that under the new donative transfer statute applicable to transfers that became irrevocable on or after January 1, 2011 (Prob. Code §§ 21360 et seq.), the services provided by Former Stepdaughter would classify her as a care custodian. Probate Code § 21362 defines “health and social services” as including, but not limited to, companionship and cooking, among other things. On the other hand, under the new statute, Former Stepdaughter would escape the reach of the care custodian classification if (1) she provided the services without remuneration (§ 21362(a)) or (2) the gifts were made more than 90 days after the last time Former Stepdaughter provided services for Decedent (Prob. Code § 21380(a)(3)). It is unclear from the facts recited in the opinion whether Former Stepdaughter would have qualified for the new timing exception. We know that Decedent was at home in November 2006 and that he returned to the nursing home at some point before May 2007. Depending on when he returned to the nursing home and when Former Stepdaughter stopped providing services to him, some or all of the six checks may have qualified for the timing exception under the new statute.

Beneficiary May Exercise “Five-Or-Five” Power After the End of the Year to Which It Applies

ESTATE OF CAIRNS (2010) 188 Cal. App. 4th 937, 115 Cal. Rptr. 3d 735 [Filed September 15, 2010]

Short Summary: A testamentary trust beneficiary validly exercised a “five-or-five” power by demanding a distribution for the 2007 calendar year on September 15, 2008 because the trust instrument does not require the “five-or-five” power to be exercised in the calendar year to which it applies. The distribution may be made in cash, in kind, or a combination of both because the trust does not limit the form of the distribution. No evidentiary hearing is required when only issues of law are to be determined by the trial court.

Facts: Decedent executed a will in 1975 and died in 1977. Decedent’s will created a testamentary Trust. Decedent’s only child (“Son”) was appointed sole trustee and is an income beneficiary of the Trust. The Trust also contains a “five-or-five” power that reads: “The Trustee shall also pay to my son during his lifetime, from the principal of the trust, such amounts as he may from time to time request in writing, not exceeding in any calendar year, non-cumulatively, the greater of the following amounts: Five Thousand Dollars (\$5,000.00) or Five Per Cent (5%) of the value of the principal of the trust, determined as of the end of the calendar year.” Son’s two children, Grandson and Granddaughter, are the remainder beneficiaries.

Son served as sole trustee until 2005, filing accountings each year, all of which were approved by the trial court. In 2005, at Son’s request, the trial court appointed a cotrustee (“Cotrustee”) to serve with Son. Thereafter, accountings were filed by Son and Cotrustee jointly as cotrustees. In June 2008, the cotrustees filed their 24th annual account and report for calendar year 2007. Based on recently obtained appraisals of the Trust’s real property, the value of the trust principal as of the end of 2007 was determined to be approximately \$14.5 million. The petition did not say anything about Son’s exercise of his five-or-five power. The petition was granted.

In September 2008, Son made a written request for his 5% distribution of trust principal for the year ending December 31, 2007, in the approximate amount of \$730,000.00, which was 5% of the market value of the trust as of the end of 2007. Son also requested that the distribution take the form of an undivided 5.325% fractional interest in a specified real property, with the balance of the distribution in cash. Instead of complying with the request, the cotrustees filed a petition for instructions, requesting that the trial court interpret the five-or-five power. In particular, the cotrustees asked for a ruling on whether the exercise of the five-or-five power must be made in the same calendar year, whether Son’s 2008 exercise for calendar year 2007 was a valid exercise of the power, an interpretation of the valuation date for purposes of exercising the five-or-five power, and whether distributions could be made in-kind as requested by Son. Grandson objected, arguing that the exercise of the power and the payment must be made in the same calendar year. Grandson also requested an evidentiary hearing.

Issues: (1) When must the five-or-five election be made before the election is waived? (2) Whether the trustees are authorized to distribute principal in-kind. (3) Whether Grandson is entitled to an evidentiary hearing.

Trial Court Holding: The Napa County Superior Court held that (1) the “5% of the value of the trust” in the five-or-five power refers to the Trust’s market value at the end of the calendar year; and (2) Son’s 2008 exercise of his five-or-five power for calendar year 2007 was a valid exercise of that power, which could be made in cash or its equivalent, in-kind distributions of undivided interests in assets other than cash, or a combination of both. Grandson’s request for an evidentiary hearing was denied.

Appellate Court Holding: The First District Court of Appeal affirmed, holding that the plain language of the five-and-five power supported the trial court’s holding, and that the trial court did not err in denying Grandson an evidentiary hearing.

Appellate Court Rationale: The appellate court explained that it must interpret Decedent’s will so as to give effect to the intent of the testator as expressed in the instrument. The instrument did not say that the power had to be exercised in the same year as the distribution year. The instrument only provided that the power was non-cumulative, which means that if it is not exercised it is forfeited. When it must be exercised, however, is a separate question. Since the power authorizes Son to exercise it “from time to time” with respect to the value of the trust “determined as of the end of the calendar year,” Son is authorized to make multiple requests for distribution for a calendar year so long as those distributions do not exceed 5% of the value of the Trust. Also, since the value of the principal of the trust is determined as of the end of the calendar year, the beneficiary will not know until after that date whether or not it would be advisable to exercise the 5% power until after the new year. Therefore, Son must exercise his power not later than the end of the next calendar year after determination of the value of the principal of the trust. Based on this interpretation, Son’s request in 2008 for a 2007 distribution was valid.

Furthermore, nothing in the Decedent’s will, or the five-or-five power in particular, prohibits the cotrustees from making the five-or-five distribution in cash or in kind, or a combination of both. To limit the cotrustees to making cash only distributions could potentially put the present and remainder beneficiaries at a disadvantage in the event that the Trust becomes cash poor because they may have to liquidate non-cash assets at a disadvantageous time, leading to a loss for all beneficiaries.

Grandson also argued that Son has an irreconcilable conflict of interest by being both a trustee and beneficial owner of Trust assets. The court rejected this argument out-of-hand because it was Decedent who put Son in that position by naming him both a trustee and beneficiary.

Finally, since Son did not present any extrinsic evidence to assist in interpreting the five-or-five power, the interpretation of that power becomes a matter of law. Because there were no issues of fact to be determined by the trier of fact, the trial court’s refusal to conduct an evidentiary hearing was not in error.

Comment: Many five-or-five powers provide, similarly to the power in this case, that “the value of the principal of the trust [shall] be determined as of the end of the calendar year.” This court concluded that because the “beneficiary will not even know the amount of the permissible demand until after the calendar year has concluded and an accounting is completed,” the testator must have intended the beneficiary to be able to “exercise his right to demand principal distributions at any time after the end of a calendar year as long as his demands within the calendar year thereafter do not exceed the specified five-or-five maximum.” Practitioners may want to review their own five-or-five power language to determine whether revisions should be made to make the time period during which the power may be exercised clearer.

Grand Theft Committed by Attorney in Fact After Principal’s Death

PEOPLE v. FENDERSON (2010) 188 Cal. App. 4th 625, 116 Cal. Rptr. 3d 17 [Filed September 17, 2010] California Supreme Court denied review on December 21, 2010.

Short Summary: Even assuming that Decedent’s power of attorney naming Caregiver as attorney in fact was still operative after Decedent’s death, Caregiver was properly convicted of grand theft and burglary for taking funds from Decedent’s bank account after her death and converting them to Caregiver’s use.

Facts: On June 30, 2005, Decedent gave Caregiver (a certified nursing assistant, home health assistant, acute care assistant, and phlebotomist) a special power of attorney on a preprinted Wells Fargo form. The form contained a provision that the power of attorney would “remain in effect until *this office* of Wells Fargo receives actual notice of my death.” (Emphasis added by the court.) In 2005, when she could no longer maintain her home, Decedent sold her house. Decedent deposited funds from sale of her house in her Wells Fargo checking account. Decedent died on January 22, 2006.

Decedent’s estate planning attorney (“Attorney”) asked Caregiver for bank records at Decedent’s funeral. After two months of repeated requests she received records of only some small accounts at Washington Mutual, and no records from Wells Fargo where Attorney knew that Decedent kept the majority of her funds. When asked on March 27, 2006, about the Wells Fargo accounts, Caregiver asserted that Decedent “had given her [the Wells Fargo] account and that’s why she wasn’t providing records for that account.” A witness testified that he overheard Decedent tell Caregiver that when she dies, Decedent wanted Caregiver to have what was left over in an account (but not identifying the specific account).

On April 7, 2006, Caregiver made out a cashier’s check from Decedent’s Wells Fargo account for \$304,000, payable to herself, and the check was immediately deposited into Caregiver’s Citibank account. Caregiver bought a house in Sonoma County seven months later, with a \$184,000 down

payment from that same account. After being arrested, Caregiver told authorities that Decedent gave her permission to take the proceeds from the sale of her home.

After a criminal trial, Caregiver was sentenced to state prison for a total term of four years. She was also ordered to pay restitution, in the amount of \$304,000, to the victims.

Issue: Whether the power of attorney remained in effect at the time of Caretaker's withdrawal from the account, entitling Caretaker to make the withdrawal, and whether such a finding means that substantial evidence does not support the trespass element of grand theft necessary to sustain Caretaker's conviction for this offense.

Trial Court Holding: The Sonoma County Superior Court jury found Caregiver guilty of grand theft and burglary of the funds in the Wells Fargo account.

Appellate Court Holding: The First District Court of Appeal affirmed the trial court jury's conviction of Caregiver.

Appellate Court Rationale: Probate Code § 4101(a) provides that "the principal may limit the application of any provision of this division [with certain exceptions that do not apply here] by an express statement in the power of attorney or by providing an inconsistent rule in the power of attorney." Because the preprinted Wells Fargo form contained a provision stating that the power of attorney remains in effect until "this office" of the bank is notified of Decedent's death, and Attorney had notified the wrong Wells Fargo branch of Decedent's death, Caregiver successfully argued that pursuant to Prob. Code § 4101(a), that power was still in effect on April 7, 2006, the date of the withdrawal.

Caregiver also relied on Prob. Code § 4308 which provides:

(a) A third person who conducts activities through employees is not charged under this chapter with actual knowledge of any fact relating to a power of attorney, nor of a change in the authority of an attorney-in-fact, unless both of the following requirements are satisfied:

(1) The information is received at a home office or a place where there is an employee with responsibility to act on the information.

(2) The employee has a reasonable time in which to act on the information using the procedure and facilities that are available to the third person in the regular course of operations.

(b) *Knowledge of an employee in one branch or office of an entity that conducts business through branches or multiple offices is not attributable to an employee in another branch or office.* (Emphasis added.)

Caregiver argued that she may have embezzled funds when she converted the money to her personal use, but she is not guilty of theft because the power of attorney gave her the right to take title to the

funds. However, the appellate court held, based on Prob. Code §§ 7000 and 7001, because Decedent was deceased on April 7, 2006, Decedent's estate owned the account, subject to administration. Caregiver was charged with theft *from the estate*, not from Decedent. Thus, while the Wells Fargo power of attorney gave Caregiver the ability to access funds, the owner of the account did not authorize her to do so on April 7, 2006. In other words, it was the estate, only with consent of the beneficiaries, that had the right to empower Caregiver to take the funds on April 7, 2006. As a result, the taking was trespassory and the conviction of grand theft by larceny was upheld.

Comment: As the Probate Code allows for express provisions in a power of attorney to override extinction of the power at death, attorneys need to be wary (and warn clients) that banks' forms granting such powers may not provide for automatic revocation of the power at death. The issue of notice becomes a problem, because the bank will not release records without permission from an attorney-in-fact. When the attorney-in-fact is an uncooperative or unscrupulous party, the attorney (or his or her executor or trustee client) may not be able to discover which branch must be notified of the decedent's death. Probate Code § 4308(a)(1) might be interpreted to include notice to an officer at a bank's headquarters, depending on what is meant by "home office." Also, an officer, based on general corporate law, would presumably be an "employee with responsibility to act on the information." The case did not reach this issue, but notice to an officer at a bank's headquarters may be effective and may be the best option available for attorneys who are unable to determine the actual branch where a power of attorney was executed.

Beneficiaries Awarded More Than \$65 Million in Damages Not Required to Trace to Obtain Disgorgement of Profits Made by Trustee Through Breach of Trust

UZYEL v. KADISHA (2010) 188 Cal. App. 4th 866, 116 Cal. Rptr. 3d 244 [Filed September 22, 2010]. California Supreme Court denied review on December 15, 2010.

Short Summary: Settlor's family friend, a venture capitalist, served as Trustee of Settlor's trusts. The trial court characterized Trustee's conduct as trustee as egregious, stating that "he acted in bad faith and in total derogation of his fiduciary duties," found him liable to the beneficiaries for numerous breaches of trust, and awarded the beneficiaries over \$65 million in damages. The appellate court increased the award of damages and held that (1) tracing is not required for the disgorgement of profits made by a trustee through the breach of trust under Prob. Code § 16440(a)(2) and (2) the fact that an act is consistent with or even compelled by the duty of prudent investing does not excuse a trustee from liability for breach of the duty of loyalty.

Facts: In 1988, as resolution of a dispute over control of foreign assets, Settlor created two irrevocable trusts. A family friend served as Trustee of both trusts. Settlor's Daughters are beneficiaries of Trust 1 and Settlor is the sole beneficiary of Trust 2. The foreign assets were split between the two trusts and Settlor conveyed her personal residence and other assets to Trust 2.

From 1988 to 2000, Trustee committed numerous breaches of trust, including securing loans against trust assets for Trustee's personal use and misappropriating trust assets for acquisition of stock. Trustee entered numerous transactions involving the purchase and sale of a company's stock and loans to actual and non-existent people on behalf of the trust. Trustee also failed to diversify trust assets beyond one company's stock, the price of which fluctuated greatly over the course of the investment. Further, to facilitate his breaches, Trustee failed to provide accurate accountings of trust assets. When Trustee refused to make requested distributions from the trust, Settlor and Daughters ("Beneficiaries") brought actions for breach of trust against Trustee.

Issue: Whether the trial court erred in its final determination of damages for breach of trust.

Trial Court Holding: The Los Angeles County Superior Court held that Trustee was liable for over \$59 million compensatory damages, disgorgement of profits, and prejudgment interest, plus \$5 million in punitive damages. Later, the court awarded \$15 million in attorney fees. Both parties appealed.

Appellate Court Holding: The Second District Court of Appeal affirmed in part and reversed in part, holding that (1) tracing is not required for disgorgement of profits made by the trustee "through the breach of trust" under Prob. Code §16440(a)(2), (2) the fact that an act is consistent with or even compelled by the duty of prudent investing does not excuse a trustee from liability for breach of the duty of loyalty, (3) an investment loss resulting from a breach of trust should be offset against a profit resulting from a breach of trust only if the breaches were not separate and distinct, and (4) the award of attorney's fees was unauthorized because Trustee had reasonable cause to oppose the contest of his account.

Appellate Court Rationale: First, the appellate court upheld both trial court decisions with respect to disgorgement of profits, the first awarding damages for disgorgement of \$15.8 million in profits Trustee made on one stock purchase, and the second refusing to award damages for disgorgement of profits Trustee made on other stock acquired in settlement of a dispute. The court concluded that tracing is not required to support an award of disgorgement of profits relating to breach of trust under Prob. Code §16440(a)(2). Although unable to actually trace the funds or show but-for causation, Beneficiaries established a "close connection" between the trust funds and the stock purchase, thus that award of disgorgement of profits was proper. On the other hand, with respect to the stock acquired in settlement of a dispute, the appellate court found that any connection between breach of trust and the profits made by Trustee was too attenuated to justify the disgorgement of profits.

Second, the appellate court upheld the trial court award \$35 million in lost profits to Beneficiaries as a result of Trustee's sale of 37,500 shares of stock in May 1992 for \$801,000 solely for his own benefit. The amount of the award was determined by the value of those shares of stock upon termination of the trust in 2000 less the 1992 sale price of the stock. On appeal, Trustee argued that the stock was an inappropriate investment for the trust, so he had a duty to sell the shares and cannot be held liable for discharging that duty with an improper motive. The appellate court reasoned that to allow a trustee to attempt to justify a breach of the duty of loyalty by showing that the transaction

was consistent with, or even compelled by, the duty to invest prudently would seriously undermine the duty of loyalty and impair its deterrent value. Accordingly, the court concluded that the fact that the sale might have been in the best interests of the trust, or even compelled by the duty to invest prudently does not excuse Trustee from liability for his breach of the duty of loyalty.

Third, the appellate court held that an investment loss resulting from a breach of trust may be offset against a profit resulting from breach of trust only if the breaches are not separate and distinct. Here, the court found that the breaches at issue were so separate and distinct that the breaches did not merge and Trustee is liable for the depreciation in value of the trust assets resulting from the later breach.

Lastly, the appellate court reversed the trial court award to Beneficiaries for attorney fees under § 17211(b), explaining that the statute requires the court to determine that the trustee's opposition to the contest was "without reasonable cause and in bad faith." The court stated that the question here is the meaning of "reasonable cause" with reference to the defense, rather than the prosecution, of a proceeding. The court explained that reasonable cause to oppose a contest of an account requires an objectively reasonable belief, based on the facts then known to the trustee, either that the claims are legally or factually unfounded or that the petitioner is not entitled to the requested remedies. The court reasoned that, conversely, there would be no reasonable cause to oppose a contest of an account *only if no* reasonable attorney would have believed that the opposition had *any* merit. However, here, Trustee's successful opposition to several substantial claims in the trial court shows that he had reasonable cause to oppose them. Moreover, the claims on which Trustee did not avoid liability presented questions concerning the existence of liability, measure of damages, or amount of disgorgement that were at least arguable. Thus, the court concluded that Trustee had reasonable cause to defend against Beneficiaries' claims and that Beneficiaries are not entitled to an award of attorney fees under § 17211(b).

Comment: There are two important lessons to take away from this case, one for the fiduciary and the attorney representing the fiduciary, the other for the attorney representing the beneficiaries. With respect to the fiduciary, if the fiduciary engages in self-dealing and breaches the duty of loyalty, damages based on disgorgement of profits made by the fiduciary and on lost profits that the fiduciary failed to make for the beneficiaries can be enormous and those damages often cannot be offset by gains that the fiduciary makes for the beneficiaries. Further, even if a fiduciary is compelled by the duty to diversify to sell an asset, if the sale personally benefits the fiduciary, beneficiaries can recover lost profits that they could have made had the fiduciary retained the asset.

With respect to the attorney representing the beneficiaries, this case of egregious abuses by the trustee sets the bar to being awarded attorney fees for challenging a trustee's account very high. The challenger has to show that *no* reasonable attorney would have believed that the trustee's opposition had *any* merit. Therefore, it is important to have a fee agreement that ensures that the attorney will be paid for his or her legal services even if the court does not award attorney fees, no matter how egregious the wrongdoing by a trustee.

Merger Doctrine Does Not Apply Where Trust Expressly Provides for a Contingent Beneficiary in the Event of Trustee/Sole Beneficiary's Death

WEINBERGER v. MORRIS (2010) 188 Cal. App. 4th 1016, 115 Cal. Rptr. 3d 860 [Filed September 24, 2010]

Short Summary: Settlor's trust provides that upon Settlor's death, the trustee, Settlor's Daughter, is to distribute Settlor's personal effects per Settlor's written instructions and hold, administer, and distribute all other trust assets for the benefit of Daughter. The trust specifically disinherits Settlor's Son and states that if Daughter should die prior to receiving full distribution, the undistributed share shall be distributed for the benefit of Daughter's Fiancé. Daughter died prior to distributing all of the trust assets to herself. The court held that the merger doctrine does not apply because the trust vests discretion in the trustee as to the timing of distributions and expressly provides for a contingent beneficiary, thus the undistributed trust estate passed to Fiancé on Daughter's death.

Facts: Settlor had two children, Daughter and Son. In 1996, Settlor executed a trust and a quitclaim deed transferring her real property into the trust. The trust directed that Settlor was to act as the initial trustee followed by Daughter and then Fiancé. The trust instrument provided that upon Settlor's death, the trustee should pay certain expenses, distribute Settlor's personal effects in accordance with Settlor's written directions, and then distribute the remainder to Daughter. The trust further stated that if Daughter should die prior to receiving full distribution, the undistributed share shall be held, administered, and distributed for the benefit of Fiancé. Until final distribution, the trustee was to pay or apply for the benefit of the beneficiary, all or part of the net income plus principal from the beneficiary's share for the beneficiary's health, support, maintenance, and education. The trust indicated that Son had been intentionally omitted. Settlor died in 1997. Daughter took over as trustee and recorded an affidavit - death of trustee/trustor in connection with the real property. Daughter never executed any documents to transfer the real property out of the trust to herself as a beneficiary. Daughter died in 2002. In 2005, Fiancé recorded an affidavit - death of trustee disclosing that Daughter had died. At the same time, he executed a quitclaim deed transferring the real property out of the trust to himself. Son filed an action against Fiancé, alleging that the property in the trust had passed to Daughter upon Settlor's death and when Daughter died, the property passed to Son as the heir of Daughter.

Issue: Whether the sole primary beneficiary's death prior to final distribution caused the sole contingent beneficiary to become the sole beneficiary of the trust, entitling the contingent beneficiary to receive all undistributed trust assets.

Trial Court Holding: The Los Angeles County Superior Court held that Fiancé, the contingent remainder beneficiary, is the beneficiary of the trust and is entitled to receive all undistributed trust assets.

Appellate Court Holding: The Fourth District Court of Appeal affirmed the ruling, holding that Fiancé is the beneficiary of the trust.

Appellate Court Rationale: The merger doctrine states that when the sole trustee of the trust and the sole beneficiary of the trust become one and the same person, the duties of the person, in his or her role as trustee, and the interests of the person, in his or her role as beneficiary, merge, meaning that the trust terminates as a matter of law and the trust's assets irrevocably vest in the beneficiary. The determination of whether the duties of the trustee and the interests of a beneficiary have become united in a single person is a question of law resolved by construction of the trust instrument. The appellate court saw no language in the trust instrument which indicated it imposed upon the trustee an affirmative duty to make a prompt distribution of the trust assets to Daughter upon Settlor's death. The trust contemplated ongoing management until final distribution at the trustee's discretion to a then-living beneficiary and the trust included express language governing the contingency of the death of Daughter prior to distribution of the trust assets to her. For these reasons, the court found that the merger doctrine did not apply and since the trust estate had not been distributed to Daughter prior to her death, the property passed to Fiancé as the contingent remainder beneficiary.

Comment: In this case, apparently Daughter died intestate. Thus, Daughter's delay in distributing the trust assets to herself as the sole beneficiary resulted in an outcome that was likely to have been acceptable to her, ultimate distribution to Fiancé. However, practitioners should be cautious in including similar language when drafting a trust as this could create an untenable situation for the trustee. If the primary beneficiary would prefer that in the event of his or her death distribution be made to someone other than the contingent remainder beneficiary, the primary beneficiary may put undue pressure on the trustee to distribute the trust estate immediately to avoid any possibility of ultimate distribution to the contingent remainder beneficiary.

Disposition of Totten Trust Savings Account on Settlor's Death Is Controlled by Disposition Provided in Subsequently Executed Living Trust, Not by Totten Trust Account Beneficiary Designation

ARAIZA v. YOUNKIN (2010) 188 Cal. App. 4th 1120, 116 Cal. Rptr. 3d 315 [Filed September 29, 2010]

Short Summary: The court held that the survivorship rights of a beneficiary of a Totten trust savings account can be terminated by a subsequently executed living trust naming a different beneficiary for the same account. Further, by raising the issue for the first time on appeal, the beneficiary named in the account beneficiary designation form forfeited appellate review of whether the gift of the savings account to the mother of the drafting attorney was invalid under Prob. Code § 21350 as a transfer to a disqualified transferee.

Facts: In 2001, Settlor opened a Totten trust savings account at Bank of America, naming Stepdaughter as the beneficiary of the Savings Account. In August 2005, Settlor established a Living Trust which was drafted by Attorney. The Living Trust provided that all property listed on the attached Schedule was trust property. The Schedule listed “savings accounts” as among the categories of personal property to be delivered to the Living Trust. The Living Trust further provided that the Bank of America savings account (“Savings Account”) was to be distributed to Attorney’s Mother upon Settlor’s death. However, Settlor never changed the beneficiary designation of the Savings Account to Attorney’s Mother.

After Settlor died, Attorney became successor trustee of the Living Trust and petitioned the court for an order authorizing him to convey the Savings Account to Attorney’s Mother per the Living Trust instrument. Stepdaughter objected on the sole ground that she was the owner of the Savings Account because Settlor never changed the beneficiary designation on the account.

After Attorney had filed his reply to Stepdaughter’s objection, Stepdaughter filed a supplemental declaration attaching discovery responses in which Attorney admitted that he drafted the Living Trust and that Attorney’s Mother is his mother. The declaration did not cite § 21350 or explain the relevance of Attorney’s admissions. Stepdaughter never filed points and authorities analyzing the statutes or addressing Attorney’s presumptive disqualification. Attorney presented no evidence or argument rebutting the presumption. Near the end of the hearing on Stepdaughter’s objections, her counsel asserted that he had raised by inference “that this was a trust that was drafted by the son of the primary beneficiary of the trust.” The trial court order did not mention § 21350. Stepdaughter did not file a motion to reconsider or otherwise attempt to secure a ruling on the § 21350 issue.

Issue: (1) Whether the designation of a beneficiary of a Totten trust account in a living trust created subsequent to the creation of the Totten trust account is clear and convincing evidence of an intent to name a different beneficiary than is named on the Totten trust account form. (2) Whether Stepdaughter forfeited the appellate review of whether the gift to Attorney’s Mother was invalid as a transfer to a disqualified transferee.

Trial Court Holding: The Ventura County Superior Court held that the Living Trust changed the beneficiary of the Savings Account from Stepdaughter to Attorney’s Mother.

Appellate Court Holding: The Second District Court of Appeal affirmed, holding that the Living Trust expressly stating Settlor’s intention to give the Savings Account to Attorney’s Mother was clear and convincing evidence that Settlor had a different intent for the Savings Account at the time of her death.

Appellate Court Rationale: A Totten trust is one form of a “multiple-party account” payable to the beneficiary on the depositor’s death unless the depositor has revoked the totten trust during the depositor’s lifetime. Probate Code § 5302 describes the treatment of funds remaining in a multiple-party account on the death of one of the parties. Where, as here, the multiple-party account is a Totten trust, § 5302(c)(2) provides that on the death of the sole trustee any sums remaining on

deposit belong to the person named as beneficiary, “unless there is clear and convincing evidence of a different intent.” Probate Code § 5303 provides that once established, the terms of a multiple-party account can be changed *only by* any one of four enumerated methods, none of which were used by Settlor. The court rejected Stepdaughter’s contention that she remained the sole beneficiary of the Savings Account because Settlor did not use one of the four methods listed in § 5303 to change the beneficiary, explaining that her narrow reading of the statute fails to harmonize it with § 5302. The court found that the Living Trust’s express statement that Settlor intended to give the Savings Account to Attorney’s Mother was the clear and convincing evidence required by § 5302(c) that Settlor had a different intent for the Savings Account at the time of her death. Although § 5302(e) provides that rights of survivorship under a Totten trust account beneficiary designation (or a joint account providing for right of survivorship) cannot be changed by will, the court reasoned that because the change was made by a living trust rather than by a will, it is not invalidated by § 5302(e).

Finally, the court rejected Stepdaughter’s argument that Attorney’s Mother is a disqualified transferee under Prob. Code § 21350. The court reasoned that Stepdaughter provided the trial court with no analysis of the applicable statutes and no argument on the question of whether Attorney’s Mother is a disqualified transferee. She raised the § 21350 issue only “by inference,” after Attorney had already filed his reply to her written objection. This untimely, oblique reference to the statute gave Attorney no opportunity to rebut the statutory presumption of disqualification. Compounding the difficulty, Stepdaughter did not demand a ruling on the issue from the trial court. A party who fails to alert the trial court to an issue that has been left unresolved forfeits the right to raise that issue on appeal.

Comment: This case is likely to cause problems for Trust and Estate practitioners and increase litigation over ownership of joint accounts and Totten trust accounts. There are three important points to take away from this case:

(1) The rule that clear and convincing evidence of a different intent can change the rights of survivorship for a Totten trust account also applies to joint tenancy accounts. Probate Code § 5302(a) provides that “sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent *unless there is clear and convincing evidence of a different intent.*” (Emphasis added.) The italicized language is identical to the § 5302(c)(2) language relied upon by the court to find that disposition of the account by a living trust was the clear and convincing evidence needed to overcome the beneficiary designation. Therefore, it is now possible to rely on *Araiza* for the proposition that if a settlor has named a different beneficiary of a joint bank account in the settlor’s living trust executed subsequent to opening the bank account, the living trust (rather than the ownership of the joint account) controls the disposition of the joint bank account on the settlor’s death. Note that in *Araiza*, Settlor did not merely list the category of “savings accounts” on the Schedule: in the trust document, Settlor specifically devised the Bank of America savings account to Attorney’s Mother. This is contrary to most practitioners’ prior understanding that a joint tenancy account passes to the joint owner on

death by operation of law and any gift of the joint tenancy account in a living trust has no impact on the disposition of the account.

(2) The argument can be made that the legislature did not intend the *Araiza* result when it enacted § 5302 in 1990. This change to the law came about as the result of a California Law Revision Commission (“CLRC”) study and recommendation. The CLRC Recommendation Relating to Multiple-Party Accounts in Financial Institutions dated February 1989 explains that the California Multiple-Party Accounts Law (“CAM-PAL”) was enacted in 1983 and improved and clarified the law governing rights between parties to a multiple-party account but that further revisions to the statute are needed. Ultimately the former CAM-PAL statute was repealed and a revised CAM-PAL statute was enacted. Probate Code § 5302(e), which says that a right of survivorship arising from the a joint account with right of survivorship cannot be changed by will, was not a part of the former CAM-PAL statute. It was newly enacted in 1990. The February 1989 CLRC Recommendation gives the following explanation for the revisions to the survivorship provisions in the statute: “CAM-PAL also strengthens the right of survivorship by requiring clear and convincing evidence of a contrary intent, and by providing that survivorship cannot be changed or defeated by a party’s will. *Most people who use a joint account or Totten trust account want the survivor or survivors to have all balances remaining at death. CAM-PAL gives effect to this intent* and minimizes the likelihood that litigation will be brought to defeat the right of survivorship.” (Emphasis added.) Although the statute says only that the right of survivorship cannot be changed by will and does not mention revocable trusts, it seems that based on the italicized explanation, the Legislature probably did not intend for testamentary dispositions in a revocable trust to defeat the survivorship provisions of joint tenancy accounts or Totten trust accounts.

(3) When challenging a lifetime or testamentary gift it is essential for the attorney to evaluate whether an argument can be made that the transfer is invalid as a transfer to a disqualified transferee. As can be seen in *Araiza*, it is critical that points and authorities on this argument be made in the pleadings, preferably in the initial objections, or the challenger may forfeit the right to later make this argument. Ironically, *Araiza* was filed on September 29, 2010 and the following day, September 30, 2010, new legislation was enacted that became effective on January 1, 2011 and is applicable to all instruments that become irrevocable on or after January 1, 2011. Probate Code § 21351 has now been replaced by Prob. Code § 21380 which provides the presumption that a donative transfer to the drafting attorney (or any person who is related by blood or affinity, within the third degree, to the drafting attorney) was the product of fraud or undue influence may no longer be rebutted by clear and convincing evidence that it was not. Thus, if Settlor had died in 2011 (instead of in 2009) Attorney would *not* have been able to argue that he could have rebutted the presumption by clear and convincing evidence.

Settlement Agreement Is Enforced Under CCP § 664.6 Where Attorney Who Allegedly Unduly Influenced Client to Sign Agreement Is Not a Party to the Agreement

CHAN v. LUND (2010) 188 Cal. App. 4th 1159, 116 Cal. Rptr. 3d 122 [Filed September 29, 2010] California Supreme Court denied review on January 12, 2011. U. S. Supreme Court denied petition for writ of certiorari on June 20, 2011.

Short Summary: A mediation settlement agreement under Code of Civ. Proc. (“CCP”) § 664.6 was held not to be void or rescindable where Plaintiff alleged that he signed the agreement under economic duress, undue influence and fraud on the part of his attorney. In order to rescind or avoid a contract, the contracting party must have been directly involved in the wrongdoing, or must have connived with the offending party.

Facts: During mediation, Neighbors settled a five-year-old dispute over tree damage on the date trial was scheduled to begin. The parties reduced the settlement to a writing. Shortly thereafter, Plaintiff discharged Former Attorney, hired New Attorney, and claimed that his consent to the purported settlement was obtained through economic duress, undue influence, and fraud employed by Former Attorney. Plaintiff alleged the following specific acts by Former Attorney as constituting the prohibited conduct: (1) threatening to withdraw on the eve of trial if Plaintiff did not agree to further mediation, (2) failing to advise Plaintiff that court approval would be needed for such a withdrawal and that ethical rules prohibited such a withdrawal, and (3) offering to discount his fees by \$10,000 in an effort to induce Plaintiff to accept the settlement agreement. The court granted Defendants’ motions to enforce settlement under CCP § 664.6, and Plaintiff appealed from the judgment entered thereon.

On appeal, Plaintiff asserted that the settlement agreement was void due to the alleged coercion and that statutes prohibiting Mediator’s compelled testimony violated Plaintiff’s due process rights under the California and U. S. Constitutions because Mediator’s testimony would have corroborated Plaintiff’s averments.

Issue: Whether, assuming Plaintiff’s assertions are factually accurate, Plaintiff is entitled to rescind or avoid the settlement agreement he admittedly signed and thereby prevent enforcement of the settlement.

Trial Court Holding: The Santa Clara County Superior Court held that Plaintiff was not legally entitled to rescind or avoid the settlement agreement, even assuming all facts alleged were true.

Appellate Court Holding: The Sixth District Court of Appeal affirmed, holding that even if Plaintiff’s claims of extortion, duress and undue influence were true, Plaintiff had no legal grounds for rescission because Defendants neither knew of nor connived with the Former Attorney’s alleged misconduct.

Appellate Court Rationale: First, with regard to Plaintiff's extortion claim, the appellate court reasoned that, based on the facts, Former Attorney's threat of withdrawal was not the "operating or controlling cause compelling" Plaintiff's assent to the settlement agreement. As to Plaintiff's claim that Defendants participated in extortion, the court held that Defendants did not "knowingly" receive stolen property.

Second, because Defendants neither participated in the alleged duress nor connived with Former Attorney, nor were "jointly interested" with Former Attorney, they could not be held to have participated in economic duress. In fact, the evidence was that Defendants did not even know of the alleged duress. Thus, Plaintiff had no right of rescission as to Defendants under a theory of economic duress. The same reasoning applied to claims that Former Attorney exercised undue influence and fraud in obtaining assent to the settlement agreement.

Third, the court held that the offer to discount fees did not constitute a "business transaction" under Rule 3-300 because Former Attorney neither acquired an interest in Plaintiff's property nor obtained an interest in Plaintiff's settlement proceeds.

Lastly, the court did not rule on the constitutional issue because the trial court made no ruling on the admissibility of Mediator's testimony upon which the appellate court could apply constitutional standards.

Comment: After reaching the settlement on the eve of trial, blaming his attorney, Plaintiff fought enforcement of the settlement in the trial court. After losing in the trial court, he fought enforcement in the appellate court. After losing in the appellate court, he filed a petition for review with the California Supreme Court. After the California Supreme Court denied review, he filed a petition for certiorari with the U.S. Supreme Court. Finally, the U.S. Supreme Court denied certiorari. The lesson here may be for all of us to think about more carefully screening our clients before we enter into engagements in the hopes that we can avoid clients like this.

Distributions to Law Firm Partner Are Community Property

MARRIAGE OF SIVYER-FOLEY & FOLEY (2010) 189 Cal. App. 4th 521, 117 Cal. Rptr. 3d 162 [Filed October 21, 2010]

Short Summary: A law firm partner's right to receive distributions from the law firm was based on the partner's performance during the prior year, most of which had elapsed before he separated from his wife. Even though the law firm's obligation to pay such distributions did not ripen until the end of the year, after the date of the partner's separation from his wife, a portion of such distributions are community property.

Facts: Husband and Wife separated on November 7, 2003 and Wife filed a petition for legal separation on January 20, 2004. Husband was an equity partner at Law Firm. During each year,

Husband received semimonthly draws against his share of Law Firm's future profits, calculated as 55% of his income for the year based on budget projections. Each year, the remainder of a partner's distribution was paid in three installments: the first in December, the second around the 10th of January, and the third during the last week of January. Law Firm's policy and planning committee determines partnership compensation at the end of the calendar year. If a partner leaves before the determination of the prior year's compensation, pursuant to Law Firm's partnership agreement, the partner forfeits the right to receive any amounts in excess of the bimonthly draws that the partner has already received. Husband received distributions from Law Firm in January 2004. Husband argued that these distributions of partnership profits were his separate property and Wife argued that they were community property.

Issue: Whether Husband's January 2004 partnership distributions were separate property or community property.

Trial Court Holding: The Los Angeles County Superior Court held that Husband's January 2004 partnership distributions were his separate property because they occurred after the date of the parties' separation.

Appellate Court Holding: The Second District Court of Appeal reversed in part and remanded to the trial court, holding that a portion of the January 2004 partnership distribution were community property.

Appellate Court Rationale: The appellate court found that the community's right to a portion of the 2004 partnership distributions accrued prior to separation. Husband's efforts on behalf of the community during the year garnered him the right to receive his share of the partnership profits at the time the firm chose to calculate them. His right to receive partnership profits was not based on the firm's beneficence at the time of their distribution postseparation, but rather his performance on behalf of the firm during the entire previous year. The court explained that its view is consistent with *Marriage of Brown* (1976) 15 Cal. 3d 838, where the court found that the right to retirement benefits represents a property interest, and, to the extent that such a right derives from employment during marriage before separation, it is a community asset.

The court explained that the fact that Husband's right to receive the firm's profits could be defeated if Husband withdrew from the partnership before the time the firm actually calculated and distributed them does not affect its analysis. The vesting of the community property interest is distinct from whether Husband's contractual right to receive his partnership distributions had ripened. The community property interest in part of the distributions vested during the period before the parties' separation in November 2003.

Comment: In reviewing with clients the characterization of assets, keep in mind that, absent a valid agreement otherwise, employment income and employment related benefits accrued during the marriage are community property, even if such benefits are actually paid out after the spouses separate.

Trial Court Erred in Dismissing Marital Dissolution Proceeding Maintained by Conservatee Through Her Conservator

MARRIAGE OF STRACZYNSKI (2010) 189 Cal. App. 4th 531, 116 Cal. Rptr. 3d 938 [Filed October 22, 2010]

Short Summary: The trial court found that it would be in the best interest of conserved Wife to dismiss the marital dissolution action she brought (and later maintained through her conservator) against her Husband. The appellate court held that the trial court erred by dismissing the action *sua sponte* without determining whether Wife had the necessary capacity to express an intent to obtain a dissolution of her marriage on account of irreconcilable differences.

Facts: In August 2005, Wife filed a petition in family court for a marital dissolution from Husband on account of irreconcilable differences. At some point no later than June 2006, the probate court appointed a conservator for Wife. The dissolution action in family court proceeded concurrently with the conservatorship case in probate court. In June 2007, the probate court found that Wife was no longer competent to be in an attorney-client relationship and appointed a guardian ad litem (“GAL”) for Wife. In April 2008, a successor conservator of Wife’s estate (“Conservator”) was appointed, and the probate court specified that Conservator “shall have standing to litigate the Family Court matters on behalf of conservatee [Wife].”

In December 2008, Conservator filed an application in the dissolution proceeding requesting the dissolution proceeding – which had been pending since 2005 – be given priority for a trial date. Husband opposed the application and filed a motion to dismiss the dissolution proceeding on the ground that he and Wife had reconciled. Husband filed his own declaration in support of the motion to dismiss as well as a declaration by a longtime friend of Husband and Wife and a declaration by the owner of the care facility where Wife resided, all stating that Wife knew Husband was her husband, Wife showed affection and love towards Husband, and Wife desired to be Husband’s wife. Conservator filed a response taking the position that there was no legal foundation and no evidentiary basis for supporting Husband’s request to dismiss the dissolution action.

Issue: Whether the trial court erred in issuing a *sua sponte* dismissal of the dissolution proceeding.

Trial Court Holding: The San Diego County Superior Court denied Husband’s motion, holding that it could not make a finding that Husband and Wife had reconciled. After denying Husband’s motion, the trial court *sua sponte* dismissed the dissolution action, without providing any notice to the parties. The trial court concluded that the action should be dismissed because (1) it was not in Wife’s best interest to divorce Husband; (2) the trial court did not “think there’s going to be any evidence presented” allowing it to find irreconcilable differences; and (3) the trial court believed it remembered case law stating that a court “can’t give a divorce if there’s a conservator.”

Appellate Court Holding: The Fourth District Court of Appeal reversed and remanded, holding that the trial court erred in dismissing the dissolution action *sua sponte*, without notice to the parties and without a proper legal or evidentiary basis.

Appellate Court Rationale: The constitutional guarantee of due process requires that a court give notice to a party and an opportunity to be heard before *sua sponte* dismissing an action. The proper procedure for the trial court to have used in ordering a *sua sponte* dismissal of the dissolution action would have been the issuance of an order to show cause and the setting of a hearing to consider a dismissal on the specified grounds.

The trial court's next error was to dismiss the dissolution action without a proper legal basis, as none of the three grounds the trial court gave were proper grounds for dismissing the action. As for the first ground, that a divorce would not be in Wife's best financial and personal interests, the trial court cited no legal authority that would permit a court to dismiss a dissolution action on the ground that a divorce would not be in the petitioning party's best interest and the appellate court was aware of none.

As for the second ground, that the trial court did not "think there's going to be any evidence presented" allowing it to find irreconcilable differences, such a finding is properly made as part of an adjudication terminating marital status. The trial court admittedly was predicting what the evidence was "going to be" at a future trial. Therefore, the trial court impermissibly prejudged, without having the evidence before it, whether it would be able to find irreconcilable differences.

As for the third ground, that the trial court remembered case law stating that a court "can't give a divorce if there's a conservator," the appellate court explained that the California Supreme Court's decision in *Marriage of Higgason* is the relevant authority. *Higgason* established that a spouse under a conservatorship may bring a dissolution action through a guardian ad litem "provided it is established that the spouse is capable of exercising a judgment, and expressing a wish, that the marriage be dissolved on account of irreconcilable differences and has done so." Although *Higgason* addresses whether a conservatee may *bring* a petition for dissolution, it does not expressly address the circumstances under which a conservatee may *maintain* a dissolution action when the conservatee's mental condition changes during the proceedings. The appellate court extended the holding in *Higgason* to actions in which a conservator is *maintaining* a dissolution action. Therefore, the proper procedure would have been for the trial court to make a finding as to whether, at present, Wife was "capable of exercising a judgment, and expressing a wish, that the marriage be dissolved on account of irreconcilable differences and has done so."

Comment: A court may not dismiss a marital dissolution action based solely on the fact that one of the spouses is subject to a conservatorship. If a court finds that a conservatee is "capable of exercising a judgment, and expressing a wish, that the marriage be dissolved on account of irreconcilable differences and has done so" then the conservatee may (through his or her conservator or guardian ad litem) bring or maintain a marital dissolution action.

Requirements for Standing to Bring an Elder Abuse Action on Behalf of a Decedent

LICKTER v. LICKTER (2010) 189 Cal. App. 4th 712, 118 Cal. Rptr. 3d 123 [Filed October 27, 2010]. California Supreme Court denied review on January 26, 2011.

Short Summary: Despite the fact that under the terms of Decedent's trust, Decedent's Grandsons were each beneficiaries of \$10,000 gifts and contingent beneficiaries of the residue, Grandsons lacked standing to bring an elder abuse action against the Son and Granddaughters of Decedent because (1) there were sufficient trust assets to pay each Grandson the \$10,000 to which he was entitled even if no recovery were had in the elder abuse action and (2) in order to be entitled to take the residue of the trust, Son and both Granddaughters would have to be deemed to have predeceased Decedent; there was no triable issue of fact as to whether one Granddaughter was liable for elder abuse, thus she could not be deemed to have predeceased Decedent. Therefore, Grandsons were not interested persons under Prob. Code § 48 and lacked standing under Welf. & Inst. Code § 15657.3(d)(1)(C) to pursue an elder abuse action.

Facts: Decedent died in 2007 at the age of 91. Following her death, Decedent's Son took over as trustee of her living trust. The terms of the trust provided for \$10,000 to be distributed to each of Decedent's Grandsons, with the entire residue to be distributed to Son. If Son were to predecease Decedent, the residue would be distributed to Granddaughters (Son's children). If Granddaughters also predeceased Decedent, the residue would be distributed to Grandsons. Therefore, the residue of Decedent's trust would be distributed to Grandsons *only if* Son and both Granddaughters were deemed to have died before Decedent.

Following Decedent's death, Grandsons filed an elder abuse action on behalf of Decedent against Son, Granddaughters and Granddaughter's Mother ("Defendants"). Grandsons alleged standing under Welf. & Inst. Code § 15657.3, as well as by seeking judgment under Prob. Code § 259 that Defendants should be deemed to have predeceased Decedent. Defendants moved for summary judgment on the ground that Grandsons lacked standing, arguing that § 15657.3 gives standing to three types of persons: (1) an intestate heir whose interest will be affected by the action, (2) the decedent's successor in interest under Code of Civ. Proc. § 377.11, or (3) an interested person as defined by Prob. Code § 48.

Issue: Whether the trial court properly granted Defendant's motion for summary judgment because Grandsons lacked standing to pursue an elder abuse action.

Trial Court Holding: The Nevada County Superior Court granted summary judgment to Defendant, finding that Grandsons would have standing only if Son and Granddaughters were deemed to have predeceased Decedent under Prob. Code § 259, but found there was no triable issue of fact as to whether Granddaughter was liable for elder abuse and, accordingly, she could not be deemed to have predeceased Grandsons.

Appellate Court Holding: The Third District Court of Appeal affirmed the judgment of the trial court, granting Defendants' motion for summary judgment.

Appellate Court Rationale: Welfare and Institutions Code § 15657.3(d)(1) provides that after the death of the elder or dependent adult, the right to commence or maintain an elder abuse action shall pass to the personal representative of the decedent. Welfare and Institutions Code § 15657.3(d)(2) provides that if the personal representative refuses to commence an action or if the personal representative's family is alleged to have committed elder abuse, the persons described in subparagraphs (A), (B), and (C) of paragraph (1) shall have standing to commence or maintain an action for elder abuse.

First, the court held that Grandsons were not entitled to standing under Welf. & Inst. Code § 15657.3(d)(1)(A) as intestate heirs. If Son and Granddaughters were deemed to predecease Decedent, the residue of the trust estate would pass to Grandsons by the terms of the trust, not by intestate succession.

Second, the court found that even if Grandsons are beneficiaries of the trust, whether or not they are interested persons under Prob. Code § 48 depends on whether they have an interest that can be impaired, defeated, or benefitted by the proceeding at issue. Grandsons' entitlement to receive \$10,000 from the trust qualified them as beneficiaries, but it was *not* a property right "which might be affected by this elder abuse action," because there were sufficient trust assets to pay each Grandson the \$10,000 to which he was entitled, regardless of whether any recovery was had in the elder abuse action. Therefore, because each Grandson's interest as a beneficiary of a \$10,000 gift was not one that could have been affected by the action, this gift did not make them interested persons within the meaning of Prob. Code § 48 and did not give rise to standing under § 15657.3(d)(1)(C).

Third, the court found that Grandsons would have standing under § 15657.3(d)(1)(C) as beneficiaries of the trust residue only if Son and both Granddaughters were deemed to have predeceased Decedent under Prob. Code § 259. Section 259 requires clear and convincing evidence that the defendants (1) abused the decedent, (2) acted in bad faith, and (3) were reckless, oppressive, fraudulent or malicious. Since Grandsons did not present a triable issue of fact as to whether one Granddaughter acted in bad faith or engaged in reckless, malicious, oppressive or fraudulent conduct, she could not be deemed to have predeceased Decedent. Therefore, Grandsons could not have an interest in the trust residue, so again they were not interested persons within the meaning of Prob. Code § 48 and do not have standing under § 15657.3(d)(1)(C).

Finally, the court explained that any cause of action Decedent may have had passed to the beneficiary of the residue of the trust upon Decedent's death, so the beneficiary of the trust residue is Decedent's successor in interest under § 15657.3(d)(1)(B). Because, as explained above, Grandsons could not have an interest in the trust residue, they could not obtain standing as Decedent's successors in interest under § 15657.3(d)(1)(B).

Comment: Grandsons had argued that the court's interpretation of the statute was contrary to public policy because it gives a personal representative the ability to terminate a plaintiff's standing to sue for elder abuse by distributing the plaintiff's beneficial interest under a trust or will. The court explained that although distribution of their respective gifts of \$10,000 made Grandsons former trust beneficiaries rather than current beneficiaries, this distribution did *not* terminate their standing to sue for elder abuse. Rather, the trust *never* gave them standing to pursue an elder abuse action because the beneficial interest they had in the trust estate was not one that could have been "affected by" the elder abuse action.

Surviving Spouse Is Liable for Debts of Deceased Spouse to the Extent of the Value of Joint Tenancy Property Owned by the Spouses at the Time of Deceased Spouse's Death

KIRCHER v. KIRCHER (2010) 189 Cal. App. 4th 1105, 117 Cal. Rptr. 3d 254 [Filed November 4, 2010]. California Supreme Court denied review on February 16, 2011.

Short Summary: A marital settlement agreement ("MSA") between Husband and First Wife requires Husband to pay \$2,000 per month for First Wife's support until First Wife's death, even if Husband predeceases First Wife. Husband remarried and transferred several real properties into joint tenancy with right of survivorship with Second Wife. After Husband's death, First Wife sued Second Wife for the support payments required by the MSA. The court held that the property owned in joint tenancy was necessarily either Husband's separate property or community property, therefore Second Wife was personally liable for Husband's debt to First Wife to the extent of the value of the joint tenancy property.

Facts: Pursuant to an MSA, Husband and First Wife agreed that Husband would support First Wife until First Wife's death or until First Wife remarried, even if Husband were to predecease her. Husband married Second Wife in 1998. In the period between Husband's remarriage and his death, Husband transferred title to three pieces of real property to himself and Second Wife as joint tenants. Husband died in January 2005. First Wife filed a creditor's claim for support payments against Husband's estate. Second Wife continued to make support payments to First Wife until April 2008, at which point she ceased making the payments. Thereafter, First Wife filed a complaint against Second Wife personally and in her capacity as the executor of the Husband's will, alleging that Second Wife is personally liable for Husband's debts under Prob. Code §§ 13550 to 13552. Second Wife filed a motion for determination that Prob. Code §§ 13550, et seq. do not apply to joint tenancy property, alleging that First Wife has no right to enforce marital support obligations against joint tenancy property as such property passed to Second Wife free of creditor's claims by operation of law.

Issue: Whether property held in joint tenancy by Husband and Second Wife falls within the scope of § 13551 and therefore Second Wife is liable for Husband's debt to First Wife to the extent of the value of joint tenancy property owned by Husband and Second Wife at the time of Husband's death.

Trial Court Holding: The Marin County Superior Court denied Second Wife's motion and held that Second Wife is personally liable for Husband's debt to First Wife to the extent of the value of the joint tenancy property.

Appellate Court Holding: The First District Court of Appeal affirmed, finding no error in the trial court's legal conclusion that the property held in joint tenancy falls within the ambit of § 13551.

Appellate Court Rationale: The appellate court explained that § 13551 "clearly limits a surviving spouse's personal liability to the fair market value, on the date of the decedent's death, of the surviving and decedent spouse's share of community (and quasi-community) property, as well as the separate property of the decedent spouse." Thus, the question before the court was whether the property held in joint tenancy by Husband and Second Wife falls within the scope of § 13551. The court explained that the fundamental principle underlying the characterization of property held by spouses under California's community property law is that property acquired during marriage in joint form, including joint tenancy, is presumed to be community property unless it meets the statutory definition of separate property. The court stated that the undisputed facts here establish that, during the course of his marriage to Second Wife, Husband granted Second Wife an interest in the subject property, thereby transmuting the subject property from sole ownership to ownership with Second Wife, as joint tenants. The court found that application of the presumptions governing the characterization of property under California's community property law to these facts indicate that the transmutation changed the characterization of the subject property from Husband's separate property into community property, but concluded that it need not decide which specific subdivision of § 13551 the subject property falls within to resolve the issue before it because at the time of Husband's death, the subject property was necessarily either community property or Husband's separate property.

The court next rejected Second Wife's argument that because joint tenancy property passes without aid of administration directly to the surviving spouse, such property is not properly considered in determining the scope of Second Wife's liability for Husband's debts. The court stated that it is not dispositive that the joint tenancy property passed to Second Wife by operation of the right of survivorship; rather, § 13551 broadly encompasses all community property interests held by the spouses, as well as all separate property interests held by the deceased spouse, and imposes personal liability on the surviving spouse up to the fair market value, at the time of the deceased spouse's death, of assets that can be so characterized. The court held that at the time of Husband's death, the property held in joint tenancy by Husband and Second Wife was presumed to be community property subject to rebuttal by Husband that it remained his separate property. The court again explained that, either way, the property at issue falls within the ambit of § 13551.

Next, the court asserted that its conclusion is not at odds with the cases relied upon by Second Wife, which stand for the proposition that a surviving joint tenant takes the property free of any encumbrances placed upon it by the deceased joint tenant. The court noted that in *Tenhet v. Boswell* (1976) 18 Cal.3d 150, for example, the California Supreme Court held that “a joint tenant may, during his lifetime, grant certain rights in the joint property without severing the tenancy. But when such a joint tenant dies his interest dies with him, and any encumbrances placed by him on the property become unenforceable against the surviving joint tenant. ... Any other result would defeat the justifiable expectations of the surviving joint tenant.”

Finally, the court distinguished *Tenhet* because (1) here, Second Wife is not seeking to avoid an encumbrance placed upon any of the properties by Husband while the properties were held in joint tenancy and (2) Husband’s separate indebtedness to First Wife arose before the creation of the joint tenancies between Husband and Second Wife. The court concluded that case law on the question of whether a surviving joint tenant takes a property free of an encumbrance placed upon it by the deceased joint tenant does not speak to the question of whether a surviving spouse may be held personally liable for the debts of the deceased spouse pursuant to the California statutory scheme in Prob. Code §§ 13550 and 13551.

Comment: The result reached by the court may have been the correct result because Husband’s separate indebtedness to First Wife arose before the creation of the joint tenancies between Husband and Second Wife, thus arguably the result did not defeat the justifiable expectations of Second Wife as the surviving joint tenant. Also, the result may have been the correct result if the transfer of the three properties to Husband and Second Wife as joint tenants could have been voidable as a fraudulent transfer. However, the court’s reasoning is disturbing because the court appears to overturn the commonly held understanding of practitioners and commentators that joint tenancy property owned by spouses is not liable for the debts of the deceased spouse after the deceased spouse’s death.

There are several problems with the court’s analysis. First, it applies the Fam. Code § 2581 presumption that property acquired in joint tenancy by a married couple is community property (which is applicable to determination of characterization of marital property upon dissolution of the marriage) to a situation in which (1) the property was not acquired by the couple during marriage, but rather was transferred from husband to husband and wife and (2) the property is being characterized for purposes of death, not for purposes of dissolution. Second, it assumes that property can be owned both as joint tenancy property and community property at the same time, which is contrary to the holding of the California Supreme Court in *Siberell v. Siberell* (1932) 214 Cal. 767, 773 that “from the very nature of the estate, as between husband and wife, a community estate and a joint tenancy cannot exist at the same time in the same property.” Third, it concludes that when Husband executed the deed transferring the property to Husband and Wife as joint tenants, either (1) the deed was not effective to transmute Husband’s separate property thus the entire property remained Husband’s separate property at the time of his death or (2) the property was transmuted to the community property of Husband and Wife. The court does not even consider whether by executing the deed transferring the properties to Husband and Wife as joint tenants, the properties

were transmuted into ½ husband’s separate property and ½ wife’s separate property and therefore Second Wife already owned ½ of the property as her separate property at the time of Husband’s death. Finally, the court reasons that the Legislature intended § 13551 to reach all property, including property held in joint tenancy.

There are numerous references in Matthew Bender practice guides to the conclusion that an advantage of holding property in joint tenancy form is that joint tenancy property may pass to the surviving joint tenant without liability for the deceased joint tenant’s debts. There are also numerous references in CEB practice guides to the conclusion that an advantage of spouses holding property in joint tenancy form is that joint tenancy property may pass to the surviving spouse without liability for the deceased spouse’s debts. For an extensive analysis of legislative history that demonstrates that the Legislature did not intend § 13551 to reach property held in joint tenancy form and further analysis of how this court got it wrong, see 32 CEB Est Plan Rep 86 (December 2010).

For an extensive analysis of whether joint tenancy property is liable for the debts of the deceased joint tenant, see the June 2010 CLRC Background Study of Liability of Nonprobate Transfer for Creditor Claims and Family Protections by Nathaniel Sterling. Mr. Sterling explains that “the majority of joint tenancies are spousal.” He further explains that joint tenancy “is a classic probate evasion device that defeats a decedent’s creditors, both secured and unsecured, based on technicalities of the form of tenure. . . . By protecting a surviving joint tenant from the decedent’s creditors, whether secured or unsecured, the law requires those creditors to recover instead from the decedent’s estate or from other nonprobate transfers, if any. There is no apparent reason the decedent’s other beneficiaries should be required to bear the burden of the decedent’s liabilities to the benefit of the decedent’s joint tenants.” For this reason, Mr. Sterling argues that the California law *should be changed* so that “the decedent’s interest in joint tenancy property is liable for the decedent’s debts on the same basis as any other nonprobate transfer.” It may very well be that California law on this issue should be changed by the *Legislature* in response to the CLRC study that is currently in progress. However, this does not mean that the *appellate court* should be able to make such a change to California law as it appears to have done in this case.

No Extrinsic Evidence Admissible Where Term “Issue” Clearly Defined in Instrument

CITIZENS BANK v. CARRANO (2010) 189 Cal. App. 4th 1200, 117 Cal. Rptr. 3d 119 [Filed November 5, 2010]

Short Summary: Husband’s and Wife’s Son had an out-of-wedlock biological child (“Grandson”) with a woman who was married to another man. Husband’s and Wife’s (collectively, “Settlors”) trust provided that if Son did not survive the surviving spouse the trust estate would be distributed to Son’s issue and defined “issue” to refer to lineal descendants of all degrees, provided that the term “issue” excludes persons adopted into or out of Settlers’ bloodline. The appellate court held that it

was error for the trial court to look to extrinsic evidence in concluding that Grandson was not a beneficiary of the trust. Since Grandson was clearly included in the definition of “issue” as expressed in the trust, he was a trust beneficiary.

Facts: Husband and Wife had only one child (“Son”). After Son was shot in 1984, a physical therapist (“Therapist”) worked with him in the hospital and continued to care for him while he recovered in his parents’ home. One night, Son drugged Therapist and had sex with her without her knowledge, conceiving an out of wedlock son, Grandson, who was born the next year. A few years after Grandson was born, Therapist learned that Son, and not Therapist’s Husband, was the father of Grandson. Although Therapist and Therapist’s Husband raised Son as their child, Son was never formally adopted by Therapist’s Husband. Husband and Wife did not approve of Son’s behavior, his relationships with women, or his fathering of children out of wedlock. Although Husband never acknowledged Grandson as his grandchild, Husband acknowledged that Son was Grandson’s father.

Wife died in November 1996, Son died in June 2007, and Husband died in July 2007. Successor Trustee of Settlor’s trust filed a petition for an order ascertaining the beneficiaries and determining entitlement to distribution.

Issue: Whether Grandson is an “issue” of Son under the terms of the trust instrument.

Trial Court Holding: The Los Angeles County Superior Court found that Grandson was *not* a child of Son. The court held that the trust is ambiguous and not specific concerning the rights of someone in Grandson’s circumstances (i.e., an out of wedlock child). As a result, the court considered extrinsic evidence to determine Husband’s and Wife’s intent, concluding that Grandson is excluded from distribution under the trust because he does not fall within the definition of issue that Settlor intended and that Grandson’s biological connection to Son was insufficient to make him fall within the trust definition of issue.

Appellate Court Holding: The Second District Court of Appeal reversed and remanded, instructing the trial court to enter an order instructing Trustee to distribute trust assets to Grandson as the issue of Son within the meaning of the trust.

Appellate Court Rationale: The appellate court noted that it was not at liberty to rewrite the trust to attach restrictions to the term “issue” that Settlor did not expressly include. The court further noted that extrinsic evidence is only admissible in trust and will construction where there is either a patent or latent ambiguity in the language of the instrument. A latent ambiguity is one which is “fairly susceptible” to more than one interpretation. Typically, latent ambiguities arise where two persons or things answer the description of a bequest, or where there is a mistaken description and one or more persons match a portion of the bequest.

Settlor, through their attorneys, defined the term “issue” as lineal descendants who had not been adopted into or out of the bloodline. Neither of those exceptions applied to Grandson who was undisputedly a lineal descendant. The court determined that the term “issue” was not subject to any

other interpretation where it was clearly, simply, and specifically defined by Settlers and there was no latent ambiguity attached to it.

Comment: If your clients have specific concerns regarding the definition of “issue” make sure to address their specific concerns in the definition of “issue” used in the instrument. Had the attorney for these Settlers done so, the court battle could have been avoided.

Tax Attorney’s Contingency Fee Contracts for Transactional Matters Voidable Because Contracts Did Not State that Contingency Fees Are Not Set by Law and Are Negotiable

ARNALL v. SUPERIOR COURT (2010) 190 Cal. App. 4th 360, 118 Cal. Rptr. 3d 379 [Filed November 22, 2010]

Short Summary: Tax Attorney’s contingency fee contracts, which contemplated payment for savings from tax-related services, were voidable under Bus. & Prof. Code § 6147(b), because they did not state, as required by Bus. & Prof. Code § 6147(a)(4), that the (contingent) success fees are not set by law but are negotiable between attorney and client. Section 6147 applies to both litigation and transactional matters and also applies to contingency fee contracts that entitle attorneys to a relatively small percentage of the client’s potential recovery and to “hybrid” fee agreements.

Facts: In December 2005, Tax Attorney entered into a service Agreement with Client. The Agreement provided that Tax Attorney would advise Client on how to minimize the “adverse economic impact” arising from “specified taxable income.” Under the fee provisions, Tax Attorney was to receive a stipend of \$20,000 per month for nine months and a “success fee” of 2% of specified reductions in “adverse economic impact” and other “economic savings.”

In June 2009, Client terminated Tax Attorney’s services claiming that the agreements were voidable under Bus. & Prof. Code § 6147 for lack of the statutorily required statement that the (contingent) success fees were “not set by law but [were] negotiable between attorney and client.” Tax Attorney filed a complaint asserting breach of the agreement and requested declaratory relief and recovery in quantum meruit. Client sought summary adjudication of all issues with the exception of Tax Attorney’s claim for recovery in quantum meruit.

Issues: Whether § 6147 is applicable to contingency fee agreements outside of the litigation context.

Trial Court Holding: The Los Angeles County Superior Court denied Client’s request for summary adjudication, relying on *Franklin v. Appel* (1992) 8 Cal. App. 4th 875 which held that the then-effective version of § 6147 was inapplicable to “contingency fee agreements outside the litigation context.” Client filed a petition for writ of mandate, prohibition or other appropriate relief on June 23, 2010.

Appellate Court Holding: The Second District Court of Appeal reversed and granted the petition for writ of mandate, directing the trial court to enter a new order granting summary adjudication, holding that the requirements for contingency fee contracts under § 6147 apply to “hybrid agreements” such as the one at issue as well as contingency fee contracts that entitle attorneys to a relatively small percentage of the client’s potential recovery.

Appellate Court Rationale: The appellate court first reviewed the *Franklin* decision and amendments made to § 6147 subsequent to that decision. The version of § 6147 in effect when *Franklin* was decided provided in § 6147(a) that § 6147 applies when an attorney contracts to represent a *plaintiff* on a contingency fee basis. After *Franklin* was decided, the Legislature amended § 6147(a) by replacing the above-referenced term *plaintiff* with the term *client*. The appellate court held that, in view of the amendment, § 6147 now encompasses contingency fee arrangements regarding litigation *and* transactional matters and thus, the agreements at issue.

The court next addressed Tax Attorney’s argument that § 6147 does not apply to “hybrid” fee arrangements which combine fixed monthly payments with a variable success fee. Acknowledging that this was a question of first impression and that § 6147 does not define “contingent fee,” the court reviewed the plain meaning of the term, the definition of “contingency fee” provided by Witkin, and case law concerning § 6146, then concluded that § 6147 also applies to hybrid agreements like the one at issue here. The court explained that to hold otherwise would “gut” § 6147, as it would permit attorneys to avoid the section’s requirements merely by requiring a non-contingent fee payment in addition to the contingent portion of their fees.

Comment: The prudent practitioner may want to review pro forma contingency fee agreements, whether for litigation purposes or transactional services to ensure compliance with Bus. & Prof. Code §§6146-6148. If the agreements do not strictly comply with the code, the attorney may only be entitled to collect fees in quantum meruit.

Although IRS Circular 230 § 10.27 did not become effective until March 26, 2008 and may not have been applicable to this contingency fee agreement entered in 2005, this fee agreement appears to be the type of agreement that is now prohibited by Circular 230. Section 10.27 of Circular 230 provides (with limited exceptions that do not appear applicable here) that “a practitioner may not charge a contingent fee for services rendered in connection with any matter before the Internal Revenue Service.” Matters before the IRS are defined to include “tax planning and advice.”

Fired Attorney Cannot Recover From Previous Co-Counsel on Contingency Fee Quantum Meruit Claim

OLSEN v. HARBISON (2010) 191 Cal. App. 4th 325, 119 Cal. Rptr. 3d 460 [Filed December 1, 2010]. Publication status changed from unpublished to published on December 28, 2010. California Supreme Court denied review on March 2, 2011.

Short Summary: Client's original attorney, who was hired on a contingency fee basis, is not entitled to sue Client's subsequent attorney (rather than Client) for payment of fees after being fired.

Facts: Client hired Plaintiff Attorney on a contingency fee basis to pursue a personal injury lawsuit. Plaintiff Attorney decided to associate in more experienced trial counsel and contacted Defendant Attorney. The attorneys agreed in correspondence between them on the manner in which they would split the contingency fee. Client consented in writing to the fee splitting agreement. A few weeks later, Client fired Plaintiff Attorney and hired Defendant Attorney under a new fee agreement. The underlying case settled for \$775,000. Plaintiff Attorney received no fee.

Plaintiff Attorney sued Defendant Attorney for quantum meruit, breach of contract, fraud, intentional interference with contract, breach of fiduciary duty and imposition of constructive trust. Defendant Attorney demurred to the complaint on the quantum meruit ground, which was sustained. The trial court then granted summary adjudication to Defendant Attorney as to the fraud, intentional interference, and breach of contract causes of action. At trial, judgment on the pleadings was granted in Defendant Attorney's favor on the constructive trust cause of action, without leave to amend. Plaintiff Attorney appealed.

Issue: Whether Plaintiff Attorney has any available causes of action against Defendant Attorney for payment of fees.

Trial Court Holding: The Sacramento County Superior Court held that Plaintiff Attorney had no available causes of action against Defendant Attorney.

Appellate Court Holding: The Third District Court of Appeal affirmed and held that Plaintiff Attorney's remedy was against Client, not Defendant Attorney.

Appellate Court Rationale: Quantum meruit is available for the reasonable value of services rendered when a cause of action for breach of contract is not available. Prior case law provides that an attorney entering into a fee agreement with another attorney may obtain quantum meruit from counsel *when the client has not consented to the fee sharing agreement*. In these cases, where there is no client consent, the services provided by the injured attorney are to the other attorney, not to the client. However, in this case, Client consented to the association and fee sharing. Therefore, the services provided were to Client, not to Defendant Attorney. Quantum meruit, therefore, may be available against Client, but not to against co-counsel Defendant Attorney.

As to the fraud and intentional interference causes of action, Plaintiff Attorney alleged that Defendant Attorney made various disparaging representations to Client about Plaintiff Attorney with the intent of becoming retained in the case and keeping all of the fees for himself. The court held that these statements, even if proved to be true, were inadmissible under the Civ. Code § 47(b) litigation privilege. Under the litigation privilege, any statement made as part of a judicial proceeding by participants in that proceeding is absolutely privileged, regardless of its maliciousness. In this case, the statements were made during the course of the underlying personal injury action for the purpose of associating in Defendant Attorney as co-counsel for Client. It does not matter that Defendant Attorney was not yet a participant in the litigation – the statements were made for the purpose of making him a participant. Therefore, the statements are privileged and no cause of action arises from them.

As to the breach of contract cause of action, the court rejected Plaintiff Attorney's claims because once Client fired Plaintiff Attorney as her counsel, the contingency fee agreement between Plaintiff Attorney and Client ceased to exist. Once that contingency fee agreement ceased to exist, so did the fee sharing agreement. Furthermore, breach of contract is not available against Defendant Attorney for the same reasons that quantum meruit is not available against Defendant Attorney.

Finally, based its analysis, the appellate court agreed with the trial court that there was no reason to impose a constructive trust over the fees paid to Defendant Attorney.

Comment: The most interesting part of this opinion is that, immediately upon Plaintiff Attorney's firing, the contingency fee agreement terminated, leaving Plaintiff Attorney with only a claim against his former client. If his fee contract with Client had contained an attorney's lien against any recovery by Client, he may have had no problem collecting from Client and therefore may have had no need to sue Defendant Attorney for quantum meruit.

Court-Appointed Counsel for Conservatee Owes No Duty to Potential Beneficiary of Substituted Judgment Estate Plan

HALL v. KALFAYAN (2010) 190 Cal. App. 4th 927, 118 Cal. Rptr. 3d 629 [Filed December 8, 2010]

Short Summary: Court-appointed counsel for Conservatee owes no duty to the prospective beneficiary of an unexecuted substituted judgment will.

Facts: A friend had known Conservatee since the late 1960's. During the conservatorship proceedings, Court-Appointed Counsel was appointed for Conservatee. The friend was eventually appointed Conservator. Two years after Conservator was appointed, Conservator's Counsel contacted Court-Appointed Counsel and stated a desire to file a substituted judgment petition for the purpose of establishing an estate plan for Conservatee. Court-Appointed Counsel met with Conservatee. According to Court-Appointed Counsel's notes from this meeting, Conservatee told

him Conservator should inherit her condominium because she was very fond of him; Niece should not get anything because Conservatee did not like her; no relative should receive any part of her estate; and she did not know who else to give money and articles to so the remainder of her estate should go to Conservator and he could decide who to give things to. Over the course of the next 18 months, Court-Appointed counsel met with Conservatee a few more times and an estate plan was drafted. During their final meeting, Conservatee expressed to Court-Appointed Counsel her desire to leave a little more than half of her estate to Niece and a little less than half of her estate to Conservator.

Court-Appointed Counsel filed a substituted judgment petition which requested the court to approve an estate plan leaving 51% to Conservator and 49% to Niece. Niece objected, alleging that Conservatee had previously executed an estate plan which left nothing to Conservator. After the previously executed estate planning documents were located, the hearing on the substituted judgment petition was continued so that Court-Appointed Counsel could give notice to beneficiaries of the prior estate plan. Court-Appointed Counsel did not locate all of these individuals and the court denied the petition without prejudice in June 2007. Conservatee died two months later.

Conservator sued Court-Appointed Counsel for legal malpractice, alleging that Court-Appointed Counsel's failure to timely perform his duties deprived Conservator of the majority of Conservatee's estate. Court-Appointed Counsel filed a motion for summary judgment, arguing that he cannot be held liable because he owed no duties to Conservator.

Issue: Whether court-appointed counsel owes any duty to Conservator.

Trial Court Holding: The Los Angeles County Superior Court granted Court-Appointed Counsel's motion for summary judgment, holding that Court-Appointed Counsel owed no duty to Conservator who was not his client or the beneficiary of an executed estate plan.

Appellate Court Holding: The Second District Court of Appeal affirmed, holding that Court-Appointed Counsel owed no duty to Conservator.

Appellate Court Rationale: In general, an attorney can only be liable his or her client for malpractice. The court noted three cases as exceptions to the general rule where the attorney was liable to intended beneficiaries of a decedent's will for malpractice. *See Biakanja v. Irving* (1958) 49 Cal. 2d 647, *Lucas v. Hamm* (1961) 56 Cal. 2d 583, and *Heyer v. Flaig* 70 Cal. 2d 223. Those three cases can be distinguished from this case, however, because in all three cases, the testamentary instrument was actually executed by the testator and the question was whether the instrument had been negligently drafted so as to frustrate the intent of the testator. Those cases did not involve situations where the estate plan had not been executed and where the named beneficiary of an unsigned document was merely a potential beneficiary. Courts have held that it would place an undue strain on the legal profession if attorneys were held liable to potential beneficiaries for malpractice. *See Radovich v. Locke-Paddon* (1995) 35 Cal. App. 4th 946, *Osornio v. Weingarten* (2004) 124 Cal. App. 4th 304, and *Chang v. Lederman* (2009) 172 Cal. App. 4th 67.

The court stated that this conclusion was particularly true in this case where it was not Conservatee that expressed a desire to have a new estate plan prepared, but rather Conservator himself. Also, there was no guarantee that the trial court would have granted the substituted judgment petition. Finally, the court observed that extending Court-Appointed Counsel's duty to potential beneficiaries of Conservatee's estate would also expose him to liability to Niece, whose share of the estate would have been reduced. The court stated that this is precisely the kind of unreasonable burden on an attorney that requires the limit on malpractice liability.

Comment: This is great news for attorneys who act as court-appointed counsel in conservatorship matters. It also appears that court-appointed counsel did not know about the existence of an earlier estate plan. Query whether or not a substituted judgment petition would have been filed at all if the earlier plan had been discovered sooner.

Safe Harbor Petition Filed Under Former No Contest Clause Statute

FAZZI v. KLEIN (2010) 190 Cal. App. 4th 1280, 119 Cal. Rptr. 3d 224 [Filed December 14, 2010]

Short Summary: The no contest clause in the original trust applies to subtrusts created under the original trust upon Settlor's death. Trust Beneficiary's proposed petition to remove the current trustee for cause would not be a contest, but his petition seeking the appointment of a professional trustee instead of the successor trustee named in the trust who was allegedly unfit to serve as trustee would be a contest. The trust at issue became irrevocable before 2001 so the law applied was not the current statute that is applicable to instruments that became irrevocable on or after January 1, 2001.

Facts: Husband and Wife created a trust and were designated as initial co-trustees followed by Son. Upon Husband's death in 1996, the trust split into three subtrusts, revocable Trust A and irrevocable Trusts B and C. Wife executed an asset allocation agreement distributing the assets into the three subtrusts nine months after death. Petitioner and his siblings and step-siblings are the remainder beneficiaries of Trusts B and C. The no contest clause in the trust provides that any person who contests any of the provisions of the instrument shall not be entitled to any distributions or any benefits under the trust. In November 2008, Petitioner filed a Prob. Code § 21320 safe harbor petition seeking a determination that the attached proposed petition would not violate the no contest clause. The proposed petition sought (1) Wife's removal as trustee for cause, (2) a determination that the provision appointing Son as trustee applies to the original trust only and not to Trusts B and C, or if it applies to Trusts B and C, a determination that Son was unfit to serve as successor trustee, and (3) appointment of a private professional as successor trustee.

Issues: (1) Whether the no contest clause in the original trust applies to Trusts B and C. (2) Whether seeking Wife's removal as trustee for cause violates the contest clause. (3) Whether seeking to have Son disqualified from serving as successor trustee violates the no contest clause.

Trial Court Holding: The Orange County Superior Court granted the safe harbor petition, holding that (1) the no contest clause in the original trust is not applicable to Trusts B and C and (2) the proposed petition is not a contest as defined in former Prob. Code § 21300.

Appellate Court Holding: The Fourth District Court of Appeal reversed, holding that (1) the no contest clause in the original trust applies to Trusts B and C, (2) seeking Wife's removal as trustee for cause would not violate the no contest clause, and (3) seeking to have Son disqualified from serving as successor trustee would violate the no contest clause.

Appellate Court Rationale: (1) When interpreting a no contest clause, the court must determine the intent of the trustor as ascertained from the whole instrument. In this case, upon the creation and funding of Trusts B and C, a host of provisions in the original trust came into play for administering the subtrusts. The no contest clause stated that a violation prohibited a beneficiary from receiving any distributions or benefits under the trust. Together the provisions revealed the trustors' intent that the original trust provisions, including the no contest clause, apply to the subtrusts. (2) Under former law, whether there is a contest depends on the circumstances of the case and language of the no contest clause. The trust did not prohibit an action to remove an individual trustee and, even if it did, the provision would be unenforceable as against public policy. No contest clauses barring removal actions are enforceable only as to frivolous attempts to oust a trustee. See *Estate of Ferber* (1998) 66 Cal. App. 4th 244. Accordingly, Petitioner's attempt to remove Wife as trustee would not be a contest. (3) The trustors made clear their intention that Son serve as successor trustee. Petitioner's assertion that the court should ignore this intent and override the trust because he considers Son prospectively unfit would be a contest of a trust provision.

Comment: Under current law applicable to instruments that became irrevocable on or after January 1, 2001, none of the actions proposed by Petitioner would be a contest of the trust. However, there are still many Bypass and QTIP trusts out there that became irrevocable before January 1, 2001 which may be challenged after the death of the surviving spouse. This case is relevant to any such challenges because the former law will be applied to such challenges. If you find yourself before a trial court judge who does not understand that safe harbor petitions may still be used for challenges to instruments that became irrevocable before 2001, you may cite this case which reasons that because Trusts B and C became irrevocable before 2001, "the former law applies to the safe harbor determination at issue here." Further, if you wish to have a trustee removed for cause in a case where the former law applies, you may cite this case and *Ferber* for the proposition that petitioning to remove a trustee for cause is not a violation of a no contest clause for public policy reasons.

Alter Ego Doctrine Does Not Apply to Trusts But Does Apply to Trustees

GREENSPAN v. LADT LLC (2010) 191 Cal. App. 4th 486, 121 Cal. Rptr. 3d 118 [Filed December 30, 2010] California Supreme Court denied review on April 13, 2011.

Short Summary: Although a trust is not subject to the alter ego doctrine because it is not a legal entity, a trustee may be subject to the alter ego doctrine. Therefore, pursuant to the alter ego doctrine, a trustee may be added as a judgment debtor.

Facts: A real estate developer created several limited liability companies to supervise his various construction projects. The developer transferred ownership of the companies to a trust, chose his brother as trustee, and acted as the “manager” of the companies. Plaintiff filed suit against two of the companies alleging, among other claims, breach of contract. The case went to arbitration. Plaintiff prevailed against the two companies for breach of contract. The arbitrator awarded Plaintiff \$8.45 million against the companies. After conducting judgment debtor examinations, Plaintiff filed a motion to amend the judgment to add the trustee as a judgment debtor, relying on the alter ego doctrine.

Issue Relevant to T&E Practice: Whether a trustee can be added as a judgment debtor.

Trial Court Holding: The Los Angeles County Superior Court denied the motion to amend the judgment.

Appellate Court Holding: The Second District Court of Appeal reversed, holding that a trustee may be added as a judgment debtor.

Appellate Court Rationale: Alter ego theory, which is one of the grounds for piercing the corporate veil, is inescapably linked to the notion that one person or entity exercises undue control over another person or entity. California recognizes that a trust, unlike a corporation, is not a legal entity. A trust is simply a collection of assets and liabilities. As such, it has no capacity to sue or be sued, or to defend an action. Because a trust is not an entity, it is impossible for a trust to be anybody’s alter ego.

California recognizes that legal title to property owned by a trust is held by the trustee. The proper procedure for one who wishes to ensure that trust property will be available to satisfy a judgment is to sue the trustee in his or her representative capacity. Trustees are real persons, either natural or artificial. As a result, applying the alter ego doctrine to a trustee is a different proposition. As a conceptual matter, it is entirely reasonable to ask whether a trustee is the alter ego of a defendant who made a transfer into the trust. Accordingly, alter ego doctrine can provide a viable legal theory for creditors vis-à-vis trustees and, in this case, the appellate court held that the trustee could be added as a judgment debtor.

Comment: A clever attorney can usually find someone to sue or, perhaps more importantly, someone with deep pockets to collect against.

Seven-Day Waiting Period Between Date Party Is Presented With Prenup and Date Party Signs Prenup Does Not Apply to a Party Who Has Been Represented by Counsel From the Outset

MARRIAGE OF CADWELL-FASO & FASO (2011) 191 Cal. App. 4th 945, 119 Cal. Rptr. 3d 813 [Filed January 11, 2011] California Supreme Court denied review on March 23, 2011.

Short Summary: In a case where Husband was represented by counsel from the outset and argued that the prenup he signed was unenforceable because seven days did not elapse between the date he was presented with the final version of the prenup and the date he signed the prenup, the appellate court held that the prenup is enforceable against Husband because Fam. Code § 1615(c)(2), which requires the seven-day waiting period, does not pertain to a party who is represented from the outset.

Facts: Husband and Wife met in 2003 or 2004. Husband was a wealthy, retired businessperson residing in Stockton. Wife owned and operated her own business in Alameda. Husband and Wife married on May 27, 2006, and Wife petitioned for legal separation less than 18 months later. Prior to their marriage, Husband's attorney drafted a premarital agreement ("Prenup") and Husband presented it to Wife and advised her to seek independent counsel. Wife was not satisfied with the agreement and asked her attorney to prepare an addenda. Wife's attorney drafted five successive addenda, but Husband did not agree to the terms of the first four drafts. On May 17, 2006, Wife faxed a "goodbye" letter along with the four unsigned draft addenda to Husband, saying she loved him but was calling off the wedding in light of their inability to reach an agreement. Thereafter, the parties discussed their disagreements and Wife's attorney drafted a fifth addendum ("Addendum") which Wife faxed to Husband on May 19, 2006. Husband forwarded the Addendum to his attorney on May 22. The parties met in Husband's attorney's office and executed the Prenup and the Addendum on May 25, 2006, only six days after Wife had presented Husband with the final version of the Addendum.

The Prenup cited the parties' intention to waive community property and spousal support claims against each other. Husband estimated that the net value of his estate exceeded \$30 million and Wife estimated that the value of her estate exceeded \$1 million without taking into account the liabilities detailed on an attached exhibit. The Addendum provided that, among other things: (1) within 10 years following the marriage, Husband would pay off the \$400,000 mortgage on Wife's property, whether or not the marriage terminated; (2) Husband was obligated to pay for Wife's reasonable health care needs for life, whether or not the marriage terminated; and (3) in the event of a dissolution, Husband agreed to pay Wife spousal support in the amount of \$1,000 per month for each year of the marriage, for a period equal to one-half the length of the marriage.

Wife petitioned for legal separation on November 13, 2007, and the next month Husband sought dissolution of the marriage. Thereafter Wife moved for temporary spousal support and attorney fees. Among other responses, Husband moved to set aside the Addendum, arguing that the document was invalid because he did not have seven days between the time of presentation and execution, as required by Fam. Code § 1615(c)(2).

Issue: Whether Fam. Code § 1615(c)(2), which requires a seven-day waiting period between presentation of a prenup and execution of the prenup, applies to a party who is represented by counsel from the outset.

Trial Court Holding: The Alameda County Superior Court held that the Addendum to the Prenup was unenforceable because § 1615(c)(2) is mandatory and therefore does apply to Husband even though he was represented by counsel from the outset.

Appellate Court Holding: The First District Court of Appeal reversed, holding that § 1615(c)(2) does not pertain to a party who is represented by counsel from the outset, thus the Prenup and the Addendum thereto were enforceable against Husband.

Appellate Court Rationale: Family Code § 1615(a)(1) provides that a prenup is not enforceable if the party against whom enforcement is sought proves that party did not execute the agreement voluntarily. Family Code § 1615(c) provides that it shall be deemed that a prenup was not executed voluntarily unless the court makes three findings, one of which is the § 1615(c)(2) finding at issue: “The party against whom enforcement is sought had not less than seven calendar days between the time that party was first presented with the agreement and advised to seek independent legal counsel and the time the agreement was signed.”

The appellate court first found that § 1615(c)(2) is ambiguous because the court could not ascertain from its face whether the seven-day rule is confined to unrepresented parties, or whether it also covers those represented from the outset by independent counsel. The court explained that the ambiguity arises from the conjunctive phrase stating there must be at least seven days between the time the party was first presented with the agreement *and* advised to seek independent legal counsel. Therefore, the court looked to legislative history and found that while the legislative history does not entirely resolve the ambiguity, it does make it abundantly clear that the Legislature was concerned about the presumed voluntariness of premarital agreements in situations where one party is not represented by independent counsel.

The court also explained that it would be absurd to require a party pursuing enforcement to advise the other party to seek independent legal counsel when that party is already represented in the transaction by independent counsel. In other words, were the court to interpret § 1615(c)(2) as applying to represented parties, the advisement requirement becomes meaningless surplusage. Yet, when applied to an unrepresented party, the advisement proviso is critical.

Comment: This is a case involving bad facts. Here the trial court made the following findings: (1) Husband was advised by his attorney prior to signing that because the Addendum had been presented within seven days of signing it was unenforceable; (2) Husband and his attorney did not advise Wife of this or discuss the possibility of waiting one more day so as to obviate the problem; (3) Husband signed in reliance on his attorney's opinion that the Addendum was unenforceable; and (4) Wife signed because she believed she and Husband had, in fact, reached an agreement. While this is a great case to rely on if you represent the spouse attempting to invalidate the agreement at the time of dissolution, when drafting or reviewing a prenup prior to signing, the prudent practitioner will continue to advise clients to wait the full seven days after presentation of the final version of the prenup before signing the prenup.

Attorney-Client Communications Covered by the Mediation Confidentiality Statutes Are Not Admissible in a Legal Malpractice Action

CASSEL v. SUPERIOR COURT (2011) 51 Cal. 4th 113, 119 Cal. Rptr. 3d 437 [Filed January 13, 2011]

Short Summary: Following a mediation, Client sued his Attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract. Client's complaint and deposition testimony relied on and disclosed information about the conduct and private communications between Attorneys and Client during mediation. Counsel moved *in limine* under the mediation confidentiality statutes to exclude all evidence of communications between Client and Attorneys, including matters discussed at premediation meetings and the private communications among Client and Attorneys. The California Supreme Court held that, pursuant to the mediation confidentiality statutes, such communications are not admissible in a malpractice action.

Facts: In February 2005, Client filed a complaint against Attorneys alleging that they had breached their professional, fiduciary, and contractual duties while representing Client in a third party trademark infringement dispute over rights to a famous clothing label. Among other things, Client alleged the following in his pleadings and his deposition testimony. Pretrial mediation of the trademark infringement lawsuit began at 10:00 a.m. Client and Attorneys had previously agreed that Client would not agree to settle for less than \$2 million. After hours of mediation, Client said no to an offer to settle for \$1.25 million, but Attorneys insisted he remain until the mediation concluded, pressed him to accept the offer, told him he was "greedy" if he did not accept the offer, threatened to abandon him at trial, falsely represented that they would negotiate a side deal to recoup the loss, and falsely stated that they would waive or discount a large portion of his \$188,000 bill if he accepted the offer. Attorneys followed Client into the bathroom where they continued to "hammer" him to settle. After 14 hours, at midnight, Client settled, believing he had no other choice than to settle.

Attorneys moved *in limine* under the mediation confidentiality statutes to exclude all evidence of communications between Client and Attorneys related to the mediation, matters discussed at premediation meetings, and private communications during the mediation

Issue: What is the effect of the mediation confidentiality statutes on the admissibility in a legal malpractice lawsuit of evidence of private discussions between a mediating client and the attorneys who represented the client in the mediation?

Trial Court Holding: The Los Angeles County Superior Court granted Attorneys' *in limine* motion.

Appellate Court Holding: The Second District Court of Appeal vacated the trial court order, reasoning that the mediation confidentiality statutes are intended to prevent the damaging use *against a mediation disputant* of tactics employed, positions taken, or confidences exchanged in the mediation, not to protect attorneys from the malpractice claims made by their own clients. The appellate court majority concluded that when a disputant sues his own counsel for malpractice in connection with the mediation, the attorney cannot use mediation confidentiality as a shield to exclude damaging evidence of the attorney's own entirely private conversations with the client. The dissenting appellate court justice argued that the majority had crafted an unwarranted judicial exception to the clear and absolute provisions of the mediation confidentiality statutes.

California Supreme Court Holding: The California Supreme Court reversed the appellate court, holding that under the plain language of the mediation confidentiality statutes, Attorneys' mediation-related discussions with Client are inadmissible in Client's malpractice action against Attorneys, even if those discussions occurred in private, away from any other mediation participant.

California Supreme Court Rationale: The court reasoned that the statutory purpose of the mediation confidentiality statutes is to encourage the use of mediation by promoting "a candid and informal exchange regarding events in the past This frank exchange is achieved only if the participant knows that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes."

The court explained that Evid. Code § 1119, which was adopted in 1997 and expanded former Evid. Code § 1152.5, governs the general admissibility of oral and written communications generated during the mediation process. Section 1119(a) provides, in pertinent part, that no evidence of anything said or any admission made *for the purpose of, in the course of, or pursuant to* a mediation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled in any civil action. Section 1119(b) similarly bars discovery or admission into evidence of any writing prepared *for the purpose of, in the course of, or pursuant to* a mediation. Section 1119(c) further provides that all communications, negotiations, or settlement discussions *by and between* participants in the course of mediation shall remain confidential. Evidence Code § 1122 sets forth the conditions under which the confidentiality may be waived. The court further explained that the obvious purpose of the expanded language is to ensure that the statutory protection extends beyond

discussions carried out directly between the opposing parties to the dispute, or with the mediator during the mediation proceedings themselves, and includes those communications between a mediation disputant and his or her own counsel, even if these do not occur in the presence of the mediator or other disputants.

Contrasting the attorney-client privilege, which creates a privilege in favor of a particular person (the client), with mediation confidentiality, the court explained that the mediation statutes instead serve the public policy of encouraging the resolution of disputes by means short of litigation, they apply broadly, and are designed to provide maximum protection for the privacy of communications in the mediation context. The court further reasoned that neither the language nor the purpose of the mediation confidentiality statutes supports a conclusion that they are subject to a judicially crafted exception for a legal malpractice lawsuit similar to the statutory exception to attorney-client privilege for legal malpractice lawsuits.

Comment: Justice Chin began his brief concurring opinion with the comment: “I concur in the result, but reluctantly.” Justice Chin further explained: “This holding will effectively shield an attorney’s actions during mediation, including advising the client, from a malpractice action even if those actions are incompetent or even deceptive. Attorneys participating in mediation will not be held accountable for any incompetent or fraudulent actions during that mediation unless the actions are so extreme as to engender a criminal prosecution against the attorney. . . . This is a high price to pay to preserve total confidentiality in the mediation process.” Justice Chin then invited the Legislature to revise the mediation confidentiality statutes when he said: “I am not completely satisfied that the Legislature has fully considered whether attorneys should be shielded from accountability in this way. There may be better ways to balance the competing interests than simply providing that an attorney’s statements during mediation may never be disclosed. . . . As the majority notes, the Legislature remains free to reconsider this question. It may well wish to do so.”

In an article in *Orange County Lawyer*, Robert K. Sall, Esq., an attorney who lectures frequently on legal ethics and malpractice, points out that until the Legislature acts to rewrite the mediation confidentiality statutes, the *Cassel* decision may have important implications for the attorney’s duty to disclose information to the client when suggesting that the client consider mediation as an option. He then asks: “Does the lawyer’s duty of full and fair disclosure go so far as to require a lawyer to inform the client that the lawyer may be exempt from liability for claims arising from the lawyer’s acts or communications in connection with mediation?” Ethically Speaking: Ethical Concerns Regarding Mediation Confidentiality and the Implications of Cassel, 53 *Orange County Lawyer* 42, 43.

If the answer to Mr. Sall’s question turns out to be yes, it seems that clients will be much less willing to participate in mediation. Attorneys may want to consider addressing this problem by entering into an agreement with their clients, prior to mediation, which provides that solely for the purposes of any malpractice litigation against the attorney, attorneys and clients both waive the protections of the mediation confidentiality statutes.

Appraiser's Files Not Fully Protected by Attorney-Client Privilege or the Work-Product Doctrine

UNITED STATES v. RICHEY (2011) 632 F.3d 559 (9th Cir.) [Filed January 21, 2011]

Short Summary: Appraiser was hired by Law Firm (not Taxpayers) to prepare an appraisal report that was attached to Taxpayers' income tax return. The court held that the attorney-client privilege does not protect Appraiser's entire file in connection with the appraisal and that the work-product doctrine does not apply because Appraiser's file was not created in anticipation of litigation.

Facts: Taxpayers owned interests in a partnership that held a 50% interest in real property. In 2002, Taxpayers engaged Law Firm to provide legal advice regarding the partnership granting a conservation easement on the property. Thereafter, Taxpayers caused the partnership to execute a conservation deed for the property in favor of a charity. Law Firm retained Appraiser to appraise the easement for purposes of taking a charitable deduction. Appraiser prepared an appraisal report which was attached to Taxpayers' 2002 income tax return. The report contained the following statement:

“[T]his report may not include full discussion of the data, reasoning, and analyses that were used in the appraisal process to develop the appraiser's opinion of value. Supporting documentation concerning the data, reasoning, and analyses is retained in the appraiser's file.”

In connection with the easement, Taxpayers claimed a \$200K deduction on their 2002 income tax return and carried forward an additional \$1.3 million deduction to their 2003 and 2004 returns.

In 2008, the IRS summoned Appraiser to appear before the IRS and provide testimony and other information regarding the appraisal services. Law Firm directed Appraiser to not comply with the summons, asserting the attorney-client privilege and the work-product doctrine. The IRS petitioned to enforce the summons and issued a Notice of Deficiency to Taxpayers, which disallowed any charitable deduction on Taxpayers' 2003 and 2004 returns.

Issue: Whether the attorney-client privilege or work-product doctrine protects all of the content of an appraiser's file where the appraiser was hired by the taxpayer's attorney to prepare an appraisal required to be attached to the taxpayer's return.

Trial Court Holding: The U. S. District Court for the District of Idaho granted Taxpayers' motion to intervene in the IRS' summons enforcement action against Appraiser and the court issued an order quashing the summons.

Appellate Court Holding: The Ninth Circuit Court of Appeal reversed and remanded to the district court for an *in camera* examination of the materials summoned by the IRS in order to determine which materials (if any) are protected by the attorney-client privilege. The court also held that

neither Appraiser nor Taxpayers may properly invoke the work-product doctrine in protecting the contents of the appraisal work file.

Appellate Court Rationale: The appellate court pointed out that attorney-client privilege may extend to communications with third parties who have been engaged to assist the attorney in providing legal advice. However, if the advice sought is *not* legal advice, then the privilege does not exist. Here, the court reasoned that the preparation and drafting of the appraisal were for the purpose of determining the value of the easement (which was necessary to claim the income tax deduction), not for providing legal advice. The court noted that, to the extent Appraiser's files contain documents that were not communications, the files would not be protected by the attorney-client privilege. The court also concluded that Taxpayers and Appraiser could not invoke the work-product doctrine to protect the contents of the appraisal work file because there was no evidence that the file was prepared in anticipation of litigation, noting that the appraisal was prepared as a required attachment to the income tax return.

Comment: Our standard practice is to engage the appraiser on behalf of our clients in order to be able to assert some privilege over the communications with the appraiser and the appraiser's files. It would be prudent to request that the appraiser create two files at the outset of the engagement – one containing supporting factual data and analysis, and another relating to communications and legal advice. It may also be prudent to inform the client that portions of the appraiser's files and communications with the appraiser may not be protected, even where the attorney retains the appraiser.

Probate Court Erroneously Denies *Heggstad* Petition to Confirm That General Assignment Transferred Shares of Stock to Trust

KUCKER v. KUCKER (2011) 192 Cal. App. 4th 90, 120 Cal. Rptr. 3d 688 [Filed January 26, 2011]

Short Summary: The probate court erred in denying successor Trustees' *Heggstad* petition to establish that shares of stock were trust property. Decedent's omission of the shares of stock at issue was an oversight and the pour-over will and general assignment showed her intent to transfer *all* of her personal property to her trust.

Facts: On June 29, 2009, Decedent signed a revocable inter vivos trust ("Trust"), a pour-over will leaving her entire probate estate to the Trust, and a general property assignment ("General Assignment") conveying "all of my right, title and interest in all property owned by me, both real and personal and wherever located" to the trustee of the Trust. Decedent later signed an amendment and restatement of the Trust and an assignment transferring stock of 11 specified companies to the Trust. After Decedent's death, the successor Trustees filed a *Heggstad* petition (now codified as Prob. Code § 850(a)(3)(B)) to confirm that stock worth in excess of \$100,000 owned by Decedent, but not listed in the stock transfer assignment, was an asset of the Trust. Trustees also argued that Prob. Code

§§ 15200 *et seq.* and § 12507, which allows an oral trust for personal property, provided further basis for granting the petition. There was no opposition to the petition.

Issue: Whether the trial court erred in concluding that the General Assignment in conjunction with the pour-over will was ineffective to transfer Decedent's personal property to the Trust.

Trial Court Holding: The Ventura County Superior Court denied the petition, holding that Prob. Code § 15207 must be read in conjunction with Civ. Code § 1624(a)(7), which, according to the trial court, requires a writing specifically describing the property in order to transfer assets in excess of \$100,000.

Appellate Court Holding: The Second District Court of Appeal reversed, holding that Civ. Code § 1624(a)(7) is inapplicable and a general assignment is effective to transfer personal property to a trust.

Appellate Court Rationale: The appellate court found that the trial court's reliance on Civ. Code § 1624(a)(7) was misplaced. The plain language of this section of the statute of frauds limits its application to agreements to loan money or extend credit made by persons in the business of loaning money or extending credit, which is clearly not applicable to a trustor assigning personal property to his or her trust.

Further, the court held that there is no California authority invalidating a transfer of shares of stock to a trust because a general assignment of personal property did not identify the shares, nor should there be. Relying on *Estate of Heggstad* (1993) 16 Cal. App. 4th 943 and a CEB practice guide, the court found that the General Assignment in conjunction with the pour-over will shows Decedent's intent to convey all of her personal property to the Trust. Thus, the appellate court remanded to the trial court with directions to enter a new order confirming that the stock was a trust asset.

Although the court pointed out that the transfer of real property was not at issue in this case, it went on to explain that the General Assignment was ineffective to transfer Decedent's real property to the Trust. The court stated that to satisfy the statute of frauds with respect to real property, a general assignment is required to describe the real property so that it can be identified.

Comment: This case demonstrates that, even unopposed, counsel must provide the court with a full and complete legal basis of the relief requested. Even then, the trial court may get it wrong.

House Titled Solely in Husband's Name Is Held to be Community Property When Husband Fails to Rebut the Presumption of Undue Influence That Arose When Wife Quitclaimed House to Husband

MARRIAGE OF FOSSUM (2011) 192 Cal. App. 4th 336, 121 Cal. Rptr. 3d 195 [Filed January 28, 2011] California Supreme Court denied review on April 27, 2011.

Short Summary: Husband and Wife owned a house as community property. When they decided to refinance the house, Wife only agreed to execute a quitclaim deed in favor of Husband so that he could obtain a lower interest rate, because Husband told her he would return title to the names of both spouses after the refinancing transaction was complete. When the parties separated, the house was still titled in Husband's name, as his sole and separate property. The court held that the house was community property because Husband failed to rebut the presumption of undue influence that arose when Wife quitclaimed the house to Husband as his sole and separate property.

Facts: Husband and Wife were married in September 1994 and purchased a real property (the "House") in October 1994. Husband and Wife gave conflicting testimony about the source of the down payment, but finding that Husband was not credible, the trial court found that the source of the down payment was community property. To obtain a more favorable interest rate on the mortgage, Wife quitclaimed her interest in the House to Husband, and the House was acquired in his name alone. Wife agreed the House would be acquired solely in Husband's name because Husband told her that she would be added to the title at a later date. Husband later executed a second quitclaim deed placing the property in Husband's and Wife's names, as joint tenants. A few years later when the couple wanted to refinance, Wife agreed to execute another quitclaim deed in favor of Husband so that he could again obtain a more favorable interest rate. However, she only agreed for the same reason and under the same conditions as when she had executed the first quitclaim deed – she believed Husband would make good on his promise to return title to the property to both spouses' names, once the refinancing transaction was complete.

Wife testified as follows. She asked Husband several times to return title to the property to both of their names and Husband said he would do so. However, by 2002, Husband conditioned his willingness to return Wife's name to the title on a list of requirements that she "behave" in a certain way, and become a "Godly woman and a good Christian wife" with a "heart ... free of sin." It was not until after the parties separated in 2002 that Husband told her he would not, under any circumstances, put her name back on the title.

In this action for dissolution of the marriage, Husband argued that the House was his separate property and Wife argued that the House was community property.

Issue: Whether the House purchased during the marriage, that Wife quitclaimed to Husband so that he could obtain a lower interest rate on refinancing and was titled solely in Husband's name, was community property or Husband's separate property.

Trial Court Holding: The Los Angeles County Superior Court held that House was community property.

Appellate Court Holding: The Second District Court of Appeal affirmed, holding that the form of title presumption does not apply when it conflicts with the presumption that one spouse has exerted undue influence over the other.

Appellate Court Rationale: First, the appellate court found that substantial evidence supported the trial court's finding that the House was community property when acquired. The presumption of undue influence applies when there is an interspousal transaction by which one spouse gains an advantage over the other. (Fam. Code § 721; *Marriage of Mathews* (2005) 133 Cal. App. 4th 624, 629.) The court found that these prerequisite elements had been satisfied with regard to the third quitclaim deed. Thus, Husband bore the burden to establish, by a preponderance of evidence, that Wife's signing of the third quitclaim deed was freely and voluntarily made with full knowledge of all the facts and with a complete understanding of its effect of making the House Husband's separate property. (*Mathews*, 133 Cal. App. 4th at pp. 630 - 631.) The appellate court found that substantial evidence supported the trial court's finding that Husband failed to carry this burden.

Husband took issue with the trial court's failure to make any determination about his separate property contributions to the downpayment in its statement of decision. The appellate court rejected Husband's argument because the record showed that he did not specifically object to the proposed statement of decision on the basis that the trial court did not apportion his alleged separate property contribution to the downpayment. Because Husband did not raise the issue in the trial court, he forfeited his right to complain on appeal about the trial court's lack of specificity. The appellate court found that, in any event, the record supported the trial court decision that Husband was not entitled to any separate property contribution for the downpayment.

Comment: In *Marriage of Brooks & Robinson* (2008) 169 Cal. App. 4th 176, where the parties similarly took title solely in one spouse's name because this would make it easier to obtain financing, the court held that the act of taking title in the name of one spouse with the consent of the other effectively removed the property from the general community property presumption of Fam. Code § 760 and triggered the Evid. Code § 662 title presumption that the property was the wife's separate property because it was titled in her name. Because the husband was unable to rebut the presumption by clear and convincing evidence that the title reflected on the deed was not what the parties intended, the *Brooks* court held that the property was the wife's separate property. The major difference between *Brooks* and *Fossum* is that in *Brooks*, there was no contention that title to the property was taken solely in the wife's name due to any undue influence exerted by the wife, whereas in *Fossum*, Wife argued that the presumption of undue influence arose. When challenging marital transactions, the presumption of undue influence is a powerful weapon. Always consider arguing that the presumption of undue influence applies if you represent the spouse who was disadvantaged by a transaction that occurred during the marriage.

CPA's Failure to Identify Time Period for Which Extension of Time to Pay Is Requested Results in Penalties Assessed Against Estate

BACCEI v. UNITED STATES (2011) 632 F.3d 1140 (9th Cir.) [Filed February 16, 2011]

Short Summary: The CPA hired by Executor filed a request for extension of time to file the estate tax return and pay estate tax, but failed to check the Form 4768 box for requesting an extension of time to pay and failed to indicate the amount of time for which he was requesting the extension of time to pay. The IRS assessed penalties of \$58,954.28 plus interest of \$69,801.00 due to the late payment of estate tax. The Ninth Circuit held that the substantial compliance doctrine does not excuse Executor's deficient request for extension of time to pay and that Executor's reliance on CPA does not constitute reasonable cause to excuse the late payment of estate tax.

Facts: Decedent died on September 17, 2005. Executor retained CPA to prepare and file the federal estate tax return on behalf of Decedent's estate. On June 16, 2006, CPA filed a Form 4768 Application for Extension of Time to File a Return and/or Pay U.S. Estate Taxes ("Form 4768") to extend the June 19, 2006, filing deadline. CPA completed Parts I, II and IV of Form 4768, but failed to complete Part III entitled "Extension of Time to Pay." CPA did not enter an extension period in the Part III field labeled "Extension date requested," and did not check the Part III box indicating that a payment extension was needed. CPA included a letter with Form 4768 entitled "Request for extension of time to file and pay U.S. Estate Tax" ("Letter"). Among other things, the Letter explained that CPA believed that the tax due was \$131,327, but due to litigation delaying the appointment of Executor, the bank wherein most of the estate's liquid assets were held had not yet approved the release of funds to Executor so that he could pay the estate tax. The Letter further said: "We seek this extension of time to pay as well as asking that no penalty be asserted." On December 19, 2006, CPA filed the estate tax return and reported that the estate taxes actually amounted to \$1,684,408. Thereafter, the IRS notified Executor that the estate tax had not been paid by the June 19, 2006 deadline and assessed penalties and interest against the estate. Executor paid the penalties and interest and filed a claim requesting the IRS to refund the penalties and interest on the grounds that he had filed the extension request. The IRS denied Executor's claim for refund.

Executor filed an action in federal district court seeking a refund of the penalties and interest paid, alleging, among other things: (1) a payment extension request had been filed and (2) the late payment penalty should be abated on grounds of reasonable cause. The IRS moved for summary judgment, arguing that Executor did not properly request an extension of time to pay and had not established reasonable cause for his failure to timely pay. Executor cross-moved for summary judgment, arguing that (1) he had substantially complied with the regulations and thus had made a valid late payment request and (2) reasonable cause existed for excusing his failure to timely pay, as he reasonably relied on CPA to obtain the payment extension.

Issues: (1) Whether the substantial compliance doctrine is applicable to regulations governing requests for extensions of time to pay estate tax. (2) Whether the IRS is equitably estopped from

imposing a late payment penalty and assessing interest. (3) Whether Executor's failure to timely pay the estate taxes is due to reasonable cause.

U.S. District Court Holding: The U.S. District Court for the Northern District of California granted summary judgment in favor of the IRS, holding (1) that the substantial compliance doctrine was inapplicable and Executor had not complied with the regulations governing payment extension requests and (2) the late payment penalty should not be abated on the grounds of reasonable cause because the duty to file tax returns or pay taxes cannot be delegated, thus reliance on a CPA is not reasonable cause for late payment.

Ninth Circuit Court Holding: The U.S. Court of Appeals for the Ninth Circuit affirmed the judgment of the district court and held: (1) the substantial compliance doctrine does not excuse Executor's failure to strictly comply with the regulations governing requests for extension of time to pay estate taxes; (2) the doctrine of equitable estoppel does not bar the IRS from imposing a late payment penalty and assessing interest; and (3) Executor did not meet his burden of proving that there was reasonable cause for abating the late payment penalty.

Ninth Circuit Court Rationale: First, the court explained that a taxpayer may be relieved of perfect compliance with a regulatory requirement when the taxpayer has made a good faith effort at compliance or has a good excuse for noncompliance, *and* (1) the regulatory requirement is not essential to the tax collection scheme but rather is an unimportant or relatively ancillary requirement *or* (2) the regulatory provision is so confusingly written that it is reasonably subject to conflicting interpretations. The court found that Executor could not rely on the substantial compliance doctrine because doing so would defeat the policies of the underlying regulatory provision. The regulation governing payment extensions is designed to provide the IRS with the information necessary to determine whether an extension of time to pay is warranted and, if so, to determine a reasonable length for that extension. The regulation requires that a request for an extension of time for paying the estate tax state the period of the extension requested. The court found that this requirement is neither unclear nor unimportant; rather, it is essential to the IRS' tax collection efforts because it allows the IRS to assess the reasonableness of the taxpayer's request.

Second, the court rejected Executor's argument that the IRS was equitably estopped from imposing penalties and interest because the IRS had an obligation to inform him that his payment extension request was deficient. Among other things, a party asserting equitable estoppel against the government must establish that the government engaged in affirmative misconduct going beyond mere negligence. Executor did not identify any affirmative misconduct by the IRS. The IRS' failure to inform a taxpayer that he has not properly requested an extension is mere inaction that cannot support a claim of equitable estoppel.

Finally, the court rejected Executor's reasonable cause arguments. Executor's reliance on CPA to competently file a payment extension request does not constitute reasonable cause because Executor was responsible for confirming that an extension had been requested and granted before the payment deadline lapsed. Executor also argued that he was unable to liquidate the estate's assets before the

payment deadline lapsed. The court explained that if Executor believed that the estate's need to liquidate assets was reasonable cause for abatement of the late payment penalty, it was incumbent upon him to make that argument before the district court. Because Executor raised the argument for the first time on appeal, the appellate court declined to address the argument.

Comment: Checking the correct box and completing IRS forms accurately and completely can be the key to avoiding malpractice. An executor's reliance on a CPA or attorney does not constitute reasonable cause to excuse any of the following: (1) failure to file a complete request for extension of time to file or pay, (2) failure to timely file an estate tax return, or (3) failure to timely pay estate tax.

Will That Lacked Two Witnesses Held Valid Because Proponent of Will Established by Clear and Convincing Evidence That Testator Intended the Document to Constitute His Will

ESTATE OF STOKER (2011) 193 Cal. App. 4th 236, 122 Cal. Rptr. 3d 529 [Filed March 3, 2011] California Supreme Court denied review on May 18, 2011.

Short Summary: Testator's 2005 will was validated under Prob. Code § 6110(c)(2) even though it lacked two witnesses' signatures because the court found by clear and convincing evidence that Testator intended for the document to be his will. Although Testator died in 2008 and § 6110(c)(2) did not become effective until January 1, 2009, the appellate court held that § 6110(c)(2) applies retroactively to wills executed by decedents who died prior to the enactment of the statute because the Legislature has clearly expressed its intention that amendments to the Probate Code apply on their effective date. The court also found that the challenge to the validity of Testator's 1997 trust was not barred by the 120-day statute of limitations because the petition to probate the 2005 will was in substance a challenge to the 1997 trust since the 2005 will explicitly revoked the 1997 trust.

Facts: Testator executed a will and trust in 1997 which left his estate to his then girlfriend ("Ex-Girlfriend") and other friends and appointed Ex-Girlfriend as successor trustee. Testator and Ex-Girlfriend broke up around 2001. In 2005, Testator executed a new will leaving his property to his Children. He dictated his 2005 will to his friend ("Scrivener") who wrote the will verbatim and then Testator signed it in presence of Scrivener and another Friend. In the presence of Scrivener and Friend, Testator also urinated on the 1997 will and burned it. After Testator's death, Ex-Girlfriend, as successor trustee, served trustee notification of the 120-day period to contest on Children and then filed a petition to probate the 1997 will. Children filed a petition to probate the 2005 will within the 120-day statute of limitations period to contest the trust. Ex-Girlfriend argued that Children needed to file a separate proceeding with the court to contest the trust, that filing a petition to probate a will was not an action to contest a trust, and, therefore, the trust was valid because Children did not file a trust contest within the 120-day period. Ex-Girlfriend also argued that the will handwritten by Scrivener could not be made valid under Prob. Code § 6110(c) because that section only applies to

typed wills, not handwritten wills. In addition, Ex-Girlfriend argued that § 6110(c) should not apply to the 2005 will because the code section did not come into existence until January 1, 2009, and was not intended to apply retroactively to wills executed before that date. Finally, Ex-Girlfriend argued that the evidence presented at trial was not clear and convincing to establish that the decedent intended to revoke his 1997 will.

Issues: (1) Whether a challenge to a trust under Prob. Code § 16061.8 can be made by filing a petition to probate a will. (2) Whether a will handwritten by someone other than the testator, which is missing the two required witnesses' signatures, can be deemed valid under § 6110(c). (3) Whether § 6110(c), which became effective on January 1, 2009, after Testator's death, retroactively applies to the 2005 will. (4) Whether the evidence is sufficient to show that the 2005 document was Testator's will.

Trial Court Holding: The San Luis Obispo County Superior Court accepted the 2005 will for probate, finding that (1) Children established that the 2005 document was created at Decedent's direction and that he signed it and (2) there was clear and convincing evidence that the 2005 will evinces Decedent's intent. The court also held that since it had accepted the 2005 will for probate, the 1997 will had been revoked by operation of law.

Appellate Court Holding: The Second District Court of Appeal affirmed, holding that (1) when determining what constitutes a "contest" to a trust under Prob. Code § 16061.8, it looks to the substance of a petition and its practical effect; (2) § 6110(c) applies to all defective wills, handwritten or typed, and allows them to be admitted to probate if they are consistent with the testator's intent and if the proponent can show by clear and convincing evidence that at the time the testator signed the will, the testator intended for the document to be the testator's will; (3) § 6110(c) applies to wills executed prior to the enactment of the statute, and in cases where the decedent died prior to enactment of the statute; and (4) the record showed that Testator intended for the 2005 will to be his will.

Appellate Court Rationale: (1) The petition to probate the 2005 will was in substance an action to contest the trust because the 2005 will said it was revoking the 1997 trust and therefore the court would have to consider the issue of the validity of the revocation of the trust. (2) Probate Code § 6110(c) provides that a will which is defective in form may be admitted to probate if the will conforms to the testator's intent and the proponent of the will shows by clear and convincing evidence that at the time the testator signed the will, the testator intended for the document to be the testator's will. The goal of the statute is to give preference to the testator's intent rather than invalidate a will because of procedural deficiencies. Admitting a will to probate under this section is consistent with the purpose of the statute. (3) Applying § 6110(c) retroactively upholds the strong legislative intent to prevent invalidation of wills due to technical deficiencies. (4) The evidence presented at trial was sufficient in the appellate court's view to support a finding that the 2005 will was intended as Testator's will and that the evidence led to the compelling conclusion that Testator intended to revoke his 1997 will.

Comment: This case demonstrates that under the new “harmless error” rule implemented in 2009 (Prob. Code § 6110(c)), California no longer requires two witnesses to a non-holographic will. The new requirement for non-holographic wills to be valid is that *either* (1) the will complies with all of the technical requirements for being witnessed, including that the will is signed by two witnesses during the testator’s lifetime *or* (2) the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator’s will.

In dicta, the appellate court provides a disturbing analysis of the effect of the 120-day statute of limitations on contesting the will. The court *agrees* with Children’s contention *that the 120-day time limit for filing an action to contest the trust is irrelevant* under these circumstances. The court said that Testator revoked the trust through his actions, which included executing his 2005 will, and explained that a successor trustee is authorized to serve the 120-day notice when the revocable trust becomes irrevocable because of the death of one or more of the settlors of the trust, citing Prob. Code § 16061.7(a)(1). Then the court reasoned that the trust never became irrevocable because it was revoked before Testator’s death, therefore Trustee had no authority to act under a revoked trust, and a court could not enforce it because that would contravene Testator’s intent in his 2005 will. The problem with this reasoning is that it eviscerates Prob. Code § 16061.8 and renders it meaningless with respect to any direct contest of the validity of an entire trust. If a trustee properly serves notice in accordance with § 16061.7, any person on whom notification has been served is supposed to have a limited time during which he or she can contest the trust. However, under this court’s reasoning, if the contestant argues that the entire trust was revoked prior to death, the time limit does not apply. A contest alleging invalidity of a trust on the ground that it was revoked prior to the death of the settlor is one of six types of contests that are defined by Prob. Code § 21310 as direct contests. If a contestant alleges that an entire trust is invalid for any one of four of the five remaining grounds that are defined as a direct contest (menace, duress, fraud or undue influence; forgery; lack of due execution; or lack of capacity) the same reasoning would lead to the result that there is no time limit for contesting the trust because the trustee had no authority to act under an invalid trust. This surely could not have been what the legislature intended in enacting §16061.7 and §16061.8.

The court did, however, leave us with an amusing quote: “A friend of decedent’s testified that in 2001 decedent took his original copy of the 1997 will, urinated on it and then burned it. We hesitate to speculate how he accomplished the second act after the first.”

Dismissal of Wrongful Death Action on Procedural Grounds Does Not Impact Claim That Alleged Murderer is Prohibited From Collecting Decedent's Life Insurance Policy Proceeds

STATE FARM LIFE INS. CO. v. CAI, 2011 U.S. Dist. LEXIS 24750 (N.D. Cal.) [Filed March 11, 2011]

Short Summary: Wife named Husband as beneficiary of a life insurance policy. Wife's Estate accused Husband of killing Wife, but the wrongful death action filed in state court was dismissed for failure to go to trial within five years of filing. In this interpleader action filed in federal court, Wife's Estate argued that Husband is not entitled to the life insurance proceeds because Prob. Code § 252 treats a life insurance beneficiary as predeceased if said beneficiary feloniously and intentionally killed the person upon whose life the insurance policy is issued. Husband moved to dismiss the § 252 claim on the ground that the statute of limitations had run on the wrongful death claim. The federal district court denied Husband's motion to dismiss because (1) the § 252 claim was not a wrongful death action and (2) the dismissal of the wrongful death action was on procedural grounds, thus issue preclusion does not apply.

Facts: Wife named Husband as beneficiary of a \$250,000 life insurance policy. Wife died on May 28, 2003. Wife's mother filed a wrongful death action against Husband on June 24, 2005. The wrongful death action was dismissed five years later because the case had not been brought to trial within the requisite time period. Wife's Estate claimed that Husband was not entitled to the life insurance proceeds. Husband moved to dismiss the § 252 claim because the two-year limitations period had passed on the wrongful death claim. Insurance Company filed this interpleader action to resolve the competing claims.

Issue: Whether a claim under Prob. Code § 252 to require life insurance proceeds to pass to Wife's Estate as if Husband had pre-deceased Wife is barred because (1) the statute of limitations for a wrongful death action has expired or (2) the estate is collaterally estopped from relitigating the issue of whether Husband feloniously and intentionally killed Wife in a subsequent suit after the wrongful death action has been dismissed on procedural grounds.

U. S. District Court Holding: The U.S. District Court for the Northern District of California held that (1) a § 252 claim is distinct from a wrongful death claim, thus is not barred by the two-year limitation period for wrongful death actions and (2) because the issue of whether Husband feloniously and intentionally killed Wife had not been previously decided on the merits, Wife's Estate is not precluded from raising a claim against Husband under § 252.

U. S. District Court Rationale: First, the court reasoned that a claim under § 252 is not a wrongful death claim, but rather is a claim for denial of benefits where the beneficiary of a life insurance policy feloniously and intentionally killed the insured. As such, the two-year limitation period on wrongful death actions does not bar a claim under § 252.

Next, the federal court explained that if the state court had decided the precise issue of whether Husband feloniously and intentionally killed Wife in the wrongful death action, Wife's Estate could not attempt to relitigate that issue in federal court, and the federal court would likely be bound by the state court's determination. In order for issue preclusion to apply, however, three requirements must be met: (1) the issue raised in the present action must be identical to the issue litigated in a prior proceeding; (2) the prior proceeding must have resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted must have been a party, or in privity with a party, to the prior proceeding. Here, because the wrongful death suit was dismissed on procedural grounds and there was no final determination on the merits of the issue, the wrongful death action had no preclusive effect on the interpleader action before the federal court.

Comment: If a wrongful death action is barred by the statute of limitations, this does not preclude the contingent beneficiaries of the decedent's life insurance policy from asserting a claim under § 252 that the primary beneficiary of the policy feloniously and intentionally killed the decedent, thus is not entitled to collect the insurance proceeds.

Interim Attorney Fees Awarded to Executor/Beneficiary for Defending Against Alleged Pretermitted Heir in Will Contest

ESTATE OF BARTSCH (2011) 193 Cal. App. 4th 885, 124 Cal. Rptr. 3d 13 [Filed March 22, 2011] California Supreme Court denied review on June 8, 2011.

Short Summary: In an ongoing will contest, Objector filed an heirship petition in a related proceeding, claiming to be Decedent's only son and sole heir. Executor, who was also named as a beneficiary of Decedent's estate, was granted an interim award of attorney fees and costs to be paid out of the probate estate to defend against Objector's claim to be a pretermitted heir of Decedent.

Facts: Decedent's will was admitted to probate and Executor was appointed as personal representative. Decedent's will stated that he had no children and that all heirs and relatives not mentioned in the will were intentionally omitted and disinherited. The will contained a no content clause whereby a prevailing contestant would receive \$1.00 and a non-prevailing contestant would receive nothing. The will devised Decedent's estate to approximately 20 beneficiaries, one of whom was Executor. Executor was the largest single beneficiary, taking 14% of the entire estate. The remaining beneficiaries were family members and friends, most of whom resided in Germany. The will did not name Objector as a beneficiary.

Objector filed a petition to determine distribution rights under Prob. Code § 11700, claiming that he was the only child of Decedent and that he was entitled to succeed to Decedent's entire estate by intestate succession as an omitted child under Prob. Code § 21622. Two years after Objector's birth, a paternity proceeding found Decedent to be Objector's father and imposed child support obligations on Decedent. Objector alleged that Decedent either did not believe Objector was his child or had forgotten that he was his child, rendering Objector an omitted child under § 21622.

Executor filed an answer in his capacity as personal representative stating his opposition to Objector's petition, and a month later Executor filed a petition for an order approving an interim payment of his attorney fees and expenses. Objector objected, asserting that Executor is a beneficiary under the will and, therefore, Executor is not an impartial personal representative and should not receive payment from the estate for services rendered by his attorney.

Issue: Whether an interim award of attorney fees and expenses from the probate estate should be granted to Executor, who is also a beneficiary, during an ongoing will contest where Executor is a party to the will contest action in his fiduciary capacity.

Trial Court Holding: The San Francisco County Superior Court granted Executor's petition for interim payment of attorney fees and costs.

Appellate Court Holding: The First District Court of Appeal affirmed, holding that the interim award of attorney fees and costs was proper even though Executor was also a named beneficiary under the will.

Appellate Court Rationale: The appellate court reviewed the statutory interpretation of Prob. Code § 11704, which provides that a "personal representative may . . . participate in [an heirship] proceeding as a party to assist the court." The plain language of the statute permits a personal representative to "assist the court" in an heirship proceeding. The court noted that nothing in the plain meaning of § 11704 precluded Executor, in his capacity as the personal representative, from participating in the heirship proceeding solely because he was a named beneficiary. The court found that there is no basis for concluding that personal representatives who are also beneficiaries are incapable of providing assistance to the court.

Although it perceived no ambiguity in the statutory language, the court accepted Objector's invitation to examine the legislative history of § 11704. The legislative history indicated that prior to 1976, the prevailing view was that personal representatives generally had no standing to participate in heirship proceedings. After the 1976 amendment, however, which provided that "[u]pon order of the court, the administrator or executor may file objections to the petition, and participate in the proceedings as a party in order to assist the court in its determination," a personal representative could participate in the heirship proceeding, but only after obtaining a court order allowing the personal representative to participate in the proceeding. In 1988, the Legislature removed the requirement that the personal representative obtain a prior court order before participating in the proceeding.

The court noted that while it was true that Executor's opposition to Objector's heirship petition did advance Executor's personal interests, the will allocated the vast majority of the estate to many other beneficiaries. Furthermore, Executor was the only person representing the interests of the many named beneficiaries under the will. Therefore, under equitable principles, the court held that attorney fees can be properly awarded to Executor out of the estate, despite Executor being the largest single beneficiary of Decedent's estate.

Comment: Neil F. Horton, Esq., Peter Stern, Esq., and the speaker (all former chairs of TEXCOM) collaborated in the preparation and transmittal of a letter to the Chief Justice of the California Supreme Court urging the court to grant review of this appellate court decision. We explained that we believe the court misread the language of Prob. Code § 11704(b), and, in doing so, the court undermined the duty of impartiality required of personal representatives in disputes between beneficiaries of estates. The court not only allowed the personal representative to take sides in heirship disputes, but also allowed the personal representative to charge the estate with the costs of doing so, even if the representative has a present interest in the matter or takes a position that is not ultimately upheld by the court. We believe the decision will undoubtedly result in abuse of the office of estate representative by unscrupulous fiduciaries and their attorneys.

Further, *Estate of Bartsch* is the only case since the statute's enactment in 1976 to interpret § 11704(b), yet it provides the probate bar with no specific guidance as to when or how personal representatives may participate in proceedings to determine entitlement to estate distribution. Instead, it provides representatives with a carte blanche to participate in any case, which is surely not what the Legislature intended. Because heirship proceedings fulfill an important function in probate procedure – being invoked to resolve a wide variety of issues – California's judicial officers and probate practitioners need a definitive decision by the court to guide them going forward as to the permitted role of the personal representative during heirship proceedings.

Construing § 11704(b) to allow a personal representative who has a personal interest in the estate to litigate, at estate expense, the merits of a competing claim to a beneficial interest in the estate effects a radical change in the personal representative's duty of impartiality. The purpose of the statute, however, was much more limited – to allow the personal representative to participate *solely to assist the court*. The *Bartsch* court's reading of the statute, by contrast, allows the representative *to assist himself*. The phrase “assist the court” must mean something other than the representative's unrestrained participation as a party with the ability to deplete the estate to further his own interests as a beneficiary. This is antithetical to the role of a fiduciary, whose duties are to others.

***Res Judicata* Applies to All Issues in a Court-Approved Settlement Agreement**

ESTATE OF REDFIELD (2011) 193 Cal. App. 4th 1526, 124 Cal. Rptr. 3d 402 [Filed April 5, 2011]

Short Summary: Two children of Decedent (“Estranged Children”) filed petitions under Prob. Code § 850 against a third child of Decedent (“Administrator”), seeking return of \$136,000 to Decedent's estate. Approval of a settlement agreement and dismissal of the § 850 petitions with prejudice are *res judicata* as to all subsequent claims involving those funds. Therefore, Estranged Children are foreclosed from raising in any form the characterization of the \$136,000, whether by direct attack (appeal) or by collateral attack, i.e., by raising it in a challenge to their attorneys fee requests or to the co-administrators' accounting.

Facts: Decedent had three children, Administrator, with whom she had a close relationship, and the two Estranged Children. Approximately a week before her death, Decedent gave a signed withdrawal slip to Administrator and Administrator withdrew \$136,000 from Decedent's account. After Decedent's death, Administrator was appointed administrator of Decedent's probate estate. Estranged Children each filed § 850 petitions claiming the \$136,000 was part of Decedent's estate. A settlement agreement among all three of Decedent's children provided that the residue of Decedent's estate would be distributed, as per intestate succession, in equal shares to each of the three children. Although the court did not determine whether the \$136,000 was part of Decedent's estate, in addition to granting Administrator's petition to approve the settlement, the court ordered the dismissal of both § 850 petitions with prejudice. Over a year later, Administrator presented her First Account and Report. More than 19 months after the order dismissing the § 850 petitions with prejudice had become final, Estranged Children objected to the Account, claiming it was deficient in omitting the \$136,000, and claiming that during settlement negotiations Administrator had misrepresented her intent to keep the \$136,000. Over the course of a 20-day trial, which included testimony from 14 witnesses, Administrator objected multiple times to the trial court's jurisdiction based on the finality of the probate court's order, and yet the trial court, without explanation, proceeded to address the precluded claims that were raised in Estranged Children's accounting objections.

Issue: Whether the trial court is permitted to reopen the determination of the character of the withdrawn funds, after the objectors' § 850 petitions had been dismissed with prejudice.

Trial Court Holding: The Los Angeles County Superior Court, after a trial on the accounting objections, held that because Administrator should have known the \$136,000 was not hers, the funds should be returned to the estate with interest. Administrator appealed.

Appellate Court Holding: The Second District Court of Appeal reversed, holding that the trial court had no authority to reopen the settlement or to reconsider whether the \$136,000 was part of the Decedent's estate.

Appellate Court Rationale: The § 850 petitions regarding the \$136,000 had been dismissed *with prejudice* and no timely appeal was made to the dismissal order or to the order approving the settlement. Three findings are required to apply *res judicata*: (1) there was a final judgment on the merits, (2) the issue decided was identical to the one presented subsequently, and (3) the party against whom *res judicata* is invoked was a party to the prior judgment. Here, the prior case satisfied all three factors: (1) the dismissal of the § 850 petitions with prejudice and the approval of the settlement were appealable orders and no timely appeal was made, rendering the judgments final; (2) the issue in the § 850 petition of returning the \$136,000 to the Decedent's estate is the identical issue raised in the objection to the accounting claiming the administrator failed to include the \$136,000 in her account; and (3) the parties objecting to the accounting were parties to the § 850 petitions and the settlement. The claims of the objecting Estranged Children are therefore precluded, and the trial court erred in even permitting this trial to proceed. The judgment was reversed.

Comment: Parties need to fully understand the breadth of the issues they're resolving in a settlement agreement, and understand that they cannot bring up *any* of them ever again once the settlement is approved by the court and their claims are dismissed. If they don't agree with the order approving the settlement, they have a finite time within which to appeal that order. Also, one may question why the Administrator did not file for a writ before the case started, and press harder on the lack of jurisdiction.

***Marvin* Claim Brought After Decedent's Death Is Subject to One-Year Statute of Limitations, Unless the Doctrine of Equitable Estoppel Applies**

MCMACKIN v. EHRHEART (2011) 194 Cal. App. 4th 128, 122 Cal. Rptr. 3d 902 [Filed April 8, 2011]

Short Summary: A *Marvin* agreement is an express or implied contract between nonmarital partners that was declared enforceable in *Marvin v. Marvin* (1976) 18 Cal. 3d 660. Because the *Marvin* claim in this case is an action to enforce a claim that arises from a promise or agreement with a decedent for distribution from an estate, it is governed by Code of Civ. Proc. § 366.3, which requires the action to be commenced within one year after the date of death, unless the doctrine of equitable estoppel applies.

Facts: Cohabitant lived with Decedent in her home from 1987 until Decedent died intestate on October 1, 2004. Cohabitant was never on title to the home but continued to occupy it and pay for the expenses of maintaining it, including the mortgage, after Decedent's death. Decedent's daughters are the heirs of Decedent's estate. On February 25, 2008, more than three years after Decedent's death, one of Decedent's daughters ("Daughter") opened a probate of Decedent's estate. In April 2009, Daughter delivered a lease agreement for the home to Cohabitant, which he refused to sign. On November 23, 2009, Daughter served Cohabitant with a 60-day notice to quit. On January 13, 2010, Cohabitant filed a complaint alleging that Decedent promised him a life estate in the home upon her death in consideration for 17 years of his "love, affection, care and companionship." The complaint alleged causes of action for declaratory relief, intentional interference with quiet enjoyment, abuse of process, trespass to land, nuisance, injunctive relief, breach of contract, and promissory estoppel.

On January 21, 2010, Cohabitant filed an ex parte application for a temporary restraining order and for an order to show cause why an injunction should not issue to enjoin Daughter from evicting him from the home. Daughter argued that Code of Civ. Proc. § 366.3's one-year limitations period precluded equitable tolling of the statute because the statute itself provides express limitations on when tolling occurs. On March 25, 2010, the trial court issued a tentative ruling to grant the preliminary injunction in which the court stated that the agreement was "an oral non-marital *Marvin* agreement."

Issues: (1) Whether the trial court erred in determining that Cohabitant's *Marvin* claim, based on Decedent's promise to leave him a life estate in her home, is an action to enforce a claim that arises from a promise or agreement with a decedent for distribution from an estate and, thus, is governed by § 366.3. (2) Whether, depending on the circumstances of the case, the doctrine of equitable estoppel may preclude a party from asserting § 366.3 as a defense to an untimely *Marvin* claim where the party's wrongdoing has induced another to forbear filing suit.

Trial Court Holding: The Los Angeles County Superior Court adopted its tentative ruling as its final order and granted the preliminary injunction, concluding that under principles of equitable estoppel, the bar of the statute of frauds does not apply to Cohabitant's oral *Marvin* agreement. The court also determined that the one-year limitations period of § 366.3 is inapplicable because Cohabitant was not making a "claim" as defined by Prob. Code § 9000(a).

Appellate Court Holding: The Second District Court of Appeal affirmed the trial court order granting the preliminary injunction, holding that Cohabitant's *Marvin* claim would be barred by the one-year limitations period of § 366.3, unless the doctrine of equitable estoppel applies. Whether the doctrine of equitable estoppel precludes the application of § 366.3 is a determination to be made by the finder of fact.

Appellate Court Rationale: A trial court may not grant a preliminary injunction, regardless of the balance of interim harm, unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim. In reviewing a preliminary injunction order, appellate review is limited to whether the trial court's decision was an abuse of discretion.

Cohabitant cited Prob. Code § 9000, which governs creditors' claims and defines a "claim" as a "demand for payment." Cohabitant contended that, because his claim to a life estate in the home was not a "demand for payment," § 366.3 did not apply. The appellate court found that, under the reasoning of *Estate of Ziegler* (2010) 187 Cal. App. 4th 1357 and *Stewart v. Seward* (2007) 148 Cal. App. 4th 1513, Cohabitant's action to enforce a claim to a life estate in the home is controlled by § 366.3. The gravamen of the complaint is Decedent's promise to give Cohabitant a life estate in the home at her death in consideration for the love, affection, care, and companionship that Cohabitant gave to Decedent during their relationship. Thus, Cohabitant's claim for a life estate arises from Decedent's promise of a distribution from an estate, and, accordingly, is a claim for distribution within the meaning of § 366.3.

Daughter argued that, as a matter of law, there can be no avoidance of the statute of limitations, pointing out that the language of § 366.3(b) says that the limitations period "shall not be tolled or extended for any reason." The appellate court explained that tolling concerns the suspension of the statute of limitations. The doctrine of equitable estoppel applies only after the limitations period has run to preclude a party from asserting the statute of limitations as a defense to an untimely action where the party's conduct has induced another into forbearing to file suit. Thus, the restrictions on tolling set forth in § 366.3(b) do not apply to the issue of whether the doctrine of equitable estoppel can be used to preclude a party from asserting the statute of limitations.

Here, the court pointed out that both sides delayed: the estate was opened more than three years after Decedent's death, and Cohabitant filed suit almost two years later, thus it is up to the finder of fact to determine the facts and whether equitable estoppel precludes application of § 366.3.

Comment: Here, Cohabitant continued to live in the home and pay the bills, including the mortgage, for more than four years after Decedent's death before Daughter gave him any indication that he would not be able to continue living in the home for the rest of his life. Not surprisingly, Cohabitant apparently did not engage counsel until after Daughter gave him some indication that he might be forced out of the home. Had Daughter given Cohabitant notice to quit shortly after Decedent's death, presumably Cohabitant would have engaged counsel sooner and been able to file a timely *Marvin* claim. This case is a perfect illustration of the reason for the development of the doctrine of equitable estoppel.

Putative Spouse Status Under CCP § 377.60 Is Not Determined by an Objective Standard, but Rather a Subjective Standard Based on the Good Faith Belief That the Marriage Was Valid

CEJA v. RUDOLPH & SLETTEN, INC. (2011) 194 Cal. App. 4th 584, 125 Cal. Rptr. 3d 98 [Filed April 19, 2011]

Short Summary: In a wrongful death action, a claim of putative spouse status should not have been rejected as a matter of law based on a holding that Plaintiff's belief in the validity of her marriage was not objectively reasonable, because a "good faith belief" under Code of Civ. Proc. § 377.60 requires only an actual subjective belief that the marriage was valid.

Facts: Plaintiff, claiming putative spouse status under Code of Civ. Proc. ("CCP") § 377.60 as her basis for standing to sue, sued Defendant (Decedent's employer) for the wrongful death of Decedent. Plaintiff had learned before filing suit that her marriage to Decedent was void, because their wedding was two months before Decedent's divorce from his First Wife was final. Defendant moved for summary judgment, claiming that Plaintiff lacked standing because her marriage was bigamous and void, and the evidence conclusively negated Plaintiff's putative status because it was not "objectively reasonable" for Plaintiff to believe her marriage was valid.

Plaintiff was aware of Decedent's first marriage and that he had filed for divorce from First Wife approximately two years before Plaintiff's and Decedent's wedding, but Plaintiff's and Decedent's marriage license inaccurately represented that Decedent had no previous marriages. Plaintiff declared that despite having seen the documents, she did not read closely the marriage license or the notice of judgment of dissolution dated three months after her marriage to Decedent that warned Decedent against marriage before the judgment of dissolution from First Wife was filed. Plaintiff declared that she always believed that their marriage was valid, and they had even filed taxes as a married couple for the four years before Decedent's death.

Issue: Whether the trial court erred in applying an objective test for putative spouse status under CCP § 377.60.

Trial Court Holding: The Santa Clara County Superior Court granted summary judgment for Defendant, holding that Plaintiff had no standing to sue because under the objective test for putative spouse status, it was not objectively reasonable for Plaintiff to have believed that her marriage was valid, in part because the marriage license inaccurately represented that Decedent had no previous marriages.

Appellate Court Holding: The Sixth District Court of Appeal reversed, holding that the trial court erred in applying an objective test for putative spouse status, as CCP § 377.60 requires that a subjective test based on a good faith belief in the validity of the marriage is the test for putative spouse status.

Appellate Court Rationale: Code of Civil Procedure § 377.60 requires a determination of “good faith” belief, which the court noted focuses on a party’s subjective state of mind and evidence of honesty, sincerity, faithfulness, fraud, or collusion and not on whether the belief is objectively reasonable. In so holding, the court disagreed with the adoption of an objective test in *Marriage of Vryonis* (1988) 202 Cal. App. 3d 712. In *Vryonis*, the Second District Court of Appeal added an additional requirement for putative spouse status: a party’s good faith belief must also be objectively reasonable. The *Ceja* court found that the *Vryonis* court’s declaration that “good faith belief” necessarily incorporates an objective standard of reasonableness lacked any supporting authority. It also stated the *Vryonis* court’s intrusion upon the Legislature’s prerogative in codifying the judicial doctrine of putative spouse status in CCP § 377.60 amounted to judicial legislation without even an attempt to disguise it as statutory construction. The court recognized that although stare decisis is a sound rule of public policy and serves the interests of certainty, stability, and predictability in the law, it nevertheless should not shield court-created error from correction.

The court noted that there were triable issues of fact concerning whether Plaintiff harbored a good faith belief in the validity of her marriage to Decedent. The court reasoned that Plaintiff’s failure to read the marriage license and discover the inaccuracy or misrepresentation was not necessarily inconsistent with a good faith belief in the validity of the marriage so as to preclude putative spouse status. Although the license was inaccurate, the more pertinent question was whether Plaintiff knew that Decedent’s divorce was not final before they got married, and a finding of good faith could be supported by the facts alleged in Plaintiff’s declaration.

Comment: This case involved standing to bring a wrongful death action, but note that Fam. Code § 2251 similarly applies a “good faith” standard. However, the definitions of putative spouse in CCP § 377.60(b) and Fam. Code § 2251 differ. In CCP § 377.60(b), it specifically states that it is the surviving “spouse” who must have believed the marriage to have been valid. The decedent’s belief is irrelevant. On the other hand, Fam. Code § 2251 applies if “either party or both parties believed in good faith that the marriage was valid.” There is a split in authority regarding whether the innocent party must have a good faith belief that the marriage is valid to be declared a putative

spouse under Fam. Code § 2251. In *Marriage of Tejada* (2009) 179 Cal. App. 4th 973, the Sixth District Court of Appeal stated that the Legislature did not intend the division of quasi-marital property to apply *only* to the innocent party; therefore, Fam. Code § 2251 applies even if the division of quasi-marital property benefits the party who knew the marriage was not valid. In 2010, however, the Second District Court of Appeal considered the same issue in *Marriage of Guo & Sun* (2010) 186 Cal. App. 4th 1491 and came to the opposite conclusion. In a better reasoned opinion, the *Guo* court disagreed with the holding in *Tejada* and held that only an innocent party may claim putative spouse status under Fam. Code § 2251.

Attorney Husband is Obligated to Pay Ex-Wife Her Community Interest in an Account Receivable Due From His Client (and Girlfriend) Despite the Fact that He Forgive Girlfriend's Debt

MARRIAGE OF GREENBERG (2011) 194 Cal. App. 4th 1095, 125 Cal. Rptr. 3d 238 [Filed April 28, 2011]

Short Summary: Attorneys fees and sanctions were awarded to Ex-Wife following a hearing on an order to show cause compelling Ex-Husband, an attorney appearing in pro per, to honor a marital dissolution judgment dividing the parties' community property interest in an account receivable that Ex-Husband decided to forgive.

Facts: As part of their marital dissolution judgment, Ex-Husband was ordered to pay Ex-Wife her community property interest in an account receivable from Ex-Husband's Client, who was also Ex-Husband's live-in girlfriend. Ex-Husband refused to pay because the account receivable was forgiven. Ex-Wife filed an Order to Show Cause ("OSC").

Issues: (1) Whether forgiveness by Ex-Husband of fees owed by Client discharges Ex-Husband's obligation to pay Ex-Wife's community interest in the account receivable. (2) Whether Ex-Husband's refusal to pay Ex-Wife because he forgave Client's debt is cause for sanctions and an award to Ex-Wife's for her attorney's fees to bring suit for contempt.

Trial Court Holding: (1) The Ventura County Superior Court ordered Ex-Husband to pay Ex-Wife her community property interest in the accounts receivable, holding Ex-Husband's obligation to pay Ex-Wife was not discharged. (2) The court also ordered \$2,000 sanctions against Ex-Husband and awarded \$800 to Ex-Wife for her attorney's fees to bring suit.

Appellate Court Holding: The Second District Court of Appeal affirmed.

Appellate Court Rationale: The marital dissolution judgment requires that Ex-Husband pay 50% of the receivable to Ex-Wife. Ex-Husband can write off or otherwise forgive the obligation between himself and Client, but he cannot escape responsibility for paying Ex-Wife her community property

interest. The court noted that Ex-Husband had no appreciation for the trial court's order, which the appellate court viewed as an adverse factual finding, and which it stated was fatal to Ex-Husband's appeal. Ex-Husband made no showing that the trial court abused its discretion in concluding that Ex-Husband's attempt to do an impermissible end-run around the marital dissolution judgment required Ex-Wife to incur attorney fees she could not afford. Ex-Husband did not appeal the marital dissolution judgment and, therefore, it could not be collaterally attacked through this proceeding.

Comment: The court gives the reader a clue as to which way it will rule, when it begins its opinion by stating: "Abraham Lincoln once said, 'He who represents himself has a fool for a client.' Here, the client is an attorney who represented himself in the trial court. He now represents himself on appeal. He is unschooled on the basics of appellate law, suggesting that Lincoln's observation applies on appeal. We understand that emotions run high in family law litigation and that this may cloud the judgment of a party. But this does not excuse the filing of a 'creative' (i.e., misleading or incomplete or inaccurate) income and expense declaration; or perjury, as referenced by the trial court; or the filing of a frivolous appeal."

Ex-Husband was disciplined by the California State Bar on September 18, 2009 for perjuring himself when he denied under oath during his marital dissolution proceeding that he had sex with Client (his girlfriend). The appellate court also ordered the clerk of the appellate court to send a copy of its opinion to the State Bar so that it could determine whether Ex-Husband should be disciplined again.

Probate Court Must Refer Guardianship Case to CPS Where Unfit Parent Allegations Would Warrant Dependency Proceedings

GUARDIANSHIP OF CHRISTIAN G. (2011) 195 Cal. App. 4th 581, 124 Cal. Rptr. 3d 642 [Filed May 12, 2011] As modified on May 31, 2011.

Short Summary: The probate court erred under Prob. Code § 1513(c) by not referring a guardianship case to a child protective services agency for a dependency investigation because the guardianship petition was based on unfit parent allegations that would warrant dependency proceedings under Welf. & Inst. Code § 300, including an unsanitary home and inadequate parental care.

Facts: Father's brother ("Uncle") reported unsanitary living conditions and neglect to Child Protective Services ("CPS") and stated his willingness to care for Child. CPS recommended that Uncle seek a probate guardianship because a relative was available to take custody of the child. Uncle petitioned for temporary guardianship based on declarations of unsanitary living conditions, Father's mental health issues, and Father's failure to seek services for Child's developmental disability. The probate court investigator recommended placement of Child with Uncle due to Father's mental health issues and inability to recognize and provide care for Child's level of disability. Throughout the trial, Father, acting in pro per, disputed his inability to care for Child.

Issue: Whether, where there are allegations of parental unfitness, a trial court errs by granting permanent guardianship instead of referring the case to CPS for a dependency investigation.

Trial Court Holding: The Mendocino County Superior Court granted permanent guardianship to Uncle, finding by clear and convincing evidence that if Child remained in Father's care, it would be detrimental to Child "at this time," because of Child's disability and Father's limitations.

Appellate Court Holding: The First District Court of Appeal reversed, revoked letters of guardianship and remanded for compliance with Prob. Code § 1513(c), holding that Uncle's allegations amounted to an accusation of unfitness, which brings Child under dependency laws, obligating the probate court to refer the case to CPS for a dependency investigation.

Appellate Court Rationale: Probate Code § 1513(c) states that a referral to CPS "shall be made" whenever a parent is accused of unfitness as defined by Welf. & Inst. Code § 300 (which describes circumstances that bring a minor within the dependency jurisdiction of the juvenile court). The appellate court made a lengthy comparison between guardianship proceedings and dependency proceedings, concluding that guardianship proceedings are mainly designed for situations involving orphaned children or unavailable parents, and insufficiently protects parents desirous of maintaining custody of their children. The failure to follow the Prob. Code § 1513(c) mandate to refer to CPS results in guardianship proceedings under the Probate Code that provide fewer protections of parental rights (no counsel for parent, discretionary counsel for child, no reunification services, only annual written report by guardian) than the heightened protections provided by juvenile dependency proceedings under the Welfare & Institutions Code (mandatory investigation and case plan, counsel for parent and child, social services for parent and child, strong preference for reunification, frequent re-evaluations). Recognizing that parental rights are among the most basic of civil rights, the court reasoned that in a guardianship where a parent is alleged to be unfit, the probate court has a duty to refer the case to CPS so both parent and child will have greater protection of their rights, there will be greater oversight, and the process will be focused on reunification of parent and child.

Comment: Ironically, in this case, Uncle first reported Child to CPS, but CPS recommended that he seek a probate guardianship. Now, relatives who pursue guardianships due to parental unfitness do not have a secondary path to guardianship through the Probate Code. All child welfare cases regarding parental unfitness must be referred to CPS so that the cases are subjected to the heightened protection of parental and child rights provided by the Welfare & Institutions Code.

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

MARRIAGE OF VALLI (2011) 195 Cal. App. 4th 776, 124 Cal. Rptr. 3d 726 [Filed May 18, 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.

Facts: After being married for 20 years, in September 2004, Husband and Wife separated and Husband filed a petition for dissolution of marriage. At that time, Husband and Wife had three minor children together. In March 2003, Husband acquired a \$3.75 million insurance policy on his life ("the policy") because he had been experiencing medical problems and wanted to make sure that he took care of his family. The insurance agent who sold the policy testified that his company sold the policy to Husband and Wife and that Wife is the owner and beneficiary of the policy. Husband testified that he put everything in Wife's name, figuring she would take care and give to the kids what they might have coming. During the parties' marriage, prior to their separation, the insurance premiums were paid from community property funds. At the time of trial, the policy had a cash value of \$365,032.

Issue: Whether the policy was community property or Wife's separate property.

Trial Court Holding: The Los Angeles County Superior Court held that the policy is community property because the policy was acquired during the marriage and the policy's premiums were paid during the marriage.

Appellate Court Holding: The Second District Court of Appeal reversed, holding that the policy listing Wife as the policy owner when taken out by Husband and Wife is Wife's separate property under the "form of title" presumption.

Appellate Court Rationale: Citing *Marriage of Brooks & Robinson* (2008) 169 Cal. App. 4th 176, the appellate court explained that the act of taking title to property in the name of one spouse during marriage with the consent of the other spouse effectively removes that property from the general community property presumption. In that case the form of title presumption applies, and can only be overcome by clear and convincing proof that there was an understanding between the parties that the title reflected is not what the parties intended. Husband argued that Wife failed to prove that she holds legal title to the policy because the policy was not introduced into evidence. The court found that there is no authority for the proposition that title for the form of title presumption must be

established through documentary evidence. Here the fact that title was taken solely in Wife's name was established by the testimony of Husband, Wife and the insurance agent. Husband failed to rebut the title presumption because he did not present any evidence of an understanding with Wife that, when the policy was placed solely in Wife's name as owner, they intended the policy to be other than Wife's separate property.

Husband next argued that the form of title presumption in Evid. Code § 662 does not arise because of the presumption of undue influence emanating from the fiduciary duty Wife owed Husband under Fam. Code § 721 in connection with the acquisition of the policy and the advantage she obtained over Husband. The parties disagreed about the reach of the fiduciary duties codified in § 721. Wife argued that the fiduciary duties apply only to transactions between spouses and not to transactions between one spouse and a third party. Husband argued that the fiduciary duties apply not only to transactions between spouses but also to transactions between a spouse and a third party. However, the court did not resolve this issue because it found that Wife prevails under either theory. If Wife's theory is correct, she prevails because the acquisition of the policy resulted from a third party transaction and not from a transaction between spouses. If Husband's theory is correct, Wife still prevails because the third party transaction at issue was between Husband and a third party and not between Wife and a third party. Wife could not have owed a fiduciary duty to Husband in a transaction in which she did not participate.

Finally, Husband argued that there was no valid transmutation of the policy. However, again citing *Brooks & Robinson*, the court found that because the policy was acquired from a third party and not through an interspousal transaction, Fam. Code § 852 and the authorities concerning transmutation are not relevant to this case.

Comment: There was no testimony in this case that indicated that either Husband or Wife actually understood at the time of purchase that the insurance policy would be Wife's separate property. However, because there was also no evidence that Husband and Wife had an understanding or agreement that the policy would be community property, Husband was unable to overcome the title presumption. This case serves as one more reminder of how important it is for spouses to document their true intention any time they take title to an asset in the name of one spouse, yet intend the asset purchased to be community property.

Attorney's Conflict of Interest Results in Denial of Quantum Meruit Recovery

FAIR v. BAKHTIARI (2011) 195 Cal. App. 4th 1135, 125 Cal. Rptr. 3d 765 [Filed May 24, 2011]

Short Summary: Attorneys who violate a rule of professional conduct may recover in quantum meruit where they do not act in violation of an express statutory prohibition when providing legal services and where the subject services are not otherwise prohibited. On the other hand, violation

of a rule that constitutes a serious breach of fiduciary duty, such as a conflict of interest that goes to the heart of the attorney-client relationship, warrants denial of quantum meruit recovery.

Facts: Attorney was a partner at a law firm and an experienced business attorney. Client had inherited a substantial sum and was seeking real estate investment opportunities. Attorney approached Client, who had consulted Attorney for advice regarding a possible real estate transaction, with a proposal to form a real estate investment business. From 1990 to 2000, Attorney provided legal services to various business entities formed between himself and Client. In 1993, Attorney left his law firm and began working full time for the corporation that he formed with Client. Attorney and Client entered into various business arrangements without first agreeing on many essential terms. Attorney never gave advice against himself to Client. The failure to reach an agreement on essential terms was a constant source of strife in the business relationship, which eventually resulted in this litigation between Attorney and Client.

Issue: Whether an attorney who entered into a successful business transaction with his client, but did not provide the client with the written disclosures required by California Rules of Professional Conduct (“CRPC”), Rule 3-300, was properly denied leave to amend his complaint to state a cause of action for recovery of the reasonable value of his services in quantum meruit.

Trial Court Holding: The San Mateo County Superior Court held that the business agreements between Attorney and Client were properly voided at the election of Client based on Attorney’s violation of Rule 3-300 and breach of his fiduciary duty under Prob. Code § 16004. The court then denied Attorney’s motion for leave to amend to add a quantum meruit claim to his complaint against Client.

Appellate Court Holding: The First District Court of Appeal affirmed, concluding that the trial court did not abuse its discretion in denying Attorney leave to amend his complaint to assert a cause of action for quantum meruit recovery.

Appellate Court Rationale: First, the appellate court addressed whether or not Attorney was entitled to severance between the voidable services performed for Client and those services that were not in breach of his fiduciary duty or Rule 3-300. The appellate court reasoned that because the trial court had found that *all* of the business agreements were voidable and unenforceable in their entirety, the doctrine of severance did not apply because there was no lawful portion of the agreement that could be severed.

The court next undertook a thorough analysis of *Huskinson & Brown LLP v. Wolf* (2004) 32 Cal.4th 453. In *Huskinson*, the California Supreme Court allowed a law firm to recover fees in quantum meruit where a fee sharing agreement between two law firms was found to be unenforceable because the agreement was not disclosed to the client in writing and client’s written consent was not obtained, in violation of CRPC, Rule 2-200. The court distinguished *Huskinson* on the grounds that *Huskinson* concerned Rule 2-200, a rule which, although binding on attorneys, when violated is not an act in violation of an express statutory prohibition, whereas a violation of Rule 3-300 is also a

violation of Prob. Code § 16004. The court explained that it reads *Huskinson* as standing for the following proposition: attorneys who violate a rule of professional conduct may recover in quantum meruit where they do not act in violation of an express statutory prohibition when providing legal services and where the subject services are not otherwise prohibited; however, an attorney who seriously breaches a fiduciary duty, such as a conflict of interest that goes to the heart of the attorney-client relationship, may not seek recovery in quantum meruit.

Lastly, the court rejected Attorney's argument that an attorney engaged in conduct short of fraud is entitled to recover the reasonable value of his services, explaining that the California Supreme Court has also denied recovery in quantum meruit for "acts of impropriety inconsistent with the character of the profession, and incompatible with the faithful discharge of its duties."

Comment: *Fair v. Bakhtiari* makes clear what was implied in *Huskinson & Brown LLP v. Wolf*: a violation of a rule of professional conduct where there is not an express statutory prohibition against the conduct does *not* preclude recovery under quantum meruit; on the other hand, violation of a rule of professional conduct that constitutes a serious breach of fiduciary duty, such as a conflict of interest that goes to the heart of the attorney-client relationship, warrants a denial of quantum meruit recovery. Any attorney entering into a business contract with a client should ensure that Rule 3-300 is complied with in full and that he in no way breaches his fiduciary duty to his client. The best course of action is not enter into any business arrangements with clients.

Family Code § 1612(c) Pertaining to Enforceable Spousal Support Waivers Held Not To Be Retroactive

MARRIAGE OF HOWELL (2011) 195 Cal. App. 4th 1062, 126 Cal. Rptr. 3d 539 [Filed May 24, 2011]

Short Summary: Family Code § 1612(c), which invalidates any waiver of spousal support in a prenup if *either* (1) the party against whom enforcement is sought was not represented by independent counsel at the time the agreement was signed *or* (2) the spousal support waiver is unconscionable at the time of enforcement, does not apply retroactively to a prenup executed before its enactment in 2002.

Facts: Husband and Wife began dating in 1997, became engaged in 1998 and were married in mid-May 1999. They separated in late March 2008. In the marital dissolution proceedings, Wife requested spousal support and Husband argued that their premarital agreement ("Prenup") contained a spousal support waiver so he should not have to pay spousal support. The parties gave conflicting testimony about their Prenup. Husband testified that (1) he told Wife he wanted a Prenup a year and a half before they married; (2) he gave Wife the Prenup in early December 1998, telling her to take her time reading it and consult an attorney; and (3) Wife had a copy of the Prenup from early December 1998 until it was signed on January 30, 1999.

Wife testified that (1) Husband waited until the wedding was fully planned and paid for by Wife and her family to discuss his desire for a Prenup; (2) a few days after Husband brought up the issue of a Prenup, he presented Wife with an agreement prepared by his attorney; (3) Wife had the agreement for about three days before she signed it and she did not completely understand what rights she was waiving with the spousal support waiver; (4) she did not have money to hire her own attorney; and (5) she signed the Prenup because canceling the wedding would have been a great embarrassment to her and her family.

The Prenup recited, among other things, that (1) Wife has been advised to obtain legal counsel but has decided not to do so because she believes that without counsel she can fully protect her legal rights; (2) Attorney is solely Husband's attorney and is representing Husband's interests and not those of Wife; and (3) the parties mutually waive any right to receive future spousal support in the event of dissolution or legal separation.

Issues: (1) Whether Fam. Code § 1612(c) applies retroactively to a spousal support waiver in a prenup executed before its enactment. (2) Whether the waiver of spousal support in the Prenup is valid and enforceable.

Trial Court Holding: The San Diego County Superior Court ordered Husband to pay spousal support and held that § 1612(c) applies retroactively and therefore invalidated the spousal support waiver included in the Prenup because Wife was not represented by independent counsel at the time the Prenup was signed.

Appellate Court Holding: The Fourth District Court of Appeal reversed, holding that (1) § 1612(c) does not apply retroactively to a prenup executed before its enactment, and (2) based on the law that existed at the time the parties executed the Prenup, the parties' waiver of spousal support in their Prenup is valid and enforceable.

Appellate Court Rationale: In 2002, the Legislature amended Fam. Code § 1612 by adding subdivision (c) which invalidates any waiver of spousal support in a prenup if *either* (1) the party against whom enforcement is sought was not represented by independent counsel at the time the agreement was signed *or* (2) the spousal support waiver is unconscionable at the time of enforcement. The appellate court began by explaining that the issue before it, which has yet to be decided in this state, is whether § 1612(c) applies to a prenup executed before its enactment.

At the time the parties executed the Prenup, § 1612 provided, among other things, that parties to a prenup may contract with respect to any matter, including their personal rights and obligations (with the exception that the right of a child to support may not be adversely affected by a prenup) provided that the agreement is not in violation of public policy or a statute imposing a criminal penalty. The court explained that as a threshold issue, it must decide whether § 1612(c) clarified or changed existing law. A statute that merely clarifies existing law is properly applied to transactions predating its enactment whereas a statute might not apply retroactively when it substantially changes the legal consequences of past actions. After reviewing prior court decisions and legislative history, the court

concluded that the addition of § 1612(c) did not merely clarify existing law, but rather substantially changed it.

The court next analyzed whether the Legislature intended the material change in the enforceability of a spousal support waiver to apply retroactively. Finding nothing on the “face of the enactment” to suggest § 1612(c) was intended to be retroactive, the court examined legislative history and concluded that it shows the Legislature did not intend § 1612(c) to apply retroactively. The court then distinguished the California Supreme Court’s 2006 decision in *Marriage of Fellows* (2006) 39 Cal.4th 179, which relying on Fam. Code § 4(c), concluded that amendments to the Family Code generally apply retroactively unless otherwise provided by law. The *Fellows* court reasoned that the new statute being analyzed in that case did not place any new duties on the obligor spouse with respect to payment of child support whereas here if § 1612(c) were given retroactive effect, a new duty would be imposed based on the requirement that a party against whom enforcement of a spousal support waiver is sought have independent counsel *at the time of executing the waiver provision*. Finally, the court explained that in light of its decision that the Legislature did not intend § 1612(c) to apply retroactively, the court need not decide whether the retroactive application of § 1612(c) impermissibly impaired a vested right of Husband without due process of law.

Having concluded that § 1612(c) does not apply to the parties’ Prenup, the court proceeded to analyze whether the parties’ waiver of spousal support in the Prenup was valid and enforceable under the law in effect at the time the parties executed the Prenup. The court concluded that in light of the trial court’s findings, which were supported by ample evidence in the record, Wife, despite not having independent counsel at the time she executed the Prenup, knowingly and voluntarily waived her right to spousal support in the agreement, thus the spousal support waiver was enforceable.

Comment: Sometimes as practitioners we can be caught off guard by the fact that the California law that we have become accustomed to relying on for several years was not the law in existence at the time a document was executed, at the time a document became irrevocable, or at the time a decedent died. This case serves as a reminder to always confirm that the current law is the law that applies to the transaction at issue and, if it is not, to research the prior law that is actually applicable to the transaction at issue. A couple of other examples of prior laws which still affect some transactions that we are now litigating are (1) the current disqualified transferee statute which does not apply to instruments that became irrevocable before 2011 and (2) the current no contest clause statute which does not apply to instruments that became irrevocable before January 1, 2001.

Having the Same Conservator Does Not Create Privity Between the Real Parties in Interest: the Conservatees

CONSERVATORSHIP OF BUCHENAU (2011) 196 Cal. App. 4th 1031, 127 Cal. Rptr. 3d 109 [Filed May 31, 2011]. Publication status changed from unpublished to published on June 21, 2011.

Short Summary: A ruling against the Public Guardian in one conservatorship case did not create collateral estoppel against the Public Guardian in a different conservatorship case, as there was no privity between the real parties in interest: the conservatees.

Facts: Public Guardian, as conservator of a Conservatee One's estate, held an auction to sell real property out of Conservatee One's estate. Bidders made the high bid and the probate court confirmed the sale. Bidders failed to deposit the purchase funds into escrow and Public Guardian failed to deposit the deed into escrow until approximately 20 days after the end of the escrow period. Public Guardian successfully petitioned to vacate the sale, re-authorize a sale of the real property, and retain Bidders' bid deposit. After the property was finally re-sold, the probate court awarded \$60,062 in damages to Conservatee One's estate. In a concurrent case, Public Guardian, as conservator of Conservatee Two's estate, similarly held an auction to sell real property out of Conservatee Two's estate. In that case, Bidders' Agent made the high bid and the probate court confirmed the sale. Bidder's Agent similarly failed to deposit the purchase funds into escrow and Public Guardian similarly failed to deposit the deed into escrow until approximately 20 days after the end of the escrow period. In the case that had an earlier hearing date, Public Guardian had been required to return the bid deposit to Bidders' Agent. Bidders appealed on the grounds that the probate court was collaterally estopped from finding against them by virtue of its opposite ruling in the concurrent proceeding.

Issue: Whether a judgment against a conservator in its administration of one conservatorship creates privity with other conservatorships administered by that same fiduciary, for purposes of collateral estoppel, or issue preclusion.

Trial Court Holding: The Los Angeles County Superior Court authorized Public Guardian to retain Bidders' deposit where Bidders had not deposited the purchase money into escrow by the scheduled close of escrow, and ordered Bidders to pay \$60,062 in damages to the conservatorship estate. Bidders appealed.

Appellate Court Holding: The Second District Court of Appeal affirmed the orders authorizing Public Guardian to retain the bid deposit and awarding damages to the conservatorship estate, holding that the court was not collaterally estopped from finding against Bidders even though it had reached a different result in a similar concurrent case in which Public Guardian and Bidder's Agent had been involved.

Appellate Court Rationale: The appellate court found that Bidders had the burden of proof and failed to prove two of the three requirements for collateral estoppel. Collateral estoppel requires that

(1) the claim is identical to a claim litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom estoppel is asserted was a party to the prior proceeding, or was in privity with a party to the prior proceeding. Bidders failed to present any evidence that their sale agreement and escrow terms involving Conservatee One's estate were identical to the sale agreement and escrow terms involving Conservatee Two's estate. Thus Bidders failed to prove the first element required for collateral estoppel, that their claim was identical to the claim litigated in the prior proceeding.

More importantly, Bidders failed to show that Public Guardian, as conservator of Conservatee One's estate, was in privity with Public Guardian, as conservator of Conservatee Two's estate. The court stated, "[t]here is no reason that any conservatee should expect to be bound by a ruling issued against its conservator in its capacity as conservator of a completely different estate; especially when, as in this case, the conservator serves this role for numerous other parties." The conservator is not the real party in interest, it merely stands in the shoes of its conservatees, and all contractual rights belong to the conservatees, not the conservator. There is no privity between conservatees merely because they share a common conservator, and Bidders therefore failed to prove the privity requirement for collateral estoppel.

Comment: This case provides an important result for our clients who are professional fiduciaries, and for any fiduciary who administers more than one estate: a judgment against a fiduciary in one conservatorship case cannot be used as collateral estoppel against that fiduciary in a proceeding involving any of their other conservatorship cases, because the unrelated conservatees are the real parties in interest. Presumably this argument can be extended to probate, guardianship, and trust administrations as well. Having the same fiduciary does not create any issue preclusion privity between the fiduciary's clients or between the various unrelated estates that the fiduciary administers.

Necessary Parties to Wrongful Death Actions

ADAMS v. SUPERIOR COURT (2011) 196 Cal. App. 4th 71, 126 Cal. Rptr. 3d 186 [Filed June 2, 2011]

Short Summary: The appellate court granted Administrator's petition for a writ of mandate and directed the trial court to reverse its order abating Personal Representative's wrongful death and survival causes of action for failure to join all of Decedent's heirs as parties.

Facts: Administrator of Decedent's estate filed a civil claim for negligence, willful misconduct, and elder abuse as a survival claim and also filed a wrongful death claim against several defendants. Administrator admitted that she did not represent the heirs of the decedent. Defendants filed a motion pursuant to Code of Civ. Proc. ("CCP") §§ 377.60 and 382 to abate the action for failure to join all necessary parties (Decedent's heirs at law) as plaintiffs or nominal defendants.

Issue: Whether the action should have been abated for failure to join Decedent's heirs as parties.

Trial Court Holding: The Los Angeles County Superior Court granted Defendants' motion and abated the action for failure to join all of Decedent's heirs.

Appellate Court Holding: The Second District Court of Appeal granted Administrator's petition for a writ of mandate and reversed the trial court's order, holding that Administrator need not join the heirs in the wrongful death action.

Appellate Court Rationale: Code of Civil Procedure § 377.60 provides that a wrongful death claim may be made by the heirs at law of a decedent or by the decedent's personal representative on their behalf. Code of Civil Procedure § 382 states that, where the consent of a person who should be a plaintiff in the case cannot be obtained, that party may be made a "nominal defendant," with the reasons stated in the complaint why the party could not be made a plaintiff.

The appellate court reasoned that the statute authorizing a wrongful death cause of action is intended to provide a single action for damages for wrongful death, with the right to bring the action held jointly by the decedent's heirs or by the personal representative. The statute also limits the action by a wrongful death plaintiff to a single action, either by the heirs or by the personal representative. Where the heirs bring the cause of action, all heirs must be joined as parties, either as plaintiffs or as nominal defendants. Failure to do so could result in abatement of the cause of action. However, where the personal representative of the estate brings the wrongful death action, she is acting as "a statutory trustee to recover damages for the benefit of the heirs." Therefore, the personal representative may bring the action without naming those heirs for whom the action is prosecuted. As a fiduciary, Administrator represents the interests of the heirs who receive from Decedent's estate. While Administrator did state that she did not represent the heirs, that is only true to the extent that her counsel did not represent them. However Administrator's fiduciary duties govern the conduct of the litigation.

Since the trial court incorrectly abated the wrongful death cause of action, it was also error to abate the survival causes of action. Furthermore, the survival statutes, which must be strictly construed, give the personal representative the right to prosecute claims that existed during the decedent's life so as to avoid abatement of those causes of action due to the decedent's death.

Comment: The court commented that there are several advantages to naming the personal representative as the wrongful death plaintiff rather than the heirs, including that (1) case control is centralized, (2) there is no need to have guardians ad litem appointed for minor heirs, (3) no minor's compromise petitions need to be filed, and (4) where there are numerous heirs, there is no need to find them all and determine whether they are willing or unwilling plaintiffs.

No Accord and Satisfaction for Required Trust Distributions

BELLOWS v. BELLOWS (2011) 196 Cal. App. 4th 505; 125 Cal. Rptr. 3d 401 [Filed June 9, 2011]

Short Summary: The trial court erred in holding that Beneficiary entered into accord and satisfaction as to the amount of the final distribution of the trust: a trustee may never condition a required distribution on an involuntary release of liability. Further, the court found that Prob. Code § 16004.5 (no relief of trustee liability as a condition for required distributions) overrides Com. Code § 3311 (governing accord and satisfaction of a written instrument) and precludes entry of an effective accord and satisfaction when the two statutes conflict.

Facts: A trust provided that on the death of Settlor, trust assets would be divided between Trustee and Beneficiary, who were brothers. Following Settlor's death, Beneficiary requested distribution of his share of the trust assets. After a period of delay by Trustee, Beneficiary filed a petition under Prob. Code § 17200 seeking an accounting and distribution of trust assets. On November 13, 2009, the court ordered Trustee to provide an accounting of the trust assets and to distribute one-half of the assets to Beneficiary within 10 days. On November 27, 2009, Trustee mailed to Beneficiary's attorney a check for \$30,376.80, which he represented was one-half of the trust assets, accompanied by an acknowledgment that the check represented "a final distribution of the trust estate." Beneficiary cashed the check but did not sign and return the receipt.

Issue: Whether the trial court erred in holding that Beneficiary entered into accord and satisfaction as to the amount of the final distribution of the trust, precluding the need for a further accounting.

Trial Court Holding: The Mendocino County Superior Court found that Beneficiary entered into accord and satisfaction with Trustee as to the amount of the final distribution and the right to a final accounting when Beneficiary cashed the check sent by the Trustee.

Appellate Court Holding: The First District Court of Appeal held that the trial court erred in holding that Beneficiary's acceptance of the check, represented to be the final distribution, prevented him from challenging the accuracy of the accounting submitted by Trustee. Further, the court found that Prob. Code § 16004.5 overrides Com. Code § 3311 and precludes the entry of an effective accord and satisfaction. The case was remanded to the probate court for consideration of the sufficiency of Trustee's accounting.

Appellate Court Rationale: The appellate court first reviewed the language of Com. Code § 3311 and the requirements for accord and satisfaction. The appellate court next stated that Prob. Code § 16004.5 overrides the Commercial Code and precludes entry of an effective accord and satisfaction under the circumstances. First, the court consulted the language of § 16004.5(a), which provides that "a trustee may not require a beneficiary to relieve the trustee of liability as a condition for making a distribution or payment to, or for the benefit of, the beneficiary, if the distribution or payment is required by the trust instrument." The court then stated that there was no dispute that,

under the terms of the trust, Trustee was required to distribute to Beneficiary one-half of the trust assets. Therefore, under the plain language of § 16004.5, Trustee could not condition the trust distribution on a release of liability.

The appellate court then addressed whether Trustee was authorized to obtain a release by any of the exceptions to § 16004.5 contained in subpart (b). Subdivision (b)(2) allows a trustee to seek a *voluntary* release or discharge, but the court found that in the present case a release obtained as a condition of accepting payment was not voluntary. Subdivision (b)(5) permits a trustee to seek beneficiary approval of an accounting of trust activities, but the court found that in the present case Trustee could not condition the payment of money on Beneficiary's approval of the accounting. Subdivision (b)(4) permits a trustee to withhold any distribution that is reasonably in dispute and seek instructions from the court, but the court found that what the Trustee may not do is extract a compromise concerning a disputed issue as a condition of making a distribution to which Beneficiary was unquestionably entitled. Finally, the court examined the legislative history of § 16004.5, which specifically addresses the subject at issue and found that the conditional distribution made by Trustee in this case is precisely the conduct the statute is designed to prevent.

Comment: In this case, since the court had already ordered Trustee to make the distribution within ten days, Trustee had no excuse for delaying the distribution. In a more typical case where the trustee had not unnecessarily delayed distribution, it is possible for the trustee to use § 16004.5(b)(2) and (b)(5) to obtain the trust beneficiaries' approval of a formal or informal accounting as well as a general release. This can be done by providing the informal or formal accounting to the trust beneficiaries accompanied by a letter asking them to sign an approval of the accounting that includes a general release if they do approve of the accounting. The trustee can explain in the letter that if the beneficiaries do not sign the document approving the accounting, the trustee may file a petition with the court requesting the court to approve the accounting at the expense of the trust. If the beneficiaries do not all approve the accounting and provide the general release, it appears that § 16004(b)(4) gives the trustee the right to withhold from distribution any amount that might be reasonably in dispute as well as the funds required to file (and possibly defend) a petition requesting the court to approve the accounting and the acts of the trustee. This way the attorney is able to protect the trustee client either by obtaining a general release from the beneficiaries or by obtaining court approval of the trustees acts.

Failure to File Creditor's Claim Does Not Bar Breach of Contract Claim Where Administrator, Not Decedent, Breached the Contract

DACEY v. TARADAY (2011) 196 Cal. App. 4th 962, 126 Cal. Rptr. 3d 804 [Filed June 21, 2011]

Short Summary: Where a contract was not breached before Decedent's death, but rather was breached post-death by Decedent's estate Administrator, the court held that the one-year statute of limitations on creditor's claims under Code of Civ. Proc. ("CCP") § 366.2 is not applicable because

Decedent's former law partner ("Former Partner") had no claim until Administrator breached the contract and so was not a creditor of Decedent's estate.

Facts: Law Firm handled a number of inverse condemnation cases ("the Cases"). In 1990, the partners of the firm entered into an agreement to dissolve Law Firm ("Dissolution Agreement") which provided that the Cases were "assigned" to Decedent and specified the percentages each former partner of the firm would receive from attorneys fees recovered in the Cases.

Decedent died in 2001 and the Cases settled in 2004 resulting in a substantial fee recovery. Administrator settled with numerous attorneys participating on behalf of plaintiffs in the Cases and agreed to reduce the estate's share of the fee recovery. Former Partner did not file a creditor's claim against the estate and Administrator did not pay him anything from the fee recovery. In 2005, Administrator notified Former Partner of the fee recovery and declared Former Partner would not receive any of the recovery due to his failure to file a creditor's claim within the statutory period. In 2006, Former Partner filed a civil action against Administrator for breach of contract. Administrator argued that CCP § 366.2 and Prob. Code §§ 9000, 9100, 9103 and/or 9352 barred Former Partner's claims.

Issues: Whether Former Partner's claim for breach of contract was barred by his failure to file a creditor's claim within the one year statute of limitations under CCP § 366.2.

Trial Court Holding: The San Francisco City and County Superior Court held that CCP § 366.2(a) does not apply to Former Partner's claims against the estate because Administrator, not Decedent, breached the Dissolution Agreement.

Appellate Court Holding: The First District Court of Appeal affirmed, holding that Administrator waived raising the creditor's claim issue on appeal and that CCP § 366.2(a) does not apply to Former Partner's claims against the estate because Administrator, not Decedent, breached the Dissolution Agreement.

Appellate Court Rationale: Administrator waived raising the issue of Former Partner failing to file a creditor's claim pursuant to Prob. Code § 9100 on appeal because he had only raised the issue in the trial court in conjunction with other defenses and never as an independent defense. Thus, Administrator failed to preserve the issue for appeal as an *independent basis* for rejecting Former Partner's breach of contract claim. The court further rejected Administrator's argument that it could raise the issue for the first time on appeal because Former Partner's failure to file a creditor's claim was an incurable defect in Former Partner's pleading. The court found that other courts have allowed waiver or estoppel of the statute of limitations where the decedent's representative induced a creditor not to file a timely claim and, because the creditor's claim issue was never raised independently in trial court, the trial court never had the opportunity to consider whether the facts warranted a finding that the statutory period should be tolled or that estoppel applies. Thus, had the issue been raised in trial, the trial court could have found that Former Partner would still be able to file a creditor's claim and his failure to do so was not an incurable defect.

In holding that CCP § 366.2 does not apply in the instant case because the debt was not enforceable against Decedent while he was alive and the breach of contract occurred after Decedent's death, the court analyzed the meaning of CCP § 366.2 and Prob. Code § 9100. The court disagreed with Administrator's argument that Decedent's contractual liability to Former Partner under the Dissolution Agreement is the same as a "liability of the person" under § 366.2(a) ("liability for which one is personally accountable and for which a wronged party can seek satisfaction out of the wrongdoer's personal assets") because, at the time of Decedent's death, there had been no breach of the contract by the Decedent, so there was no wronged party and Former Partner could not have filed any cause of action against Decedent based on contract or tort.

Further, the court rejected Administrator's argument that the definition of liability under Prob. Code § 9000 must be read along with CCP § 366.2, so that § 9000's broader definition of liability, which includes any claim whether accrued or not accrued, is encompassed within the one-year statute of limitations under § 366.2. The court explained that the Legislature provided a special definition for "liability" in Prob. Code § 9000, but the Legislature did not indicate that this special definition has any application to statutes outside the Probate Code. Probate Code § 9000 is concerned with claims by creditors, and a creditor is any "person who may have a claim against estate property." Under a claims statute, such as Probate Code § 9100, the party has an obligation to file a claim if there is any liability or legal obligation. On the other hand, CCP § 366.2, a statute of limitations under the Code of Civil Procedure, is not concerned with possible claims against estate property. Rather, this statute, when considered within the context of contracts, applies to claims against the estate on all causes of action on a decedent's debts when the causes of action survive the decedent's death. Thus, under the statute of limitations, a party has an obligation to file an action when the party fails to perform as promised.

The court, relying on *Ferraro v. Camarlinghi* (2008) 161 Cal. App. 4th 509, concluded that "not accrued" under § 366.2 means the breach or misconduct must occur prior to the decedent's death, but the claim does not have to be discovered while the decedent is alive. Here, in contrast, no breach occurred before the Decedent's death and so there was no claim, accrued or not accrued, before Administrator breached the Dissolution Agreement. Further, the court found no case that applied § 366.2 when the decedent did not commit the injury or did not already have a collectible debt at the time of death.

Thus, Former Partner did not have a cause of action on a debt when Decedent died, because Decedent's obligation was contingent upon the Cases resulting in a settlement or victory for the plaintiffs. Neither event had occurred at the time of Decedent's death. At the time of Decedent's death, Former Partner had a claim of a potential debt based on the Dissolution Agreement. Since Former Partner had no cause of action against Decedent at the time of his death, § 366.2(a) does not apply.

Comment: An attorney must present all possible defenses as *independent defenses* in the trial court if the attorney wants to ensure that all possible defenses are preserved on appeal.

Father Who Acquiesced to Termination of Parental Rights Lacks Standing to Appeal Order Denying Placement With Grandparents

IN RE K.C., 52 Cal. 4th 231, 128 Cal. Rptr. 3d 276 [Filed July 21, 2011]

Short Summary: Due to Father's deemed acquiescence to termination of his parental rights, the California Supreme Court found that Father lacked standing to appeal the order denying placement of Child with Grandparents because Father had no remaining legal interest in Child's affairs.

Facts: Child was the youngest of eight siblings, two of whom are deceased and the other five of whom were placed with Grandparents after separate proceedings resulted in termination of Mother's and Father's parental rights to the five siblings. While still an infant, Child was removed from Mother's custody, declared to be a dependent child, and placed with a foster family who wished to adopt him. Grandparents requested placement of Child with them, but the child services agency doubted their ability to care for a sixth child and was concerned with the Parents' continued access. Father failed to object to termination of his parental rights and only supported Grandparents' request for placement.

After the trial court denied Grandparents' petition requesting placement of child with them, Grandparents failed to timely appeal. Father appealed the order denying Grandparents' petition and the judgment terminating his parental rights. In the ensuing appeal, however, Father did not argue the trial court erred or abused its discretion in terminating his rights. Instead, Father limited his argument to the question of Child's placement and contended that, should the appellate court reverse the placement order, the court should also reverse the judgment terminating parental rights to restore the parties to their prior positions.

Issue: Whether a parent whose parental rights have been terminated and who does not challenge that decision has standing to appeal an order entered at the same hearing denying a petition by the dependent child's grandparents to have the child placed with them.

Trial Court Holding: The Kings County Superior Court denied Grandparent's petition to modify placement, selected adoption as the permanent plan, and terminated both parents' parental rights.

Appellate Court Holding: The Fifth District Court of Appeal dismissed Father's appeal, holding that Father could not show the placement decision affected his parental rights and thus he was not aggrieved by the decision.

California Supreme Court Holding: The California Supreme Court affirmed the appellate court's decision.

California Supreme Court Rationale: Only an aggrieved party has standing to appeal. The party must have rights or interests injuriously affected by the decision in an immediate and substantial way. A parent's appeal from a judgment terminating parental rights confers standing to appeal an

order concerning the dependent child's placement only if the placement order's reversal advances the parent's argument against terminating parental rights. Here, Father did not contest termination of his parental rights in the trial court and does not contend the order terminating his rights was improper. Thus, Father's deemed acquiescence to termination of his parental rights relinquished the only interest in the child that could render him aggrieved by the trial court's denial of Grandparents petition.

Comment: Proper objections must be made to termination of parental rights in juvenile dependency proceedings if a parent does not want to risk losing standing to appeal all court judgments concerning the child.