

TRUST & ESTATE LITIGATION REPORT

Message From The Firm

As a society, we're getting older. An unfortunate fact to be sure, but as they say, it beats the alternative.

An additional undesirable by-product of our graying society is a growing number of disputes among those left behind. As a result, there has been an ever increasing amount of litigation involving trusts, wills and estates. Since the first wave of baby boomers is just now reaching retirement age, the upward trend in trust and estate litigation is likely to continue for the foreseeable future.

Not surprisingly, our attorneys have been spending more and more time in the probate courts, helping our clients navigate disputes between and among trustees, executors, beneficiaries, and often other family members. To help us meet the demand this growing practice presents, we're pleased to welcome to the firm Trudi Sabel Schindler, who has spent her entire career as an attorney litigating trust and estate matters.

There are lessons to be learned from the real life stories behind every litigation matter, and we want our friends and clients to benefit from those lessons—hopefully in time to avoid litigation themselves. That was the inspiration behind our Trust and Estate Litigation newsletter, which we plan to issue several times a year. If you have any questions regarding our rapidly expanding Trust and Estate litigation practice, please call me or Trudi Sabel Schindler.

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Details, Details, Details – The Need for Precision in Probate Court Proceedings



By Joe Faucher (JoeFaucher@Reish.com)

Most trust and estate litigation matters involve complex rules of law. Just as often, however, cases come down to seemingly insignificant details. A case we recently handled demonstrates the need for caution and attention to those details.

In our case, nearing her death, the family matriarch had not completed her estate planning. Just days before she died, some of her family members presented her with a trust document for her to sign. One of the effects of that document would have been to effectively disinherit our clients, two of her grandchildren, who stood to inherit a substantial portion of the matriarch's estate if she died without a will or trust. There were significant questions of whether the matriarch had sufficient capacity to execute the document and whether she was subject to undue influence when she did. If a court determined that she lacked capacity, or that someone exerted undue influence over her when she signed the document, the document would be given no effect.

The Probate Code provides that after a revocable trust becomes irrevocable (for instance, when the Trustor dies), the Trustees must give notice to the Trust beneficiaries. After the matriarch died, the trustees named by the trust document issued a notice to the matriarch's heirs, as required by the Probate Code, that the

trust had become irrevocable. Once that notice is issued, the persons who receive the notice generally have 120 days from the date the notice is served – by mail or personal delivery – to file an action contesting the trust. Similar provisions relate to contested wills.

The notice in this case was sent to both of our clients by mail at the same address. However, at the time the notice was sent, one of our clients had not been living at that address for some time. Therefore, as to that client, the notice was arguably never properly served.

We initiated a lawsuit contesting the trust. The time period within which one of our clients had to contest the trust arguably expired, but as to our second client, we argued that the time had not yet begun to run, because he had never been served with the required notice. Ultimately, the case was resolved in a favorable way.

There are lessons to be learned from this story – for virtually everyone who has a potential interest in a trust or will. First, if you are the trustee of a trust, or executor of a will, it pays to be very careful in compiling accurate information regarding the decedent's heirs and beneficiaries. If there is some question about whether you have accurate information regarding any of the beneficiaries, and you want to limit the time within which any heirs or beneficiaries have to contest the trust

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Bright Line Rule Regarding Execution of Wills



By Trudi Sabel Schindler (TrudiSchindler@Reish.com)

Testamentary documents like wills, trusts and powers of attorney are frequently challenged on the ground that they were not executed in conformance with the rules set forth in the Probate Code. The rules governing execution of these documents vary depending on the document being executed.

It isn't uncommon for individuals – particularly those acting without an attorney – to mistakenly believe that because they had their signature on their will notarized, they have a valid will. For a period of time, California law was unclear as to when the witnesses to a will signing needed to sign the will attesting that they witnessed the testator sign the will. These issues were at the root of a dispute that recently percolated all the way to the California Supreme Court in *Estate of Saueressig* (2006) 38 Cal.4th 1045.

In 1983, the California legislature did away with the previous long-standing rule that witnesses to the execution of wills subscribe the will in the presence of the testator and each other, i.e., that testator and witnesses all be in the room and sign in each other's presence. In the process of changing the law, the legislature failed to specify exactly *when* the witnesses needed to affix their signatures to the will they witnessed.

This brings us to the *Saueressig* case. Timothy Saueressig asked a notary public to notarize the execution of his will. After watching Timothy sign his will, the notary signed and notarized

it. Timothy delivered the document in a sealed envelope to Scott Smith, a friend who he named as executor, and told Scott that the envelope contained his will. Timothy died approximately two years later. When Scott tried to offer the will for probate, the Probate Court found it did not meet the Probate Code requirements, since it had not been signed by two witnesses at the time it was executed by Timothy. Scott's attorney then attempted to offer testimony that someone beside Timothy and the notary was present when the will was notarized – thus providing two witnesses to the execution – and that that person was willing to now sign and attest the will.

The trial court would not admit the will to probate on the ground that the execution of the will did not comply with the Probate Code. The Court of Appeal reversed the trial court's decision, and the California Supreme Court granted review.

Ultimately, the Supreme Court held that in order for the will to be valid, the witnesses needed to have signed it before Timothy's death. The Court stated that a will must be valid at the moment of a testator's death and can not be made valid *after* death. The Court reasoned that if a witness could withhold his signature until after the testator's death, the will's validity would be dependent upon whether or not the witness was now willing to sign the document. Why does this matter? Consider the hypothetical of the elderly, wealthy widower with no children or grandchildren, whose only relatives are two nephews. He creates a will leaving his entire estate to nephew A, omitting nephew

B entirely. But for the will, A and B would share the estate equally. Thus, if the will was not properly signed by two witnesses at the time it was created, the witness could theoretically benefit by striking a deal with A in exchange for his signature after the uncle's death. Alternatively, a witness could easily forget whether the document he saw being signed (in some cases months or years earlier) was the same document he is being asked to testify about now.

When it comes to estate planning, the formalities matter. Doing it right the first time can avoid lengthy, costly and divisive litigation. If that litigation happens, however, we're here to help. ❖

Court Proceedings

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or will, consider having those persons personally served with the required notice. (This significantly reduces any question of whether service is properly made.)

Heirs and beneficiaries who receive such a notice must also be diligent in responding, if there is any reason to think that the trust may have come about due to fraud, undue influence, or because the person making the document was not legally competent to do so. The deadlines imposed by the law in these situations are short, and the consequences for failing to timely act are harsh. If there is a reason to act, the heirs and beneficiaries must do so within the time period set forth in the notice, or their claim may be barred. ❖

Liability Protection for Trustees



By Richard Luftman (RichardLuftman@Reish.com)

With each passing day, our society is growing older. More and more Americans are formalizing their estate plans, and using trusts as the cornerstone of their estate planning. This, in turn, is leading to more and more litigation against trustees, for acting as trustee of a trust is not a simple task. It is fraught with potential personal liability. There are many reasons why trustees find themselves the targets of litigation. Litigation in the trust area, however, is perhaps most often driven by the same thing that drives litigation in other contexts: a failure to clearly communicate.

Once a person decides to act as trustee, one of the first things he or she should do is determine the extent to which the trust instrument requires the trustee to account to beneficiaries. While there are certain exceptions to a trustee's duty to account, and the trust instrument may waive the necessity of an accounting, this article assumes – just like a cautious trustee should – that the trustee is obligated to account to the beneficiaries. Trustees obtain the highest level of protection by presenting a formal accounting to the court for approval. If the court approves the accounting, and the time for appealing the order approving the accounting passes, the trustee can typically avoid liability to the beneficiaries for the actions he or she takes as trustee, as long as the accounting includes information that puts the beneficiaries on notice of the acts the beneficiaries might complain about.

Formal court-approved accountings are, however, time consuming and expensive. California has detailed rules concerning the format of court accountings and trustees generally need experienced trust and estate counsel and experienced accountants in their corner to prepare them.

Trustees can strike a middle ground by providing certain information to beneficiaries informally – bypassing formal court approval. Trustees can opt to describe the acts undertaken, and provide a more informal version of the accounting information concerning the trust assets. This approach may not be ideal for the trustee whose objective is to obtain the maximum protection against personal liability. However, if done properly, providing this information to the beneficiaries will not only keep the beneficiaries informed, but will start the clock ticking on the time to bring a lawsuit against the trustee, and shorten the period of time that beneficiaries have within which to sue the trustee.

In order to satisfy the rules for this more informal report to the beneficiaries, the trustee must be sure to comply with California law concerning the information that must be included in the informal report. In addition to accounting information, California law requires the trustee to include the amount of compensation paid to the trustee; the agents hired by the trustee, their relationship to the trustee, if any, and their compensation; a statement that the beneficiary may petition the court to review the report; and, a statement that claims against the trustee for breach of the trustee's

duties cannot be made more than three years after the date the beneficiary receives the report disclosing facts giving rise to the claim. In addition, the trustee will want to describe other significant acts taken during the period being reported, such as the purchase or sale of a trust asset, an audit of the trust, or the compromise of a trust's claim against a third party. It is in a trustee's best interest to err on the side of providing more, rather than less, information.

Under California law, the period of time that beneficiaries have within which to sue the trustee is normally four years from receipt of information giving rise to the claim. If the trustee provides a proper informal account as described in the preceding paragraph, this period of time is shortened to three years. If the trustee does not report to the beneficiaries, the time within which a suit must be brought arguably never ends (unless the beneficiaries learn of the alleged breach in some other way).

In addition to the "legal" benefits of providing information to beneficiaries, there are certain "practical" benefits. First, the better and more frequent the communication between trustee and beneficiaries, the more likely it is that a good relationship will exist. That, in turn, reduces the likelihood of hostility and litigation. Second, if the beneficiaries nevertheless sue the trustee, the trustee who has communicated more fully and more frequently with the beneficiaries is more likely to avoid liability.

If you have questions concerning the trustee's duty to account and the risks and benefits associated with it, please contact Joe Faucher, Trudi Schindler or me. ❖

Around the Firm

Announcement: Trudi Sabel Schindler was elected co-chair of Legal Updates for the Beverly Hills Bar Association Trust and Estate Section Executive Committee. Congratulations to the following attorneys for being named 2007 Rising Stars, as published in Los Angeles Magazine and Law & Politics Magazine: Stephanie Bennett, Pascal Benyamini, Debra Davis, Richard Luftman and David Schwartz.

Speeches: Jonathan Karp gave the following presentations: "Buying and Selling an Accounting Practice" at the California Society of CPAs San Fernando Valley CPA seminar in Encino on November 27th; "Pass-Through Update" at the Tax Update and Planning Conference in San Francisco and Universal City on November 19th and 20th; "Buy/Sell Agreements- Disputes and War Stories" at the Closely Held Business Conference in Universal City and San Francisco on October 29th and 30th; and "Succession Planning" at the Business in Industry Committee of the Los Angeles Chapter California Society of CPAs in Santa Monica on October 17th. Fred Reish presented "The Direction of 401(k) Plans: Present, Future & Beyond" at the Center for Due Diligence Conference in Scottsdale, AZ on October 3rd. Bruce Ashton and Joe Faucher co-presented "ERISA Litigation: What is the Nature of Recent Lawsuits, Who Are the Named Defendants & What Safeguards Minimize Your Exposure?" at the Center for Due Diligence Conference on October 2nd.

Quotes: Fred was quoted in the article "Stable-Value Funds Don't Get 401(k) Nod" published in the October 23rd issue of *The Wall Street Journal Online*.

Articles: Fred's column in the October issue of the *Plan Sponsor* magazine addressed the topic of "Meeting Expectations." Nick White wrote articles entitled "Reliance On Inaccurate Benefit Estimates- Do Plan Participants Have A Remedy" and "Varying Partner Contributions: A Trap For The Unwary," published in the October issue of the *Pension Plan Fix-It Handbook*. Our ERISA attorneys wrote the following articles in the Autumn issue of *Journal of Pension Benefits*: "The Unintended Consequence of Providing Employee Benefits for Domestic Partners," by Heather Bader-Abrigo, "Revenue Sharing Litigation: A Threat to 401(k) Plans," by Fred and Bruce, and "Designing Benefits for Domestic Partners," by Debra Davis.

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