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Preface

With the ascendancy of the living trust as the estate planning vehicle of choice, there has been an increasing volume of trust litigation complementing the already sizable body of conventional will and probate litigation. California Trust and Probate Litigation is designed to respond to the growing need for guidance in trust and probate litigation, and to provide a single-volume practice and reference work that will enable attorneys to practice competently and effectively in this expanding area.

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Selected Developments

March 2010 Update

Rule 3-410 of the California Rules of Professional Conduct has been adopted, requiring an attorney who knows or should know that he or she does not have professional liability insurance to inform a client in writing at the time of engagement if it is reasonable to foresee that the representation will exceed 4 hours. See §3.21.

The court has equitable power to charge a beneficiary's share of a trust for reasonable and necessary legal fees incurred by the trustee to oppose the beneficiary's frivolous litigation against the trust. *Rudnick v Rudnick* (2009) 179 CA4th 1328. See §3.31.

A prenuptial waiver of a surviving spouse's rights that meets the requirements of Prob C §§140-147, is a valid waiver of the spouse's inheritance rights for purposes of Prob C §21611(c), even if it fails to meet requirements of Fam C §1615, which governs premarital agreements in general. *Estate of Will* (2009) 170 CA4th 902, 88 CR3d 502. See §§4.11, 5.24.

The broad change in the no-contest clause statutory scheme, repealing Prob C §§21300-21322 and replacing them with Prob C §§21310-21315, operative January 1, 2010, as described in last year's update to this book, is now in effect. Accordingly, portions of chapter 5 discussing no-contest clauses have been revised and reorganized as necessary to reflect the current state of the law. Because the repealed scheme remains applicable to instruments that became irrevocable on or before January 1, 2001, discussion of it has been retained. For an overview of applicability of the two divergent schemes, see §§5.3A-5.3B.

Related to the no-contest clause statutory scheme change, in 2009 the legislature amended CCP §§366.2 and 366.3 to refer to "former" Part 3 (former Prob C §§21300-21322) as grounds for tolling the 1-year statute of limitations, and amended Prob C §§1303 and 1304, to refer to "former" Chapter 2 of Part 3 (the statutory safe harbor procedure) in a list of appealable orders. As a result, the safe harbor procedure is clearly still available for instruments that became irrevocable before January 1, 2001. See §5.3B.

If a beneficiary designation in an ERISA plan is consistent with the plan's terms, the plan administrator might be required to make a distribution to the designated beneficiary, even if the beneficiary is a presumptively disqualified person under Prob C §§21350-21356. However, this might not prevent interested persons from later recovering the funds from the beneficiary. See *Kennedy v Plan Admin'r* (2009) __ US __, 172 L Ed 2d 662, 675 n10, 129 S Ct 865, discussed in §6A.4.

Code of Civil Procedure §2031.010 has been amended to provide that a party may make a demand for the production of electronically stored information, as defined in new CCP §2016.020(d)-(e), in the possession, custody, or control of any other party. See §10.21.

A new section has been added discussing the right to an evidentiary hearing. Cases cited include *Estate of Bennett* (2008) 163 CA4th 1303, 78 CR3d 435 (right to evidentiary hearing applies to contested Probate Code motion, because Prob C §1022 trumps CCP §2009), *Estate of Lensch* (2009) 177 CA4th 667, 99 CR3d 246 (right to evidentiary hearing on contested entitlement petition not waived by failure to give notice under Cal Rules of Ct 3.1306(b), which does not apply to probate matters other than discovery), and *Estate of Shellenbarger* (2008) 169 CA4th 894, 86 CR3d 862 (no evidentiary hearing allowed when demand involved evidence that might have made no difference as matter of law). See §10.39A. See also §§13.55, 16.22.

Evidence Code §957 has been amended to provide that the attorney-client privilege does not exist after a client's death for communications relevant to an issue between parties, all of whom claim through the client, if the claims are by nonprobate transfer. This was already the case for claims by testate or intestate succession or by inter vivos transaction. See §10.76.

California Rules of Court 8.104(a) has been amended to provide that, for purposes of triggering the 60-day period for filing a notice of appeal, service of notice of entry of judgment or a copy of the judgment may be by any method permitted by the Code of Civil Procedure, including electronic service when permitted under CCP §1010.6 and Cal Rules of Ct 2.250-2.261. See §§13.59, 23.11. References in the rule to "mailing" have accordingly been changed to

refer to "service." See §23.11.

In a technical change, Prob C §15643(f) was amended to state that an automatic vacancy in the office of trustee occurs when the trustee "is the subject of an order for relief in bankruptcy." The subsection had previously stated that a vacancy occurs when "[t]he trustee files a petition for adjudication of bankruptcy or for approval of an arrangement, composition, or other extension under the federal Bankruptcy Code, or a petition filed against the trustee for any of these purposes is approved." See §14.26.

The CCP §366.2 1-year limitations period for bringing an action on a cause of action against a decedent is not tolled for a minor's claim during minority under CCP §352. *Farb v Superior Court* (2009) 174 CA4th 678, 94 CR3d 586. See §15.31A.

The Prob C §8226(c) time limit for a proponent of a subsequent will to petition for probate is triggered only by formal written notice under Prob C §8110 of a prior petition for probate or for letters of administration, not by actual knowledge of the prior proceeding. *Estate of Kelly* (2009) 172 CA4th 1367, 91 CR3d 674. See also *Estate of Earley* (2009) 173 CA4th 369, 92 CR 3d 577. See §17.22.

In *Chang v Lederman* (2009) 172 CA4th 67, 90 CR3d 758, the court held that estate planners do not owe a duty of care to nonclient potential beneficiaries who are not expressly named in the executed estate plan. As to named beneficiaries, the duty applies only to properly effectuating a bequest as expressly set forth in the executed testamentary instrument. It does not extend to effectuating the alleged intent of a client, since deceased, to revise such a bequest to something other than that which the instrument expressly states. See §17.54A.

Entitlement proceedings under Prob C §11700 can be used to determine whether a named beneficiary survived the decedent, and the application of the anti-lapse statutes. *Estate of Lensch* (2009) 177 CA4th 667, 99 CR 3d 246. See §18.3.

A new section has been added discussing intestacy rights of remote relatives under Prob C §6402(d). In *Estate of Beckel* (2009) 174 CA4th 34, 93 CR3d 890, cited in the text section, an intestate decedent was survived by no grandparents or children of grandparents, but only by cousins at different levels, descendants of her grandparents. The shares of surviving issue in each generation level were entitled to a share calculated by application of Prob C §240, construed in accordance with Prob C §50. See §18.34A.

Family Code §308 was amended to provide that same-sex couples who contracted a marriage after November 4, 2008, that is valid in another jurisdiction have all the rights, protections, and benefits, and are subject to the same responsibilities, obligations, and duties as spouses except the designation of "marriage." See §18.35. (Note that the same bill amended Fam C §308 to provide that same-sex marriages validly contracted in another jurisdiction before that date are valid marriages in California.)

In *Charisma R. v Kristina S.* (2009) 175 CA4th 361, 96 CR3d 26, the court deemed the evidence sufficient to support its finding of parentage in the context of a same-sex couple. See §18.39.

Probate Code §6453(b), allowing paternity to be established by clear and convincing evidence that the father has openly held out the child as his own, was held to be the applicable statute in *Estate of Chambers* (2009) 175 CA4th 891, 96 CR3d 651. See §18.39.

When a decedent had not consented in writing to posthumous conception as required by Prob C §249.5, the posthumous child's intestacy rights to Social Security survivorship benefits were not established. *Vernoff v Astrue* (9th Cir 2009) 568 F3d 1102. See §18.39.

The failure to pay child support and the lack of a meaningful parent-child relationship did not cut off a natural father's right to inherit from his child's intestate estate, when the child had been conceived during marriage and the father had effectively acknowledged paternity in an out-of-state divorce decree that awarded child support against him. *Estate of Shellenbarger* (2008) 169 CA4th 894, 86 CR3d 862. See §18.39.

The Evid C §662 presumption that the owner of legal title to property is the owner of full beneficial title was applied in *Marriage of Brooks & Robinson* (2008) 169 CA4th 176, 86 CR3d 624. See §§18.42-18.43.

Language in a revocable trust that a husband's separate property was "hereby converted to community property" with his spouse, "each having a present existing and equal interest," was sufficient to cause a transmutation, despite additional trust language disclaiming a present transfer and referring to estate planning purposes. *Marriage of Lund* (2009) 174 CA4th 40, 94 CR3d 84. See §18.45.

A beneficiary has standing to sue a former trustee for breach of trust, even when a successor trustee is available to do so. *Estate of Bowles* (2008) 169 CA4th 684, 87 CR3d 122. See §21.46A.

Attorneys who aid a trustee in trust administration do not have to wait for final adjudication of beneficiaries' claims against the trustee before receiving compensation from the trust. *Kasperbauer v Fairfield* (2009) 171 CA4th 229, 236, 88 CR3d 494. See §21.76.

An appellant now has 40 days, rather than 30, in which to serve and file the opening brief after the record or reporter's transcript is filed in the reviewing court. Cal Rules of Ct 8.212(a)(1). See §23.22.

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1

Introduction and Overview

Dominic J. Campisi

I. INTRODUCTION §1.1

II. SUBJECT AREAS §1.2
- A. Intake and Analysis §1.3
- B. Accounting, Surcharge, and Removal §1.4
- C. Probate §1.5
- D. Trusts §1.6

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§1.1 I. INTRODUCTION

Probate and trust litigation is fostered by fundamental forces of death, taxes, cupidity, the triumph of medical technology in prolonging life beyond the patience of heirs, and by the unfair distribution of looks, luck, love, and lucre among siblings and their half-brethren. Grief is also a major motivating force, leading the living to strike out at the deceased through representatives and exposing family dysfunction among the survivors. Generational conflict also serves to promote litigation, with children of a first marriage often disappointed when their parent's wealth goes to second spouses and caretakers rather than them. Charitable institutions, once anxious to avoid appearing grasping, now frequently seek to wrest their bequests from other claimants and feckless fiduciaries. The frequency and intensity of probate and trust litigation will only increase with the demographics of an aging population and the fraying social safety net.

Litigation over wills, trusts, conservatorships, and elder abuse is complicated by the jurisdictional complex of probate remedies and rules, the options of probate and civil jurisdiction, and the minefields sown by the taxing authorities, restrictive deadlines, and ethical prohibitions.

The complexities of probate and trust litigation present a daunting challenge to attorneys seeking to practice in this area. The attorney who performed estate planning for a now-deceased client is often asked to advise the personal representative or trustee. Although the attorney may have substantial experience in routine trust and estate administration, a different situation is presented when litigation arises. An attorney who accepts responsibility for a probate or trust litigation matter must possess a wide range of skills to satisfy the requirements of the Rules of Professional Conduct. As discussed in chap 3, the attorney should be knowledgeable about and experienced in the substantive area of law involved in the dispute, general civil litigation procedures, and procedures unique to the proceeding and court trying the matter. Depending on the particular case, the attorney may need to be familiar with applicable laws and procedural rules relating to probate, wills, trusts, state and federal taxation, civil litigation procedures, and probate and trust litigation procedures.

This book is designed to take the attorney through the steps necessary to evaluate representation of a party to potential or actual litigation, to assist the attorney in determining the merits of the dispute, and to suggest procedures for dispute prevention or resolution through predeath planning, litigation, or settlement. It also is designed to provide guidance to the practitioner in determining whether he or she has sufficient learning and skill to deal with the issues that may arise in probate and trust litigation, with a view towards either acquiring such learning and skill or associating specialized counsel to provide assistance.

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§1.2 II. SUBJECT AREAS

This book is divided into four major subject areas: (A) intake and analysis, (B) accounting, surcharge, and removal, (C) probate, and (D) trusts.

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§1.3 A. Intake and Analysis

The intake and analysis section begins with a discussion of lifetime planning strategies to avoid the sorts of probate and trust disputes that are described in this book (chap 2). The intake and analysis section then moves on to deal with issues common to most contested probate and trust proceedings. The chapter on attorney-client relations (chap 3) discusses important issues regarding attorney competence, conflicts of interest, fee arrangements, and the economics of probate and trust litigation. Many lay people have no concept of the costs that can be generated in complex litigation with multiple parties. Their views may also be colored by grief and anger at the situation confronting them or a naiveté about the reasonableness of the opposing side. Chapter 3 suggests approaches that can be used to educate clients and to arrive at representation agreements that work for both the attorney and client.

Chapter 4 discusses the initial case analysis that an attorney must undertake to evaluate a contested probate or trust matter. Chapter 5 covers no-contest clauses and other barriers to litigation, such as statutes of limitations. Because many of the grounds for contesting a will or trust are similar, chap 6 covers these in a single chapter, and discusses differences in the grounds for contesting these instruments, notably concerning the area of mistake.

Strategic and procedural considerations are also discussed (chaps 7 and 9), including whether to bring suit in probate or on the civil side, whether to initiate simultaneous proceedings, and whether to include elder abuse remedies (chap 8). Because many estate planners are unfamiliar with basic litigation concepts and procedures, chap 10 is devoted to an overview of litigation tools, with special emphasis on probate and trust litigation applications. Included in this chapter are sample forms of interrogatories, request for admissions, and demand for production of documents for a will or trust contest.

Finally, the intake and analysis section concludes with a discussion of alternative dispute resolution (chap 11) and settlement (chap 12).

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§1.4 B. Accounting, Surcharge, and Removal

The section on accounting, surcharge, and removal deals with accounts of executors and trustees, and contains forms for objecting to these accounts and obtaining the removal of the fiduciary. Chapter 13 summarizes a trustee's and personal representative's duty to account and report information. Forms are provided to compel a fiduciary to account. This chapter also discusses the procedures for raising objections to an account and for obtaining a surcharge, including attorney fees.

Chapter 14 deals with fiduciary resignation or removal. This chapter covers methods of resignation, procedures for obtaining release or discharge, and methods for compelled removal of fiduciaries.

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Source: Estate Planning/California Trust and Probate Litigation/1 Introduction and Overview/§1.5 C. Probate

§1.5 C. Probate

The section on probate deals with the issues most common in contested probate proceedings. Chapters are included for contesting the appointment of a personal representative (chap 16), resolving title disputes to real and personal property in probate court (chap 19), and proceedings to determine entitlement to estate distribution (heirship proceedings) (chap 18). Will contests are extensively discussed in chap 17, which contains numerous forms, including a petition for revocation of a purported will.

Chapter 15 deals with actions by and against a personal representative and covers, among other things, probate disputes concerning bonds, disputes among family members, and surcharges for breach of fiduciary duty. This chapter also discusses claims of the estate against third parties and wrongful death claims, as well as claims of third parties against the estate.

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§1.6 D. Trusts

The section on trusts begins with chap 20, a complete chapter on trust contests, perhaps the most rapidly developing area of probate and trust litigation. This chapter begins with a discussion of the grounds for attack, and then moves on to discuss parties, statutes of limitation, and different forms of challenges and remedies. The chapter concludes with a form for challenge of a trust and imposition of a constructive trust.

Chapter 21 deals with breach of a trustee's duties and covers the grounds for breach of trust, the standard of care that applies to a trustee's conduct, evidence, defenses, and remedies. Chapter 22 discusses the power and duty of trustees to prosecute and defend actions, as well as actions by third parties against a trust. This chapter also deals with the claims of a settlor's and a beneficiary's creditors.

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2

Dispute Avoidance

Dominic J. Campisi

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I. INITIAL CASE ANALYSIS: PUTTING TRUST AND PROBATE DISPUTES IN CONTEXT

§2.1 A. Dispute May Involve Multiple Issues

Seldom is there a probate or trust dispute with only a single issue at stake. The skein of property rights, dispositive documents, marital rights, and tax restrictions tie most elements of an estate together. A change in a joint tenancy or other inter vivos transfer has implications for tax liability, offsets to specific gifts, liability for debts, and community property interests, as well as the bounty remaining for residuary clauses of wills and trusts. Hence, the attorney must put every disputed issue into the context of the overall estate to determine how changes affect other aspects of the estate and to determine the repercussions to the client.

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Source: Estate Planning/California Trust and Probate Litigation/2 Dispute Avoidance/§2.2 B. Factors to Consider When Dispute May Arise

§2.2 B. Factors to Consider When Dispute May Arise

When a probate dispute arises or may arise, counsel should first assess the following:

- Factual and financial circumstances of the estate;
- Legal documents governing the assets and income involved;
- Legal rights of spouses, children, intestate heirs, and persons with contracts or business arrangements with the person in question;
- Income and estate tax implications;
- Legal presumptions raised by the action;
- Likely reactions of family members or others with legal or personal interests;
- Whether the proposed action may be defended at trial;
- Consequences of the action on the person involved or on others who may change their donative plans as a result of counsel's actions; and
- Personal, legal, and financial consequences of litigation.

Before taking any action, counsel should consider that any seemingly isolated action can have substantial and expensive consequences for the client in the context of the overall estate. *Burch v George* (1994) 7 C4th 246, 27 CR2d 165, is an example of the cascade of problems that can result from one action in a complex estate. In *Burch,* the fifth wife of the decedent wished to raise claims involving a statutory right to pension payments and an alleged community property interest in stock acquired after their marriage. She also was entitled to receive substantial distributions from her husband's inter vivos trust, which contained a no-contest clause. The California Supreme Court concluded that an action against the pension plan trustee or a community property claim to the corporate stock would trigger the no-contest clause and terminate the wife's interests in the trust because it would thwart the testamentary plan. Thus, a seemingly independent action based on purportedly solid legal grounds could have cost the widow substantial devises from the trust if she had not first brought a declaratory judgment action to determine whether the assertion of her rights would trigger the no-contest clause.

NOTE: The statutes codifying the declaratory relief procedure for no-contest clauses will be repealed operative January 1, 2010, for instruments that became irrevocable on or after January 1, 2001, and replaced with Prob C §§21310-21315, which do not have a comparable declaratory relief mechanism. See §5.12I.

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II. PREDEATH STRATEGIES TO AVOID DISPUTES

§2.3 A. Disclosure

It is difficult to convince clients that surprise is inadvisable in the estate context. Some clients will refuse to confront their prospective beneficiaries out of fear of conflict or being coerced into changing their plans. Others want to savor the thought of the wretches learning, after years of pressure, that they have gotten their just reward. A will or a trust may be the only way that a shy or fearful individual can vent his or her true feelings or avoid unwanted pressure and complaints. There is also the occasional soul who wants the "bastards to fight over it" as one happy publican recently said before bequeathing several years of intense litigation to his heirs.

When there is a modicum of good will and common sense among the putative heirs, it may be possible to defuse potential litigation by disclosing the dispositive plan and the rationale behind it. Similarly, when steps are being taken to manage the affairs of a failing relative, disclosure of the actions to the more remote relatives and claimants can eliminate the suspicions that lead to unnecessary litigation.

Disclosure also establishes that the transferor personally made the decision in question, that he or she was competent, and that his or her decisions were not the product of delusion, mistake, fraud, or duress. At best, disclosure of the proposed transfer and the transferor's rationale to the people affected provides a legal and personal basis for avoiding disputes. This can be accomplished at a family meeting (see §§2.4-2.10), at a signing ceremony (see §§2.11-2.15), in audiotapes or videotapes (see §§2.16-2.17), in letters to the affected persons or explanations in the will or trust, or in personal disclosures to credible lay or professional persons.

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B. Family Meetings

§2.4 1. Agreement to Estate Plan

Most people will abide by the testator's wishes if presented directly at a family meeting. The testator's explanation of his or her desires and the method selected to implement those desires may be enough to induce acceptance. The explanation also provides direct evidence of competence and freedom from undue influence.

It is advisable to have an attorney present to moderate public outbursts and to provide a forum for sensitive disclosures. The attorney can also explain the tax and legal aspects of the case.

If there are unequal distributions to kindred, it may be significant to disclose the rationale. Explanations can defuse the anxieties and guilt that heirs often feel. Explanations also may minimize the basis for feuds between siblings or relatives by showing that it was the testator's intention and not chicanery that brought about the decision.

Disclosure of the estate plan at a family meeting may also permit the heirs to explain that the financial rationale is incorrect, that they would prefer to have money go directly to grandchildren, or that they have some other preference. The estate plan then can be fine-tuned to avoid a conflict later.

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2. No-Contest Clause as Threat

§2.5 a. Use of Clause as Settlement Vehicle

When the expectations of the heirs do not die easily, a family meeting can provide a forum for wheeling out the means of enforcement. A no-contest (in terrorem) clause can be a powerful means of herding the dissatisfied heirs back into line. Simply disinheriting heirs leaves them no incentive to accept the client's decision because the temptation is often too strong to redress the perceived slight by suing.

The solution is to make a gift substantial enough that its loss will force the beneficiary to pause. A no-contest clause may not stop an angry attack, but it may shorten the litigation by offering a settlement vehicle that is clearly limited in amount and thus constitutes a powerful negotiating tool, *e.g.*, "All we will offer is the amount you are going to lose because of the no-contest clause, not a penny more." Having a fixed settlement amount and a rationale blessed by the deceased gives substantial leverage in negotiating an exit to litigation.

For a no-contest clause to work, it must be disclosed early and mentioned often. It should be a major topic raised by counsel at the family meeting. After the testator's death, counsel should make sure that an explanation of the pertinent portions of the document are provided to the heirs.

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§2.6 b. Wording of Clause

The wording of a no-contest clause must be broad enough to encompass any challenges the contestants may devise. Depending on who the potential contestants may be, the clause should accomplish the following.

- When there are classes of potential beneficiaries slighted, the clause should encompass persons who may indirectly assist in any litigation, financially or otherwise. For example, one brave child frequently initiates the litigation for other, more timid children in a family.
- If a second spouse may challenge the will, the no-contest clause should pick up claims to community property, pensions, and personal property. To assure that the estate brooks no challenge to characterization of the property, the will and trust should clearly identify all of the property as separate or community so that a challenge must be held to thwart the testamentary plan. *Jacobs-Zorne v Superior Court* (1996) 46 CA4th 1064, 54 CR2d 385.
- If a significant other may bring a challenge, the clause should ensure that a *Marvin* (see *Marvin v Marvin* (1976) 18 C3d 660, 134 CR 815) or quantum meruit claim will be treated as a triggering act; by the same token, the clause should attempt to forestall challenges by a separated spouse and children to testamentary gifts in favor of a significant other. On *Marvin* claims and quasi-contact claims, see §§7.10-7.11.

When spouses or children are involved, however, the attorney should make sure that the no-contest clause does not go too far. A clause that disinherits the challengers and treats them as if they had "died without heirs" may throw that portion of the estate into intestacy, and the challengers will inherit anyway. The attorney should provide alternative dispositions for the devises or bequests or be careful with the residuary gifts if there is any possibility that the clause can be used as a sword against other heirs who do not take by intestacy.

For full discussion of no-contest clauses, see chap 5.

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Source: Estate Planning/California Trust and Probate Litigation/2 Dispute Avoidance/ 3. Other Financial Pressures/§2.7 a. Conditional Gifts

3. Other Financial Pressures

§2.7 a. Conditional Gifts

It is possible to set up extremely draconian regimes in trusts to assure a semblance of harmony. Depending on the vagaries of state law, a settlor probably can (Restatement (Second) of Trusts §62 (1959); Restatement (Third) of Trusts §29 (2007); Restatement (Second) of Property (Wills and Other Donative Transfers) §§5.1-5.2, 8.1-8.3 (2000)):

- Condition a gift on the settlor's son marrying someone of true Greek blood and of the Orthodox religion. *Estate of Keffalas* (Pa 1967) 233 A2d 248, 250.
- Terminate a usufruct (the right to use another's property) on remarriage. *Succession of Augustus* (La App 1978) 361 So2d 474, 476.
- Require beneficiaries to refrain from the use of tobacco and intoxicating liquor and to spell their surname as specified. *Holmes v Connecticut Trust & Safe Deposit Co.* (Conn 1918) 103 A 640.
- Require that grandchildren be raised in the settlor's faith. *In re James' Estate* (Wis 1956) 76 NW2d 553.
- Require that beneficiaries attend memorial services each year for the settlor's spouse. *In re Folsom's Will* (App Div 1958) 174 NYS2d 116.
- Require that masses be said for the settlor's soul. *Delaware Trust Co. v Fitzmaurice* (Del Ch 1943) 31 A2d 383.

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Source: Estate Planning/California Trust and Probate Litigation/2 Dispute Avoidance/§2.8 b. Cutting Off Income or Remainder Interests

§2.8 b. Cutting Off Income or Remainder Interests

A settlor can give a trustee the power to cut off the income or remainder interests of the beneficiaries if they challenge the interest of the surviving spouse by litigation or otherwise. Because this is a strong power to give anyone, it is important to draft the triggering events with some care so that the terms are explicit and enforceable against claims of vagueness. It is also necessary to select a trustee who is sensible, unlikely to be co-opted by the surviving spouse, and willing to preside over bickering.

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§2.9 c. Providing That Trust Funds Will Be Used to Defend Challenges

A settlor can discourage litigation by providing in the trust and will that funds from the trust may be used to defend any challenges to the dispositive plan. The fiduciary can be directed to defend the plan aggressively and to charge defense expenses to the shares of the beneficiaries involved. Absent a trust provision, a finding of good faith may preclude a fiduciary or court from allocating the expenses of defense to the defeated party's share of the estate. *Estate of Beach* (1975) 15 C3d 623, 635, 125 CR 570.

An express provision in the trust can provide funds to defend a will even before admission to probate and can serve as a sanction to litigation by ensuring a vigorous defense. Such an allocation clause for defense costs may be the best alternative when the testator or settlor does not want to disinherit his or her beneficiaries with a no-contest clause, but does want to deter expected litigation.

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Source: Estate Planning/California Trust and Probate Litigation/2 Dispute Avoidance/§2.10 d. Counseling Client About Punitive Trust Terms

§2.10 d. Counseling Client About Punitive Trust Terms

The attorney should counsel the client about the impact that punitive trust terms will have on his or her place in the family memory. A tough trust enforced by some ogre of a trustee and a phalanx of attorneys is certain to ensure that the settlor's memory will remain grim for several generations. Counsel may want to raise the question of why such nonfamilial means are necessary in the first place; it may indicate the dispositive scheme is unjust.

If the client insists on including penalties in the trust plan, a family meeting is the best place to advise the beneficiaries. It gives the beneficiaries time to adjust to the plan, and it can be used to clarify the settlor's motivation and provide a rationale to support the imposition of sanctions as appropriate under public policy. At the family meeting, an introduction of the attorneys who would be involved in defense of the plan, wearing their expensive suits and the air of blitzkrieg, can be a practical demonstration of the expense of contesting the inevitable.

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C. Signing Ceremony

§2.11 1. Witnesses to Signing

The signing ceremony is often overlooked as an important factor in defending a document from claims of incompetence, undue influence, or other defects. At a minimum, a signing ceremony for a will or trust provides a stage and a credible audience with acute memories for testamentary disclosures.

Therefore, the selection of witnesses should not be left to chance. Witnesses should be selected for their credibility and experience in judging whether the testator or settlor has the capacity and freedom to execute the document. The attorney should provide the witnesses with some preliminary information about the testamentary scheme and family dynamics so that they are alert to factual issues that may be important later.

Witnesses should attempt to recall the testator's statements about the objects of his or her bounty, about current events that show he or she was oriented and alert, and about the rationale for certain selections. Witnesses who are experienced legal personnel should evaluate the factors of the testator's or settlor's competence and freedom from duress.

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§2.12 2. Witnesses to Capacity

The treating physician may be the best witness to competency if he or she is alerted to the potential that the patient's wishes will later be challenged. In addition, the physician can help assure that the will or trust is executed during a period of lucidity and that a record is maintained of the patient's capacity.

The attorney, however, should make sure that the physician understands the elements of testamentary capacity so that he or she can conduct an evaluation with those elements in mind. Most physicians understand the tests for imposing a conservatorship or capacity to agree to medical treatment, but testamentary capacity or capacity to execute or fund a trust may be quite different. See, *e.g.*, Prob C §1871(c) (right to make will not affected by imposition of conservatorship); *Conservatorship of Bookasta* (1989) 216 CA3d 445, 450, 265 CR 1 (ability to transact business is higher and different standard than that needed to execute valid will).

In addition to medical personnel, neighbors and close friends are often the best witnesses of competence. Involving such persons in a signing ceremony or at meetings where the testator explains his or her wishes can be of enormous assistance in defending the will or trust. Close acquaintances often understand the personal values and family dynamics that resulted in the testator's dispositive scheme.

On lack of capacity as grounds for contesting the will or trust, see chap 6.

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3. Conduct of Ceremony

§2.13 a. Timing of Ceremony

When the testator is weak or suffering from the effects of disease or medication, it is crucial to arrange the signing ceremony for a time when he or she is alert. Mornings are often best; elderly people may be less coherent at the end of the day.

An elderly or infirm testator may have only limited periods of concentration. Counsel should time the elements of the ceremony so that the crucial execution occurs before the testator has become exhausted or confused. A brief and succinct execution ceremony may be the only way to meet the client's goals when he or she lacks the endurance for a lengthy discussion.

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Source: Estate Planning/California Trust and Probate Litigation/2 Dispute Avoidance/§2.14 b. Recitals and Documentation of Ceremony

§2.14 b. Recitals and Documentation of Ceremony

At the signing ceremony, the attorney should recite the elements of the plan and the reasons why certain gifts were made or not. The testator should add comments, if possible, as the attorney makes these recitals.

When the documents are complex, the attorney should provide the witnesses with a brief summary of the salient points. The summary should be sent to the testator before the ceremony, and discussed at the meeting. Both the testator and the witnesses can use the summary as a simple checklist and as a basis for any later testimony.

The attorney may wish to draft a ceremony script with places to check off various elements of execution of the documents. The attorney can file the script and use it to prod his or her memory in the future, if necessary.

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§2.15 4. Ceremony for Trust Execution

If a trust is being executed, counsel should be sure that the witnesses are able to describe what was said about the execution. Because the transfer of property into the trust is a separate act that requires capacity and freedom from undue influence (see *Robertson v Campbell* (Utah 1983) 674 P2d 1226, 1231 (judgment on validity of will collaterally estopped litigation of undue influence concerning trust because documents were executed on same day)), the execution of deeds and exhibits transferring property should be highlighted at the ceremony.

Frequently, the deeds and exhibits to the trust transferring personal property are not ready at the time of the execution ceremony. In this situation, the attorney should gather the same witnesses later when the documents are executed or notarized so that they can serve as witnesses to capacity at the time of the actual execution.

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5. Videotapes as Evidence of Capacity

§2.16 a. Advantages and Use of Videos

Videotapes are useful when the testator or settlor is a good actor. A video of a capable testator can be a powerful tool in deterring litigation or concluding it successfully. The author has used videos in a number of estates to terminate litigation at the onset. If a contesting attorney may have heard fanciful stories about incompetence, disease, or disability of the deceased, a video can convince him or her that the decedent in fact was conscious and able to articulate his or her wishes and choices.

If a testator is prone to strong language, the attorney should caution him or her against outbursts and expletives on the video. Assertions about the unworthiness of discarded heirs can provide a basis for a claim of mistake, delusion, or undue influence. In addition, because a person can be libeled by statements in a will or slandered by those in a signing ceremony or video (see Whittington, *Libel in a Will*, 110(1) Tr & Est 902 (Nov. 1971); Anno, *Libel by Will*, 21 ALR3d 754 (1968)), counsel must ensure that comments of the testator are temperate and factually defensible.

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§2.17 b. Disadvantages of Videos

There are several disadvantages to the use of videotapes. If the testator is ravaged by age or disease, a video may make him or her look pitiful and incompetent. In reported cases involving videos, the videos were used more often to invalidate the document at issue than to support it. See, *e.g.*, *Matter of Stotlar* (Del Ch, Jan. 29, 1987, No. 1149) 1987 Del Ch Lexis 377, 1987 WL 6091, aff'd (Del 1988) 542 A2d 358 (court found lack of testamentary capacity based on videotape showing testator did not remember or understand nature of her investments); *Estate of Seegers* (Ok App 1986) 733 P2d 418, 421 (verdict of undue influence sustained based in part on videotaped ceremony).

An elderly person may be nonplused or made anxious by the prospect of a video, particularly if bright lights are used. Similarly, if the testator has only limited endurance, the time required to set up the equipment and script the event may push him or her into exhaustion and the appearance of incompetence.

If a testator or settlor is inarticulate, forgetful, or fragile, a videotaped record may not be advisable. In such a situation, it is better to rely on witnesses, who generally tend to recall details that support their conclusions of competence.

Finally, there is little opportunity for a second take or editing of a video. An attorney who discovers after starting the camera that the testator is terrified or exhausted or has become confused may have created invaluable evidence for the opposition. Keeping the aborted first tape may mean that important demonstrative evidence is preserved for the opposition. But, if the tape is discarded, the opposition is likely to learn about it and make it appear that spoliation of evidence was involved rather than mere stage fright.

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§2.18 6. Note-Taking

Although some malpractice carriers prefer that attorneys never take notes, it is best to maintain careful notes of the comments of the testator or settlor explaining his or her goals and decisions. It may be decades before the attorney is called to testify about the events that took place in the drafting and execution process, and notes may be essential to refreshing the attorney's recollection. As business records, the notes may be the only admissible evidence when time and a busy practice erase any memories of the crucial details. See Evid C §§1270-1272.

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§2.19 D. Probate of Will as Estopping Challenge to Trust

The typical inter vivos trust and pour-over will provides an inherent means of discouraging challenges that should not be overlooked. The test for competence of a will is the lowest possible; the competence to create and fund a trust may be higher. Probate of the will, with a judge rather than a jury, generally collaterally estops a challenge to a self-settled inter vivos trust executed on the same date. See *Robertson v Campbell* (Utah 1983) 674 P2d 1226, 1231. The level of competence required for execution and funding may be higher and collateral estoppel may not be wholly effective when the trust is irrevocable, a third party is named as trustee, or gifts are made from the trust before death. Nonetheless, probate of the will can assure that a challenge to the trust is meaningless, because the assets would otherwise pass by a validated will containing the same dispositive scheme. For this reason, the attorney should make sure that the terms of the trust are expressly contained or incorporated in the will so that it will be republished if execution or funding of the trust is defective. This tactic also helps to ensure that no jury will be involved in the decision over the validity of the dispositive scheme because a contestant would find it fruitless to raise a claim (such as tortious interference or fraud) that could be tried to a jury. On jury trials in trust and probate matters, see chap 10.

In addition, because the time to contest a trust may be as short as 120 days (see Prob C §16061.8), probate of the will provides a method for smoking out any contest and forcing a prompt resolution. On time to contest a trust, see §§5.15-5.16.

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§2.20 E. Sequential Transfer Documents

Probate Code §8252(a) requires trial of contests of later wills before consideration of prior ones, *i.e.,* the most recent document must be tried first. This requirement suggests the tactic of frequently amending wills and trusts and of retaining intact copies of prior wills and trusts. Frequent amendment may allow the defenders to force contests of each instrument in sequence. If a will is invalid, the earlier document is revived. See Prob C §6123.

By amending and revoking wills and trusts on a regular basis, a testator or settlor can discourage potential challengers, who otherwise would be forced to struggle and waste their money and energy on one document after another before ever getting to the one they would have to invalidate to obtain a bequest. The attorney should make sure that the most recent document republishes and reaffirms the terms of the prior document that are not revoked.

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§2.21 F. Predeath Contests

Although a number of states authorize predeath contests of wills in order to determine competence and freedom from undue influence while the testator is still subject to subpoena, such proceedings are not available in California. Code of Civil Procedure §1060 was amended in 1994 to provide that "[a]ny person interested under a written instrument, *excluding a will or trust,* [may] bring an original action… for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity" (emphasis added). Therefore, general declaratory judgment procedures are unavailable to test a will or trust.

Under Prob C §17200(b)(3), on the other hand, the trustee or interested party can raise questions about the validity of a trust provision. This allows a determination of whether the trust is valid before the death of the settlor.

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§2.22 G. Preserving Witness Testimony Before Contest

Probate Code §8224 provides a means of preserving a witness's testimony in advance of a will contest. Under the statute, the testimony of each witness in a proceeding concerning the execution or provisions of a will, the decedent's testamentary capacity, and other issues of fact can be reduced to writing (*i.e.,* a reporter's transcript), signed by the witness, and filed in the court where the will is expected to be contested. The signed statement or testimony is only admissible if the witness has become unavailable within the meaning of Evid C §240 (*i.e.,* the witness claims a privilege, is disqualified, dead, not subject to process, or unable to testify). See *Estate of Burdette* (2000) 81 CA4th 938, 97 CR2d 263.

This procedure allows either side to the potential contest to initiate discovery that may affect the outcome of a contest or proceeding involving interpretation or heirship rights. Depending on what testimony is expected, the procedure can be used offensively to tie down a witness in advance of filing litigation or to explore whether a contest may be productive.

In defending a will, the testimony of a strong witness can be revealed to potential contestants to discourage a challenge. The option also is useful when a witness to execution is ill or failing or may be difficult to depose after a contest is initiated.

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H. Conservatorship Proceedings

§2.23 1. Use to Avoid Disputes

Conservatorships can be used to resolve a number of problems involving the competence of a party or the misuse of his or her assets. The test of capacity for imposition of a conservatorship does not require a finding of incompetence to make a will. Hence, for a frail or disabled person, it may be useful to have a conservatorship imposed as a protective device and as a mechanism to resolve disputes over the person's ultimate dispositive plans.

Conservatorships may be used to protect a failing relative, to make the management of the relative's affairs more convenient, or to take advantage of gift tax or estate tax rules. A conservatorship is often viewed, however, as too expensive and cumbersome a procedure for these purposes in light of the alternatives of inter vivos trusts and durable powers of attorneys. But, when disputes are likely to arise over control of the person or estate of the individual, a conservatorship with its bond requirements, accountings, and court supervision can eliminate many of the concerns about financial mismanagement that might arise from the alternatives.

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Source: Estate Planning/California Trust and Probate Litigation/2 Dispute Avoidance/§2.24 2. Correcting Conservatee's Estate Plan

§2.24 2. Correcting Conservatee's Estate Plan

When a conservatorship has been imposed, there is a procedure to address problems of the conservatee's improperly created testamentary instruments. Under Prob C §§2580-2586, the court can require disclosure of a conservatee's estate plan as part of a substituted judgment. This procedure permits the conservator to recover property improperly transferred to joint accounts, trusts, or persons holding durable powers of attorney (Prob C §850) and then create an estate plan that reflects the desires of the conservatee for final disposition of the property. Conversely, a substituted judgment can serve to protect the conservatee's desired or existing estate plan from later challenge. See *Murphy v Murphy* (2008) 164 CA4th 376, 78 CR3d 784 (postdeath attack on trust executed pursuant to substituted judgment order was barred by collateral estoppel).

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3

Attorney-Client Relations

Dominic J. Campisi

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I. ESTABLISHING ATTORNEY-CLIENT RELATIONSHIP

§3.1 A. General Considerations

Probate and trust litigation can often involve many parties with different interests in disputed assets. When an attorney has had some role in the affairs of the family involved in potential litigation or has represented individual or corporate fiduciaries in the past, the attorney must carefully determine whether past representation or receipt of confidential information prevents representation in the proposed matter. Similarly, as a probate or trust proceeding unfolds, representation may shift from the client in his or her individual capacity, to the client in his or her fiduciary capacity, in which duties may exist in favor of other parties. Accordingly, the attorney must analyze not only the initial client relationship but also any anticipated fiduciary role the client may assume to determine the scope and propriety of representation.

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Source: Estate Planning/California Trust and Probate Litigation/3 Attorney-Client Relations/§3.2 B. Identifying Parties Involved in Estate or Trust

§3.2 B. Identifying Parties Involved in Estate or Trust

One of the first steps in evaluating a contested trust or estate proceeding is identifying the parties involved in the dispute. One useful approach is to establish a family tree to determine which relatives may have a financial or personal interest in the estate, *e.g.,* spouses, former spouses, domestic partners, children, other relatives, and persons with some fiduciary role, such as a conservator, holder of a power of attorney, or trustee. The attorney should determine if there are dispositive documents such as wills, trusts, or prenuptial agreements that provide a financial interest in the estate to former or present clients in the form of an inheritance, bequest, or nomination to serve as a fiduciary. Additionally, the attorney must determine whether there are parties with actual or potential claims arising from personal or business relations with the estate, trust, or other parties in interest.

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§3.3 C. Who Is the Client?

Identifying who the client is, and the nature of the client's claims, will provide a starting point for analysis of any conflicts, sensitive issues, or other factors involved in the potential representation. Because a party to litigation may be, *e.g.,* a beneficiary under a will or trust, an omitted beneficiary, a creditor, a fiduciary, or any combination of them, the attorney will need to sort through the facts to identify whether representation is appropriate, whether conflicts of interest preclude representation, and whether concerns regarding confidential information need to be addressed. These issues can be especially sensitive when the attorney has previously represented members of the family in estate planning matters.

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§3.4 D. Receipt of Confidential Information

Even if an engagement agreement or other formal arrangement is not entered into by the parties and the attorney declines to represent the proposed client, an attorney-client relationship may nevertheless exist. The attorney has a duty to maintain client confidences and secrets. Bus & P C §6068(e)(1); State Bar Committee on Prof Resp & Cond Formal Opinion 1993-133; *Goldstein v Lees* (1975) 46 CA3d 614, 120 CR 253. The attorney may, however, reveal confidential information to the extent that the attorney reasonably believes disclosure is necessary to prevent any criminal act that the attorney reasonably believes is likely to result in death or substantial bodily harm to any individual. Bus & P C §6068(e)(2).

The key to determining the existence of an attorney-client relationship is whether legal advice is given—even if the recipient never retains the attorney. See *Beery v State Bar* (1987) 43 C3d 802, 239 CR 121; *Miller v Metzinger* (1979) 91 CA3d 31, 154 CR 22. Thus, for example, if the probate or trust lawyer has had informal discussions with the spouse of an estate planning client or with family members and either provided advice or received confidential information, a conflict of interest could arise should the attorney seek to represent an adverse party in subsequent litigation.

Informal preliminary discussions may lead to a party's expectation that the attorney has been retained to provide legal services. To prevent the unintended creation of an attorney-client relationship, the attorney should consider sending the prospective client a nonengagement letter. For a form, see Selecting & Forming Business Entities §1.26 (2d ed Cal CEB 2007).

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§3.5 E. Attorney as Percipient Witness

When an attorney has been a percipient witness to contested matters that will require his or her testimony before a jury, Cal Rules of Prof Cond 5-210 prohibits the attorney from acting as an advocate before that jury unless the attorney obtains informed written consent from the client. The attorney contemplating a litigation representation may have prepared estate plans, represented the decedent or conservatee in business matters now in dispute, or represented a fiduciary whose acts are being challenged. Although most probate and trust disputes are heard by the superior court in its probate role without a jury, there are some matters that can be heard before a jury. See §10.42. Additionally, the attorney who has become a percipient witness must consider whether he or she can provide effective representation before any trier of fact when his or her testimony and credibility may be called into question by the opposing side.

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F. Professional Competence

§3.6 1. Compliance With Cal Rules of Prof Cond 3-110

Under Rule 3-110(A) of the California Rules of Professional Conduct, an attorney is required to perform legal services competently, *i.e.,* to apply diligently the learning and skill necessary to perform his or her duties arising from employment or representation. If an attorney lacks the requisite competence, he or she can nevertheless satisfy the competence requirement by either (a) associating with or professionally consulting another attorney reasonably believed to be competent or (b) acquiring sufficient learning and skill before performance is required. Cal Rules of Prof Cond 3-110(B).

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§3.7 2. What Probate or Trust Litigator Needs to Know

The attorney who performed estate planning for a now-deceased client is often asked to advise the personal representative or trustee. Although the attorney may have substantial experience in routine trust and estate administration, a different situation is presented when litigation arises. An attorney who accepts responsibility for a probate or trust litigation matter must possess a wide range of skills to satisfy the requirements of Cal Rules of Prof Cond 3-110. The attorney should be knowledgeable about and experienced in the substantive area of law involved in the dispute, general civil litigation procedures, and procedures unique to the proceeding and court trying the matter. Depending on the particular case, the attorney may need to be familiar with applicable laws and procedural rules relating to probate, wills, trusts, state and federal taxation, civil litigation procedures, and probate and trust litigation procedures.

Several cases involving probate and estate planning matters hold that a lawyer may be disciplined for failure to act competently. See *Lewis v State Bar* (1981) 28 C3d 683, 170 CR 634 (probate). See also *Bucquet v Livingston* (1976) 57 CA3d 914, 129 CR 514 (failure of general practitioner to adequately consider tax consequences of general power of appointment).

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§3.8 3. Sharing Client Relationship

If an attorney determines that he or she is not sufficiently experienced to handle a trust or probate litigation matter, the attorney can satisfy the requirements of Cal Rules of Prof Cond 3-110 by delegating the matter to another member of the attorney's firm who is competent to handle the litigation. If this course of action is unavailable, the attorney can consider either an association of, or outright referral or transfer of the matter to, litigation counsel.

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§3.9 a. Association

In an association arrangement, both the initial counsel and litigation counsel are the attorneys for the client for purposes of the litigation and both are listed as attorneys of record on the litigation pleadings. An association arrangement is suitable when, for example, the initial counsel has substantial litigation skill and experience and can properly handle (and wants to handle) the bulk of the pretrial litigation work but wants to associate litigation counsel for the purposes of developing and supervising litigation strategy and handling the trial if the litigation cannot be settled. Association is also appropriate when initial counsel has substantial litigation skill and experience but is a sole practitioner and needs to associate another attorney or firm in order to have the resources to handle major litigation.

The initial attorney and client should discuss their prospective relationship with respect to the litigation, *e.g.,* will the associated attorney remain in the background as an adviser or be in direct contact with the client and actively involved in the litigation?

The initial attorney should have a written fee agreement with the specialist, delineating their separate responsibilities. Typically, the referring lawyer is responsible for supervising associated counsel's work and ensuring that the client is satisfied.

The client must consent in writing to the dual representation and to any division of attorney fees. Cal Rules of Prof Cond 2-200 (financial arrangements among lawyers). Under this rule, the total fee may not be unconscionable (as defined in Cal Rules of Prof Cond 4-200) and may not be increased solely because of the division of fees. The fee division need not be made on the basis of the proportion of services rendered by the lawyers as long as the lawyers assume responsibility for the representation as a whole and the client is advised about and consents in writing to the arrangement. See *Chambers v Kay* (2002) 29 C4th 142, 126 CR2d 536 (fee-splitting agreement unenforceable because attorneys failed to obtain client consent as required by Cal Rules of Prof Cond 2-200); *Moran v Harris* (1982) 131 CA3d 913, 182 CR 519 (court upholds fee-splitting arrangement between referring lawyer and lawyer actually rendering services).

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Source: Estate Planning/California Trust and Probate Litigation/3 Attorney-Client Relations/§3.10 b. Referral

§3.10 b. Referral

If the initial counsel is not in a position to bring any value to the litigation effort, the extra cost of an association arrangement (*e.g.,* duplicate sets of pleading and discovery documents, and time spent for conferences between administrative counsel and litigation counsel) may not be in the client's best interest. Referral is dictated when the initial counsel does not wish to assume direct professional liability for proper management of the litigation effort.

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II. CONFLICTS OF INTEREST

§3.11 A. Conflicts Among Clients

Conflicts of interest may arise in contested probate and trust proceedings because of the interrelatedness of parties and the multiple roles of individual parties as beneficiaries, fiduciaries, or business associates. Often, these roles can shift during the course of the proceedings.

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Source: Estate Planning/California Trust and Probate Litigation/3 Attorney-Client Relations/§3.12 1. Rules of Professional Conduct

§3.12 1. Rules of Professional Conduct

Among other responsibilities, an attorney representing a client has the following duties to the client:

- Undivided loyalty (*e.g., Flatt v Superior Court* (1994) 9 C4th 275, 36 CR2d 537);
- Avoiding representing adverse interests (Cal Rules of Prof Cond 3-300);
- Keeping the client reasonably informed and making available copies of significant documents when necessary to keep the client so informed (Cal Rules of Prof Cond 3-500; Bus & P C §6068(m)-(n)); and
- Maintaining client confidences and secrets (unless the attorney reasonably believes disclosure is necessary to prevent a criminal act as defined in Bus & P C §6068(e)(2)) (Bus & P C §6068(e)(1); State Bar Committee on Prof Resp & Cond Formal Opinion 1993-133; *Goldstein v Lees* (1975) 46 CA3d 614, 120 CR 253).

When an attorney represents more than one client in a matter, the attorney-client engagement letter must address these four conflicting duties in a manner consistent with Cal Rules of Prof Cond 3-310(C), which provides:

> A member shall not, without the informed written consent of each client: (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict.

Thus, the attorney must comply with Rule 3-310(C) with respect to both potential and actual conflicts. If no potential or actual conflict exists, Rule 3-310(C) does not apply. If a potential or actual conflict exists either at the beginning of the attorney-client engagement or subsequently arises during the course of representation, Rule 3-310 applies and requires the attorney to obtain the clients' written consent to initial or continued representation. Even if the attorney obtained the clients' written consent when a potential conflict existed or arose, another written consent is required if the potential conflict becomes an actual conflict.

An attorney representing more than one client should be alert for possible conflicts of interest throughout the entire period of representation. If multiple representation initially appears appropriate but interests diverge or an actual conflict arises during the course of representation, the attorney must inform the parties in writing of the nature of the conflict and its foreseeable consequences. The attorney should obtain the parties' informed written consent to continued representation despite any prior consents that the parties may have granted. Cal Rules of Prof Cond 3-310(C)(1)-(2).

For a discussion of the conflicts of interest that can frequently arise in estate planning, see House & Ross, Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel (State Bar of California Estate Planning, Trust and Probate Law Section, 2d ed 2008).

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§3.13 2. Possible Conflict Situations

Possible conflict of interest scenarios in trust and probate litigation include the following:

- **Representation of executor or trustee and remainder beneficiary.** See *Estate of Huber* (1973) 31 CA3d 126, 134, 107 CR 89 (court denied compensation to bank and its attorney because of attorney's representation of remaindermen in dispute with income beneficiary).
- **Representation of executor or trustee and one of the beneficiaries in controversy with other beneficiaries.** See *Estate of Effron* (1981) 117 CA3d 915, 173 CR 93 (absent written consent, executor's attorney may not represent beneficiary of estate); *Morales v Field, DeGoff, Huppert & MacGowan* (1979) 99 CA3d 307, 316, 160 CR 239 (trustee's attorney must inform beneficiaries of dual representation in trust transactions).
- **Suit by executor against beneficiary.** See *Estate of Hammer* (1993) 19 CA4th 1621, 1642, 24 CR2d 190 (court required removal of executor who sued sole beneficiary in another forum on matters unrelated to estate).
- **Representation of trustee and guardian.** See *Potter v Moran* (1966) 239 CA2d 873, 49 CR 229 (court vacated trust accountings for extrinsic fraud stemming from attorneys' failure to disclose representation of trustee and guardian for minor beneficiaries).

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§3.14 3. Dealing With Conflicts

In probate and trust contexts, the "family" attorney may face conflicts that are irreconcilable. An attorney cannot avoid this conflict by withdrawing from the representation of some family member clients involved in a dispute with others. See *Flatt v Superior Court* (1994) 9 C4th 275, 36 CR2d 537 (duty of loyalty to first client precludes attorney's simultaneous or dual representation of second client, even in unrelated matter); *Truck Ins. Exch. v Fireman's Fund Ins. Co.* (1992) 6 CA4th 1050, 8 CR2d 228 (applying Cal Rules of Prof Cond 3-310(B), prohibiting concurrent representation of clients with conflicting interests, except with informed written consent).

Some conflicts may be waived after full disclosure. See *Zador Corp N. V. v Kwan* (1995) 31 CA4th 1285, 1295, 37 CR2d 754; *Federal Home Loan Mortgage Corp. v La Conchita Ranch Co.* (1998) 68 CA4th 856, 80 CR2d 634 (written waiver by sophisticated client).

Informed written consent after disclosure of the material facts is required in cases of actual or potential conflict (Cal Rules of Prof Cond 3-310(C)) or when "by reason of the representation of the client or former client, the member has obtained confidential information material to the employment" (Cal Rules of Prof Cond 3-310(E)).

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§3.15 4. Problems With Multiple Clients

Realistically, in the context of disputed probate and trust litigation, tactical and interpersonal considerations make it unlikely that the combatants will consent to their former attorney representing an adverse party. The issue is more likely to arise when an attorney seeks to represent multiple parties who appear to be on the same side, but whose interests may actually or potentially conflict in more subtle ways. An attorney may, for example, seek to represent all parties that share a common interest in a disputed trust or probate matter, particularly when a contingency fee agreement is required and the estate is divided among multiple heirs. Some of these parties, however, may have distinctly different legal positions or may receive different or contingent classes of assets. A widow challenging or defending a will or trust may have community property interests that conflict with her children's or other relatives' interests in the will or trust. Intestacy may benefit a spouse disproportionately depending on whether the property is community or separate, making her adverse to her own children or stepchildren.

Although it may make strategic and economic sense to have a potential client round up other relatives and heirs to establish a critical mass for sharing of fees and expenses or payment of a contingency, the attorney should first analyze whether there are conflicts among the parties. Any conflicts should be resolved in advance, or the parties must agree in writing, after full disclosure, to waive the actual or potential conflicts. An attorney who fails satisfactorily to clear conflicts may not only be subject to liability to clients and face possible disciplinary action for an ethical violation but may be unable to settle the litigation because one or more of the clients demands satisfaction of his or her personal desires as a precondition to consent to the settlement.

Even if the parties' interests are not directly in conflict, disparate abilities to pay current fee or cost assessments may cause serious conflicts. Although litigation sometimes brings a distant family group together, more often the disappointments and expenses of prolonged litigation erode bonds of common outrage and expose divergent financial positions or tolerance for risk. When several clients demand settlement because of their financial plight while their well-heeled relatives urge prosecution to the end, the attorney may find the conflict incapable of resolution. One possible solution is for the fee agreement to provide that decisions will be made by persons holding a majority of the interests (defined in terms of numerical majority or dollar amount).

The parties may also have divergent views on the public airing of skeletons in the family closets, *e.g.,* infidelity, abuse, mental illness, or chemical dependency. If the attorney seeks advance agreement in the fee contract on mechanisms for obtaining majority decisions from client groups, the contract should disclose the possibility of clashes of personal as well as financial values.

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Source: Estate Planning/California Trust and Probate Litigation/3 Attorney-Client Relations/§3.16 B. Conflicts Between Attorney and Client

§3.16 B. Conflicts Between Attorney and Client

An attorney may not accept or continue representation of a client without providing written disclosure to the client if the attorney:

- Has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter (Cal Rules of Prof Cond 3-310(B)(1)); or
- Knows or reasonably should know that the attorney previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter and that that relationship would substantially affect the representation (Cal Rules of Prof Cond 3-310(B)(2)).

An attorney may not accept or continue representation of a client without providing written disclosure to the client if the attorney:

- Has or had a legal, business, financial, professional, or personal relationship with another person or entity who the attorney knows, or reasonably should know, would be substantially affected by resolution of the matter (Cal Rules of Prof Cond 3-310(B)(3)); or
- Has or had a legal, business, financial, or professional interest in the subject matter of the representation (Cal Rules of Prof Cond 3-310(B)(4)).

In contrast to the conflict-of-interest rules in Rule 3-310(C), Rule 3-310(B) requires written disclosure but not the obtaining of informed written consent. Disclosure is not limited simply to a prior legal representation. The attorney must disclose a "legal, business, financial, professional, or personal relationship" with a party or witness.

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§3.17 III. ATTORNEY FEES

A major concern in probate and trust litigation is whether compensation will be available, when payment can be obtained, and from what sources. If the client is a fiduciary, compensation may be restricted by statute, *e.g.,* Prob C §10813 (agreement for attorney compensation in excess of statutory amount is void), or may be subject to court approval (Prob C §§10830-10832). Before agreeing to represent a client, the attorney should disclose any statutory limitations on the client's ability to pay costs and attorney fees and should discuss with the client the possibility of obtaining reimbursement from other sources.

In addition to legal barriers, there may be substantial practical barriers to recovery of fees when the interest of the client does not mature until some future date. An impecunious heir to a probate estate, a remainderperson of a trust, or parties who will only take in intestacy may face delays before they realize the fruits of litigation to establish or protect their interests. In such cases, the attorney should determine whether there are current assets available to compensate counsel.

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A. Economic Considerations

§3.18 1. Estimating Litigation Fees and Expenses

Representation of a fiduciary in connection with a trust or probate litigation matter will most often be based on an hourly fee arrangement. When representing an interested party in an individual, nonfiduciary capacity as an heir or beneficiary, the attorney should early on estimate the probable cost of the litigation to determine whether an hourly fee arrangement is feasible. One approach is to list the types of activities involved in the litigation and to estimate the amount of time each task will take. These tasks include:

- Initial factual investigation;
- Witness interviews;
- Initial legal research;
- Drafting initial pleadings;
- Propounding, reviewing, and responding to written discovery;
- Witness depositions, including analysis of transcripts;
- Discovery and pleading disputes, including dispositive motions;
- Retention and preparation of experts;
- Alternative dispute resolution procedures, including pleadings and hearings;
- Trial and trial preparation; and
- Posttrial motions and appeals.

In addition, the parties need to consider litigation costs such as filing fees, expert witness fees, preparation expenses, and deposition expenses. Although initial estimates can only begin to predict actual costs, calculation of the expenses involved in individual elements of a litigation case can provide a useful framework for estimates.

Estimating the hourly time and out-of-pocket expenses also helps to determine whether a contingency fee arrangement is appropriate in the matter. The opportunity cost in terms of alternative uses of legal services and the costs and expenses involved in the litigation will determine whether a contingency offers a viable alternative for the attorney. See §§3.23-3.37. Conversely, a proceeding with large amounts of money involved for the client but relatively small litigation costs points to an hourly fee arrangement.

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§3.19 2. Additional Considerations

Additional factors in the attorney's evaluation of litigation costs include the possibility of creditors' claims, tax liens, falling asset values, and hidden liabilities such as pollution risks. The potential expenses of a loss should also be taken into account, particularly when the proceeding may provide some basis for the shifting of costs or attorney fees to the losing side. Because most contested probate and trust litigation matters are settled, in evaluating alternative fee arrangements the attorney should further consider that the value of past legal services or payments may be discounted to facilitate settlement.

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§3.20 3. Cash Flow Evaluation; Hybrid Fee Arrangements

Before entering an hourly fee arrangement, the attorney should determine whether the potential client has the cash flow or liquid assets to sustain hourly fees and current expenses for the possible duration of the litigation. If it seems probable that protracted litigation will exhaust the client's ability to meet current fees and expenses, possible solutions include additional compensation in the form of enhanced attorney rates, interest charges on delayed payments, partial contingencies, and liens on the client's share of the estate assets.

The attorney should note that there may be forfeiture-on-alienation (cesser) provisions in a will or trust that can terminate the client's beneficial interest on an assignment creating an attorney's lien. Such a provision conceivably could be invoked if a beneficiary transferred a portion of the estate to an attorney under a contingency fee agreement. On the validity of forfeiture-on-alienation provisions, see *In re Fitzsimmons (Litchfield v Nolden)* (9th Cir 1990) 896 F2d 373, 375; *Firestone v Galbreath* (SD Ohio 1995) 895 F Supp 917, 929; (attorney's lien triggered termination-on-alienation clause); Restatement (Third) of Trusts §§57-58.

When multiple clients have disparate financial situations, the attorney should consider obtaining an agreement from the more solvent members of the group to guarantee the payment of fees and see to their collection. Alternatively, it may be necessary to offer some hybrid fee arrangement to accommodate the financial realities. For example, some clients within a class could agree to pay a proportionate share of hourly fees and costs, while the remainder agree to a contingency for their proportionate share. Reduced hourly rates with a contingency "kicker" may also enable clients to meet the attorney's minimal cash needs.

The attorney should consider the effect of a hybrid arrangement on the clients' ability to communicate litigation directives, particularly involving settlement. One group of clients who are weighed down with the prospect of future payments of hourly fees may find themselves outvoted by contingent fee clients who can continue the litigation at little additional cost to them. It is essential in such hybrid arrangements to have express provisions for voting on litigation decisions such as settlement and to assure that the clients understand the potential conflicts that may arise among relatives who may have common family values but a different economic perspective.

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§3.21 B. Statutory Requirements

In most circumstances, a written fee agreement with a potential litigation client is required to protect both the client and the attorney. A written fee agreement is required for both contingency and, with some exceptions, noncontingency cases. Bus & P C §§6147-6148. A duplicate copy of the contract must be provided to the client at the time the agreement is entered into. Without a required written fee agreement, an agreement with an individual client is voidable at the client's election, but the attorney in such circumstances is entitled to a "reasonable" fee. Bus & P C §§6147-6148. A reasonable fee within the meaning of the statute, however, may be far less than the attorney would have obtained under a written agreement, particularly if the litigation had poor results or took an excessive amount of time. Moreover, litigation or mediation over the reasonableness of a fee can take substantial time that is generally uncompensated. See generally California Civil Procedure Before Trial, chap 3 (4th ed Cal CEB 2004).

NOTE: Rule 3-410 of the California Rules of Professional Conduct requires an attorney who knows or should know that he or she does not have professional liability insurance to inform a client in writing at the time of engagement if it is reasonable to foresee that the representation will exceed 4 hours. The Bar's official discussion of the rule states that the following language may be used in the fee agreement or in a separate writing: "Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance."

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§3.22 1. Noncontingency Fee Contracts

Under Bus & P C §6148, a noncontingency fee agreement must be in writing if it is reasonably anticipated that the client's fees and costs will exceed $1000. The agreement must contain the bases for compensation, including hourly rates, statutory fees, or flat fees, and other standard rates, including fees and charges that apply to the case. The agreement must also include a statement of the general nature of the legal services to be provided and the respective responsibilities of the attorney and client in performing the agreement. Although a written fee agreement is not required for an attorney representing a corporate client (Bus & P C §6148(d)(4)), the author recommends that such an agreement be used because there are substantial risks of misinterpretations and disputes if the terms of the representation are not carefully spelled out.

Absent such a written fee agreement, an agreement with an individual client is voidable at the client's election. Bus & P C §6148(c). The attorney faced with a voided unwritten agreement is entitled to "reasonable" fees. Bus & P C §§6147(b), 6148(c).

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§3.23 2. Contingency Fee Contracts

A contingency fee agreement must be in writing. Bus & P C §6147(a). The agreement must include the agreed contingency rate, a statement regarding how disbursements and costs will affect the contingency fee and the client's recovery, and a statement of the extent, if any, to which the client could be required to pay any compensation to the attorney for related matters that arise out of the relationship with the attorney but that are not covered by the agreement.

For advance court approval requirements for contingency fee contracts, see §3.38.

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§3.24 a. Services Covered by Agreement

The agreement should clearly delineate the services covered by the agreement, including whether cross-claims and other offensive attacks will be covered. A will contestant may, for example, be subject to a claim for transfer of property claimed to be owned by the decedent or for unpaid debts owed to the decedent. Additional counterattacks may come in the form of a claimed violation of an in terrorem clause, a dispute over the characterization of property, or a dispute over nonprobate assets. The fee agreement should address whether these kinds of claims are covered by the contract. The contract should also state whether it covers legal services rendered in connection with the client's duties as a fiduciary.

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§3.25 b. Variable Contingency Fee Agreements

A contingency fee agreement may be drafted to provide for different contingency percentages depending on the duration or nature of the litigation. Litigation could initially be covered by a contingency fee, but the fee could revert to a multiple of the attorney's hourly rate if the matter were settled within, *e.g.,* 50 hours of attorney time. Or the contingency percentage could increase, *e.g.,* from 25 to 33 percent of the net recovery, if the case remains unresolved one month before trial, increasing again if the matter is appealed. An escalating contingency formula can be structured to provide an incentive to the client to settle before trial and to protect the attorney from the expenses of protracted appeals and trials. Conversely, a variable contingency arrangement can assure the client that the attorney will not obtain a windfall if the matter is promptly settled or resolved without trials and appeals. For a form that can be used in a will or trust contest, see §3.42.

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§3.26 c. Collectibility of Fee

Before entering into a contingency fee agreement, the attorney should review the will or trust to ensure that the agreement does not trigger any forfeiture-on-alienation (cesser) provision. See §3.20. If there is any doubt about the consequences of a contingency assignment, the attorney should petition the court for an interpretation of the provision in question.

The attorney should also examine the nature of the client's interest to determine whether it is capable of transfer to the attorney in a timely fashion. In *Estate of Muhammad* (1971) 16 CA3d 726, 94 CR 856, the client's interest in a contested will was through a testamentary trust in which the client would ultimately obtain only a beneficial interest. Because the beneficiary had no enforceable interest in the estate, the attorneys were denied a lien on the assets that ultimately were transferred to a testamentary trustee.

The fee agreement should cover the possibility that the litigation could result in the recovery of periodic payments. The agreement should provide that the contingency fee would apply to those payments as received by the client, after satisfaction of litigation costs. If the client is awarded the power to revoke or appoint assets, the agreement should require the client to revoke or appoint the percentage of assets necessary to satisfy the client's contingency fee obligation to the attorney.

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§3.27 d. Limitations for Minors in Local Rules

Some local probate rules limit the amount of contingency fees available when the client is a minor. See, *e.g.,* San Mateo Ct R 4.80(e), limiting contingencies in settlements for minors to 25 percent of the net settlement absent a showing of good cause for a higher amount.

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§3.28 C. Potential for Reimbursement From Third Parties

There are a variety of circumstances in which it may be possible in trust and probate litigation to obtain reimbursement of reasonable fees and expenses on successful prosecution of a proceeding. Reimbursement may be delayed, however, as a result of protracted litigation or appeals or the intervention of other claims that prevent an assessment of the value of the services or raise questions about the cost of the services relative to the size of the estate. Similarly, a trust or estate may contain illiquid assets that cannot readily be sold or that are subject to conflicting claims. If the estate or trust must liquidate or borrow against estate or trust assets to pay attorney fees, reimbursement may have to await termination of tax litigation, creditors' claim disputes, or heirship proceedings. The client should be warned that reimbursement may be denied, may be less than actual expenditures, and may be delayed.

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§3.29 1. Reimbursement From Estate Based on Preservation of Common Fund

Although the American rule generally precludes recovery of fees from an opponent (*Estate of Trynin* (1989) 49 C3d 868, 876, 264 CR 93), there are a number of statutory and decisional exceptions to this rule. For example, when a benefit has been conferred on an estate by the creation or protection of a common fund, it may be possible to seek reimbursement from that fund. *Estate of Stauffer (*1959) 53 C2d 124, 132, 346 P2d 748. Because the key issue in common fund cases is whether other beneficiaries will be free riders who will be unfairly benefited if their share of the estate does not contribute to the attorney's compensation, however, the representation of multiple beneficiaries by various counsel (see *Estate of Korthe* (1970) 9 CA3d 572, 88 CR 465) or the representation of most of the beneficiaries by a single attorney (see *Estate of Gump* (1982) 128 CA3d 111, 180 CR 219) militates against recovery under the common fund theory. Thus, although an attorney's representation of most of the interested parties may minimize the individual expense to each client of hourly fees or may make a contingency fee agreement practical from the attorney's viewpoint, such omnibus representation may make it difficult to obtain reimbursement from the estate.

Recovery of attorney fees and expenses from the estate will cause the client nevertheless to bear part of the expense to the extent that the client is a residual heir or the estate is otherwise distributed to a class of which the client is a member.

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§3.30 2. Reimbursement From Trust

The same principles generally apply in trust actions as in probate estates. *Copley v Copley* (1981) 126 CA3d 248, 293, 178 CR 842 (attorney fees allowed from fund when beneficiaries recovered funds from trustee/executor because assets were sold to fiduciary at too low a price); *Hutchinson v Gertsch* (1979) 97 CA3d 605, 159 CR 40 (successful removal of faithless trustee can provide basis for award of attorney fees to beneficiaries when their actions preserve estate); *Wells Fargo Bank v Marshall* (1993) 20 CA4th 447, 458, 24 CR2d 507 (beneficiary forced to defend interpretation of trust provision from attack by another beneficiary allowed to recover fees from trust).

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§3.31 3. Reimbursement From Party Acting Improperly

An attorney generally should not take a case on the expectation that the client can recover attorney fees and expenses from the other side. Under the American rule, unless there is a contract or statutory provision to the contrary, a prevailing party cannot recover attorney fees, even when fraud or breach of fiduciary duty is involved. *Estate of Trynin* (1989) 49 C3d 868, 876, 264 CR 93; *Gray v Don Miller & Assocs.* (1984) 35 C3d 498, 504, 198 CR 551; *Schneider v Friedman, Collard, Poswall & Virga* (1991) 232 CA3d 1276, 1283, 283 CR 882; *Estate of Gerber* (1977) 73 CA3d 96, 117, 140 CR 577 (beneficiary cannot recover fees from breaching trustee). Absent bad faith, the expenses of defense or prosecution of an action for the benefit of a trust are not allocated to the share of the losing objector. *Estate of Beach* (1975) 15 C3d 623, 646, 125 CR 570.

There are a number of statutory exceptions that allow recovery of reasonable fees and costs from the opposing side:

- Bad faith prosecution or defense of objections to account of fiduciary (Prob C §§2622.5 (conservatorships and guardianships), 11003 (estates), 17211(trusts));
- Unreasonable prosecution or defense of creditor's claim (Prob C §9354(c));
- Removal of trustee who is a disqualified person or whose appointment was the product of fraud, menace, duress, or undue influence (Prob C §15642(b)(6), (c));
- Bad faith filing of petition to remove a trustee when the removal would have been contrary to the settlor's intent (Prob C §15642(d));
- Removal of trustee for cause when a trustee of an irrevocable trust refuses to transfer administration to a successor trust company on request of all adult beneficiaries who are receiving or entitled to receive income or to receive principal if the trust were terminated (Prob C §15645);
- Financial abuse regarding dependent or elder is proved by clear and convincing evidence (Welf & I C §15657);
- Undertaking of frivolous bad faith actions or of delaying tactics may subject the offending party to sanctions under CCP §128.5 (*Levy v Blum* (2001) 92 CA4th 625, 112 CR2d 144 (trustee ordered to pay attorney fees as sanction for bad faith attempt to renege on settlement agreement); *Estate of Ivey* (1994) 22 CA4th 873, 885, 28 CR2d 16) (spendthrift provision does not preclude assessment of sanctions against beneficiary's share of trust after bad faith objection to trustee's account)).

The court also has equitable power to charge a beneficiary's share of a trust for reasonable and necessary legal fees incurred by the trustee to oppose the beneficiary's frivolous litigation against the trust. *Rudnick v Rudnick* (2009) 179 CA4th 1328.

For further discussion of allocation of attorney fees, see §§13.48-13.49 (objections to account), 14.32-14.35 (actions for removal of fiduciary), 21.72-21.78 (breach of trust actions).

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§3.32 4. Risk of Adverse Judgment for Costs and Fees

In evaluating a potential probate or trust action, the attorney must take care to determine whether there is some prospect of an adverse judgment or of an award of fees and costs against the client or attorney. Bringing a claim without probable cause could subject an attorney or client to a claim for malicious prosecution if there is no favorable termination of the proceeding. *Crowley v Katleman* (1994) 8 C4th 666, 34 CR2d 386 (malicious prosecution claim against contestant upheld because of lack of probable cause in claiming improper execution of will).

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§3.33 D. Representing Fiduciaries

In addition to the factors that an attorney should consider in determining whether to represent an individual, the decision to represent a fiduciary should additionally be evaluated in terms of the ability of the fiduciary estate or others to provide compensation for legal services. The ability to be compensated depends in great part on the nature of the fiduciary, the size and liquidity of the estate, and the degree to which extraordinary services will be required. If the representation is of a successor fiduciary, care must be taken to determine what proportion of the ordinary services have already been performed, whether corrective action will be required, and the circumstances under which the fiduciary may be removed or terminated on the occurrence of events such as the death of a life income beneficiary. In such cases the fees for the fiduciary's counsel may be allocated based on the proportion of the services performed by each (Prob C §10814). If obtaining appointment of the client as a fiduciary is a prerequisite to bringing a claim, failure of the fiduciary to gain appointment may leave the attorney without recourse against the estate or trust for fees, and little chance for recovery elsewhere unless the client has guaranteed the fees.

The considerations discussed in §§3.21-3.23 regarding the need for a written fee contract for contingency and noncontingency cases apply with respect to fiduciary clients as well.

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§3.34 1. Limitation on Fees of Personal Representative

An executor or administrator of a probate estate may have no personal liability for the payment of fees for legal services rendered (Prob C §10803; *Estate of Trynin* (1989) 49 C3d 868, 873, 264 CR 93) and the attorney may have no recourse if fees are not awarded by the court out of the probate estate.

Ordinary fees for counsel for the personal representative are governed by Prob C §10810, which provides a sliding scale for fees based on the size of the estate. See Cal Rules of Ct 7.703 for a list of extraordinary services. See also California Decedent Estate Practice, chap 30 (2d ed Cal CEB 2009).

A statutory attorney fee cannot be reduced to a reasonable amount based on the number of hours of work involved in ordinary services. *Estate of Getty* (1983) 143 CA3d 455, 466, 191 CR 897. Thus, fees will not be reduced because a large estate might produce a windfall relative to the amount of work actually performed.

An excessive delay in closing the estate may result in a reduction of the statutory fees. Prob C §12205. Before embarking on litigation that may delay closure of the estate without any corresponding benefit, the attorney should consider whether the delay may result in reduced statutory fees (and perhaps denial of extraordinary fees for the litigation).

Compensation may be limited by the terms of a will or trust. If the will or trust limits compensation to the fiduciary's attorney, it may be possible to obtain an order from the probate court authorizing a higher fee. Prob C §§10812(b), 15680(b), 17200(b)(9).

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§3.35 2. Ordinary Fees in Trust Proceedings

Attorney fees rendered to a trustee in performance of ordinary services, if not set by the trust, are generally treated as expenses incident to the trustee's right to hire agents for assistance in the performance of trust duties. Prob C §16247. The trustee may be reimbursed for payment of legal fees when the services were properly incurred. Prob C §15684.

It is important to determine if the trust specifies whether the fees are to be taken out of income or principal or allocated on a prescribed basis. A direction in the trust generally will be followed. Prob C §16335(a)(1); *Estate of Colyear* (1970) 10 CA3d 670, 679, 89 CR 147.

Absent a direction in the trust, normal principal and income allocation rules will govern unless the court orders otherwise. Under Prob C §§16370(b) and 16371(a)(1), ordinary expenses of accountings generally are charged equally to income and principal. If a matter concerns primarily the income or principal interest of a trust, fees should be charged to that interest. Prob C §§16370(c), 16371(a)(4); *Thomas v Gustafson* (2006) 141 CA4th 34, 45 CR3d 639 (when litigation primarily concerns trust principal, trustee's attorney fees, if payable by trust, must be allocated solely to principal; court has no discretion to allocate portion to income).

When representing a beneficiary who is also a fiduciary, take care to determine whether attorney fees will be deducted from the client's income or principal interest. The ability to shift such expenses to other interests should be explored.

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Source: Estate Planning/California Trust and Probate Litigation/3 Attorney-Client Relations/§3.36 3. Litigation Fees

§3.36 3. Litigation Fees

The attorney for the nominated executor who successfully defends a will contest brought before admission of the will to probate generally can obtain payment of reasonable attorney fees and expenses. Prob C §10810. Although this section does not expressly provide for such fees, the predecessor statute, former Prob C §902, expressly provided for fees for "the successful defense of a will which is contested before the will is admitted to probate" or after it is admitted to probate. The Law Revision Commission note points out that the circumstances allowing recovery were deleted from the new statute because the list was not complete, and that the deletion was not intended to change the law. Case law allows payment of fees of the nominated executor for a successful defense or settlement of a contest. *Estate of Schuster* (1984) 163 CA3d 337, 209 CR 289; *Estate of Perreira* (1961) 191 CA2d 369, 12 CR 589. At least one court has allowed payment of fees for a nominated executor's unsuccessful defense of a later will that was offered for probate in good faith. See *Kessler v U.S.* (ND Cal 2008) 2008-1 USTC ¶60,559, 101 AFTR2d 1409.

After admission of the will to probate, the executor has a duty to defend the will. Prob C §8250(b). Again, former Prob C §902 expressly provided for payment of reasonable fees, and these are impliedly authorized under Prob C §10810. See also *Estate of Dunton* (1936) 15 CA2d 729, 731, 60 P2d 159; *Estate of Corotto* (1954) 125 CA2d 314, 318, 270 P2d 498.

Payment of attorney fees for representation of a fiduciary in litigation other than will contests generally turns on whether the litigation resulted in a benefit to the estate and the fees were incurred in good faith. The same principles apply to probate estates, trusts, and conservatorships and guardianships. *Conservatorship of Lefkowitz* (1996) 50 CA4th 1310, 58 CR2d 299.

When a party attacks the validity of a trust, the trustee generally has a right to retain an attorney to defend the trust at the trust's expense. *Estate of Duffill* (1922) 188 C 536, 556, 206 P 42. However, when the trustee is also a beneficiary and defends one trust document or amendment as opposed to a competing document or amendment, the object of the litigation may not be to protect the existence of the trust but rather to protect the document that benefits the trustee. Under these circumstances, it may be improper to charge the trustee's attorney fees to the trust. See, *e.g., Terry v Conlan* (2005) 131 CA4th 1445, 33 CR3d 603 (trustee not allowed to pay her attorney from trust to defend a 2001 trust instrument benefiting her and her siblings against a 1999 trust instrument benefiting their stepmother—trustee was not defending the existence of the trust, just the trust instrument for her benefit over another); *Whittlesey v Aiello* (2002) 104 CA4th 1221, 128 CR2d 742 (attorney for trustee named in a trust amendment that benefited trustee not entitled to fees from trust for unsuccessful defense of validity of amendment, because it would be inequitable to force the prevailing remainder beneficiary under initial trust to, in effect, pay her opponent's fees in addition to her own).

When the fiduciary's defense or prosecution of an action has not been successful, the fiduciary's attorney may nonetheless be awarded compensation in the discretion of the court when the fiduciary's actions were in good faith and in accordance with his or her fiduciary duties. *Estate of Trynin* (1989) 49 C3d 868, 877, 264 CR 93. When the trustee resists an action in good faith and with probable cause, discretionary trustee fees have been awarded even when there is a surcharge. *Copley v Copley* (1981) 126 CA3d 248, 295, 178 CR 842. When a trustee acts improperly, however, the court will deny all or part of its attorney fees. *Estate of Miller* (1968) 259 CA2d 536, 538, 66 CR 756; *Estate of Baird* (1955) 135 CA2d 343, 347, 287 P2d 372, overruled on other grounds in *Estate of Schloss* (1961) 56 C2d 248, 14 CR 643. Even if the trustee in good faith resisted removal, a fee can be denied when the defense was not reasonable. *Estate of Gilmaker* (1964) 226 CA2d 658, 663, 38 CR 270. See §21.77.

When the fiduciary is partially successful in defending its actions, the court has discretion to award reasonable fees. *Estate of Cassity* (1980) 106 CA3d 569, 165 CR 88.

The reasonableness of the trustee in making the decision to institute or defend against litigation is the major factor considered by the courts when the litigation terminates unfavorably.

Before embarking on litigation for a fiduciary, care must be taken to determine whether the action is in the best interests of the estate or trust and whether it is reasonable under the circumstances to initiate or defend the action in question. The attorney can assist in ensuring that compensation will be available by undertaking a legal and factual analysis at the initiation of litigation to demonstrate the good faith nature of the fiduciary's decision and the fact that it

was undertaken in accordance with the applicable fiduciary duty. See *Estate of Trynin, supra*. To support the reasonableness of legal fees, the attorney should also prepare a record of the actual services performed in order to fully document the value of the services to the trust or estate. Although defeat is not always unrewarded, the client's receipt of a benefit is much more likely to result in fees to the attorney.

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4. Advance Authorization for Attorney Fees and Costs

§3.37 a. Hourly Fees

The timing of payment of fees may be crucial, because an award may be substantially delayed as litigation continues and it may be difficult to determine the worth of the services to the estate and the fiduciary before termination of the litigation. Payment of attorney fees by a personal representative, conservator, or guardian requires a prior court order unless an allowance on account of the statutory compensation has been made for the personal representative's attorney, or periodic payments for a guardian or conservator's attorney have been approved. See Cal Rules of Ct 7.700-7.701, 7.755. The court may remove or surcharge a personal representative who pays attorney fees before court approval. Cal Rules of Ct 7.700(b).

There is no absolute right to payment of fees for extraordinary services to the fiduciary and payment of attorney fees by a fiduciary without court approval can result in a disgorgement order, including payment of interest. Prob C §10811(a); Cal Rules of Ct 7.700, 7.703; *Estate of Hilton* (1996) 44 CA4th 890, 895, 52 CR2d 491.

If a fiduciary lacks resources or is barred from making payment until authorized by court order, the fiduciary can obtain advance authorization to pay costs and attorney fees. Application can be made under Prob C §10832 for an order authorizing payment for services rendered, or to be rendered, in litigation on behalf of a personal representative. Even though the trustee has the power under Prob C §16247 to hire attorneys and the power under Prob C §16243 to pay reasonable compensation to counsel, the parties should consider seeking authorization in advance under Prob C §17200 to pay litigation fees and expenses in order to avoid disputes after the services have been rendered. The authorization request should include the expected hourly rate for the attorneys involved, with proposed maximum payment amounts or time periods that cannot be exceeded without further court order.

A guardian or conservator may request the court to authorize periodic payment of attorney fees on account of future services under Prob C §2643 on a showing of an ongoing need for legal services. Cal Rules of Ct 7.755(b).

For trusts, there is no prohibition against making a fee agreement with the fiduciary in the fiduciary's individual capacity. When the assets of a trust are in doubt or too small, or when the conduct of the fiduciary may be called into question, a fee agreement with the acting or proposed fiduciary in his or her personal capacity can provide some assurance that attorney fees will be paid.

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§3.38 b. Advance Approval of Contingency Fee Agreements

If the fiduciary lacks the funds or the litigation appears too risky for an hourly fee arrangement, a contingency fee agreement may be a suitable alternative. Rather than have its decision challenged after the fact by beneficiaries, the fiduciary should obtain advance authorization for the agreement. A trustee may seek instructions under Prob C §17200 regarding executing such an agreement.

An attorney for a personal representative may enter into a contingency fee agreement for extraordinary legal services with his or her client. Unless there is an emergency or other unusual circumstances, the personal representative must obtain court approval *before* services are performed. Prob C §10811(c)(2); Cal Rules of Ct 7.703(d). The court must find that compensation under the agreement is just and reasonable, and that the agreement is to the estate's advantage and in the best interests of the persons interested in the estate. Prob C §10811(c)(3); Cal Rules of Ct 7.703(d).

A "lodestar fee agreement" for compensation at a multiple of normal hourly rates was held unenforceable in *Estate of Stevenson* (2006) 141 CA4th 1074, 46 CR3d 573, even though the attorney's work had been "heroic," because the fees would have consumed everything the attorney had recovered for the estate, leaving nothing for creditors or beneficiaries. The trial court had approved the fee agreement in advance of the work, under Prob C §10811(c), which allows for payment of extraordinary services under a contingency fee agreement approved by the court. The court of appeal held that the lodestar fee agreement was not a contingency fee agreement within the meaning of Prob C §10811(c) because it provided for a fee award based on hourly rates without regard to outcome. Contingency fee agreements typically provide that counsel will recover a percentage of any recovery, if there is a recovery, ensuring that the client will also receive a portion of any recovery.

A guardian or conservator of the estate may enter into a contingency fee agreement in connection with a matter that is of a type customarily the subject of a contingency fee agreement, if the court issues an order (Cal Rules of Ct 7.753):

- Authorizing the guardian or conservator to execute the contract; or
- Approving the agreement under Prob C §2644.

To obtain an order, the guardian or conservator must show that the agreement is to the advantage, benefit, and best interest of the ward, conservatee, or estate. A copy of the contingency fee contract must be attached to the petition. Prob C §2644(b).

In cases under Prob C §372 (guardian ad litem) or Prob C §§3600-3602 (blocked accounts), the court may approve the contingency fee agreement if it is reasonable under all the facts and circumstances. Cal Rules of Ct 7.955.

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§3.39 5. Compensation in Dry Probate

A litigation attorney may be involved in handling the general probate of an estate. Although only a small part of a decedent's assets may be subject to probate (with the major portion of the assets held in a trust, joint tenancy account, or other nonprobate form), a probate proceeding may have strategic advantages, *e.g.,* to force a will contest within the 120-day period provided in Prob C §8270, or to smoke out and deal with creditors. Because attorney fees for ordinary services rendered to a personal representative are limited to a percentage of the value of the probated assets, a fee agreement with the inter vivos trustee or the joint tenant may be the only way to obtain payment for ordinary services if probate of a small estate is desired in conjunction with handling a litigation matter.

Although an intervivos trust can be drafted to provide for payment of attorney fees for expenses related to the probate of the trustor's estate, there are no cases authorizing such a provision, and such an agreement may violate statutory prohibitions against an agreement that provides for compensation in excess of the statutory fee. See Prob C §§10803 (agreement between heir or devisee and personal representative), 10813 (agreement between personal representative and attorney). To avoid any questions after the fact, the trustee should file a petition for instructions authorizing such a fee agreement.

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IV. DEDUCTIBILITY OF ATTORNEY FEES

§3.40 A. Income and Estate Tax

For a discussion of the deductibility of attorney fees for estate and income tax purposes, see §§5.40-5.42.

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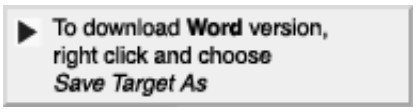
Source: Estate Planning/California Trust and Probate Litigation/3 Attorney-Client Relations/§3.41 B. Tax Considerations in Structuring Judgments and Settlements

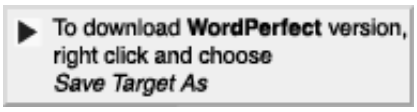
§3.41 B. Tax Considerations in Structuring Judgments and Settlements

The resolution of many disputes can lead to assets being transferred to parties in a manner that can reduce estate or income taxes and result in higher net recoveries. Litigation costs of preserving or enhancing the estate may be deductible and reduce taxes that would otherwise be paid. For further discussion of tax considerations in structuring judgments and settlements, see §§12.5-12.10.

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§3.42 V. FORM: VARIABLE CONTINGENCY FEE AGREEMENT—WILL AND TRUST CONTEST





3.42-1 Variable contingency fee agreement—will and trust contest

Re: _ _[*Describe matter*]_ _

Dear _ _[*name of client*]_ _:

This letter is to confirm our agreement under which this firm has undertaken to represent your interests in connection with contesting the will and trust of _ _[*name of decedent*]_ _, deceased. Our representation will be limited under this agreement to these matters. If other matters arise that require separate representation, we will contact you to determine whether you wish to engage us in such matters and the terms under which such representation will be conducted.

We suggest that you discuss this agreement and these matters with your personal counsel. The terms of this agreement, including the fee, are not set by law and are subject to negotiation. We will be happy to discuss such terms with you.

We have discussed the risk that the initiation of legal contact or litigation may eliminate any possibility of receiving a benefit from the decedent, either as a result of an in terrorem (no-contest) clause in the will or trust or because of action taken in retaliation by others interested in decedent's will or trust. We have also discussed the risks inherent in bringing this litigation and the possibility that no recovery may be obtained. You should be aware that, if litigation is brought and lost, you may be personally liable for an award of costs by the court.

However, based on the facts and documents you have provided us, we are willing to undertake this representation on a contingency fee basis, with our firm to advance your litigation costs for prosecuting the suit, to be recovered out of any settlement or judgment obtained, as provided below.

The contingency fee is as follows: First, if the matter is settled or a judgment obtained after less than _ _[*e.g., 50*]_ _ hours of attorney time, our fee will be twice our hourly rate plus any costs advanced. Such costs include filing fees, copying expenses, court or jury fees, deposition transcripts, travel expenses, expert witness fees, process server costs, and other out-of-pocket expenses.

The hourly rate for partners on this matter for purposes of this enhanced fee will be _ _[*dollar amount*]_ _, with lesser rates for associates and legal assistants ranging from _ _[*dollar amount*]_ _ to _ _[*dollar amount*]_ _.

If more than _ _[*e.g., 50*]_ _ hours of attorney time is expended before obtaining a settlement or judgment, our fees will be on a sliding scale. If more than _ _[*e.g., 50*]_ _ hours of attorney time is required, the contingency fee will be _ _[*e.g., 25*]_ _ percent of the amount of the settlement, judgment, or other recovery, after first deducting and paying to us our costs.

If litigation is not resolved until one month before the trial date, the contingency fee percentage would be _ _[*e.g., 33-1/3*]_ _ percent of any settlement, judgment, or other recovery received after such time. In the event of an appeal, the contingency fee percentage will be _ _[*e.g., 40*]_ _ percent of any settlement, award, judgment, or other recovery.

If you sign and return this fee agreement to us, you grant us a lien for all unpaid attorney fees and costs advanced on all claims and causes of action that are the subject of our representation of you under this agreement and on all proceeds of any recovery obtained, whether by settlement, award, order, or judgment. Please be aware that this lien may significantly impair your interest because, among other factors, it could delay payment of any recovery or settlement funds to you while disputes about attorney fees and costs

advanced remain unresolved. We advise you to obtain independent legal advice about granting us this lien. By signing this fee agreement and returning it to us, you are representing that you have had a reasonable opportunity to seek independent legal advice about this lien and have either obtained it or decided that it was unnecessary to do so.

Of course, we cannot guarantee that there will be any recovery. You have the right to agree or disagree with any settlement proposed. You have the right to terminate our firm's representation at your discretion. If you do so, however, our firm would retain a quantum meruit claim for a proportion of any subsequent settlement or recovery under common-law rules.

Our firm has the right to resign from this representation, subject to any necessary court approval, and subject to any quantum meruit claim that we might have under applicable law.

We are pleased to be representing you in this matter and look forward to working with you. Please acknowledge your agreement to the foregoing by signing and returning the enclosed copy of this letter at your earliest convenience.

Very truly yours,

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney

Agreed to and approved _ _[*date*]_ _**.**

__[*Signature of client*]__
_ _[*Typed name*]_ _

Comment: See §3.21 for required written disclosure if attorney does not have professional liability insurance. For additional fee agreement forms, see Fee Agreement Forms Manual (2d ed Cal CEB 2007).

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4

Dispute Analysis

Dominic J. Campisi

I. FACT-GATHERING
- A. Necessity of Factual Basis for Incompetence §4.1
- B. Interviewing Medical Personnel §4.2
- C. Debriefing Client About Opponent §4.3
- D. Determining Client's Standing
  - 1. Family Tree §4.4
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I. FACT-GATHERING

§4.1 A. Necessity of Factual Basis for Incompetence

When an attorney is asked to attack a transfer document based on incompetence or susceptibility to undue influence, he or she first must ascertain that the client speaks from factual knowledge and not just anecdotal surmises. Incompetence is difficult to prove in many circumstances because the law presumes competence (*Church v Capital Freight Lines* (1956) 141 CA2d 246, 296 P2d 563; *American Trust Co. v Dixon* (1938) 26 CA2d 426, 431, 78 P2d 449), and even when it is shown that the transferor was incompetent some of the time, it is presumed that a person executes a document during a lucid moment (*Estate of Mann* (1986) 184 CA3d 593, 229 CR 225; *Estate of Goetz* (1967) 253 CA2d 107, 61 CR 181). There is also a risk of a malicious prosecution action for bringing a claim without probable cause. *Crowley v Katleman* (1994) 8 C4th 666, 34 CR2d 386.

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§4.2 B. Interviewing Medical Personnel

In evaluating a claim, it may be necessary to review the medical records and interview the medical personnel before proceeding.

The attorney representing the fiduciary generally should have no difficulty in contacting medical personnel to determine the transferor's medical condition at the time of execution of a will, deed, power of attorney, joint tenancy account, or other questionable transfer of property. Medical communications are confidential, however, and, if another party is attempting to obtain them, the personal representative has the right to quash such efforts. Evid C §993(c); *Rittenhouse v Superior Court* (1991) 235 CA3d 1584, 1 CR2d 595.

On the other hand, there is no patient-physician privilege for communications relevant to an issue between parties all of whom claim through a deceased patient, regardless of whether they claim by testate or intestate succession. Evid C §1000. Therefore, in most probate and trust litigation, the privilege will not prevent discovery of the testator's medical or treatment records. See §10.75.

The attorney should decide early in the litigation whether simply to disclose the records and testimony rather than face the consequences of an imprudent claim of privilege. Many cases are settled simply by disclosing records that show lucid moments and competence during the questioned periods. The author has even allowed opposing counsel to meet with the treating physician or nurse under an appropriate discovery agreement when the medical facts are overwhelmingly favorable.

If the client is a close relative, many medical practitioners will explain the condition of the person, because it is typical for practitioners to deal with family members. Most doctors and nurses are not alert to the potential privilege issues, particularly when their patient is deceased.

If medical personnel refuse to give any information, the attorney should reason with opposing counsel, pointing out that disclosure may help eliminate an issue and that expensive discovery proceedings might result if informal production of records and interviews are not allowed.

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§4.3 C. Debriefing Client About Opponent

When embarking on a probate or trust case, the attorney should understand the actual family dynamics and the reasons why the client claims to have been treated badly. It is important to take the time to learn about the family and test the perceptions of the potential client.

It is usually a good exercise to ask the clients what individuals on the other side claim about the client's conduct or status. What types of defenses will the opposition raise? What about the fact that the client had not seen the relative in recent years? Did the opponents inveigle their way into control of the transferor and isolate him or her from loving kin, or will they claim to have succored an abandoned relative?

Because the person who contacts an attorney may be the most volatile member of the family group, counsel should attempt to get calmer members to confirm the essential details.

For a further discussion of the client interview, including a form of client information checklist, see §§17.1-17.4.

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D. Determining Client's Standing

§4.4 1. Family Tree

To evaluate a potential case, the attorney needs to uncover information about the persons involved. It may be helpful to create a family tree, including divorced spouses and children adopted in second or subsequent marriages. A family tree can be essential to determine whether the client inherits by intestacy, has standing as an interested person, or has priority in appointment as a personal representative or conservator. In addition, the client's status within the family may allow formal or informal access to information. Heir hunters are useful in this respect because they usually have computer databases that can develop family trees quickly and efficiently.

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Source: Estate Planning/California Trust and Probate Litigation/4 Dispute Analysis/§4.5 2. Interested Persons

§4.5 2. Interested Persons

An "interested person" may commence a proceeding to administer a decedent's estate (Prob C §8000(a)), including a petition to order production of a will (Prob C §8201). An interested person also may petition to discover or recover property belonging to the estate. See Prob C §8870. An "interested person" in an estate proceeding includes "an heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding." Prob C §48(a); *Estate of Kovacs* (1964) 227 CA2d 308, 38 CR 612.

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§4.6 3. Intestate Heirs and Other Persons With Standing

Aside from an "interested person," the potential client may be an intestate heir with rights to information and standing to bring actions. See Prob C §§6400-6414 (intestate succession). For example, a person who has "only an expectancy or prospective interest in the estate" (Prob C §2616(a)(3)) may petition in guardianship and conservatorship proceedings to discover and recover wrongfully withheld property. The children of the prospective client may be intestate heirs and have standing, even though the client is related only by former or present marriage or is expressly disinherited. The attorney should be careful, however, to ensure that there are no conflicts involved in acting as guardian ad litem or guardian for a minor.

A "relative" also may have standing in guardianship (Prob C §1510) or conservatorship proceedings (Prob C §1820(a)(3)). A relative is broadly defined for these purposes. See Prob C §1513(g) (defining "relative").

When the potential client is a beneficiary of a trust, he or she may have standing to demand information about the terms and management of a trust. The principal limitation is when the trust is revocable. During the period of revocability, the trustee owes a duty to provide information only to the person holding the power to revoke, unless that person is not competent. Prob C §15800. When the trust later becomes irrevocable, under some circumstances a trustee may be required to account to the beneficiaries for the trustee's actions during the period when the trust was revocable. *Evangelho v Presoto* (1998) 67 CA4th 615, 79 CR2d 146. For the period when a trust is irrevocable, the trustee has a general duty to provide information. See Prob C §§16060-16061.

For additional discussion of standing, see §§9.10-9.14.

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§4.7 E. Searching Probate Files

A search of probate files can provide essential information concerning the lodging of wills, prior probates of spouses or ancestors, and conservatorship proceedings. Initial estimates of estate assets in probate petitions and even subsequent inventories are often misleading because they exclude assets passing outside of probate and may not reflect all the assets of a complex estate. In evaluating the assets subject to the proceeding, however, probate files may provide enough information to determine if litigation is practicable and may help determine what types of proceedings are required. Comparing a listing of assets provided by the client against those listed in probate court documents can direct the search to assets passing by means of joint tenancy, gift, or trusts outside of probate.

Divorce records often provide significant information about the nature and value of assets at some point in the past. They can also provide the names of potential witnesses and sources of assistance.

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F. Obtaining Asset Information

§4.8 1. Knowledge of Relatives

A search for information about assets and their ownership status may provide the basis for evaluation of a potential claim. Relatives vary substantially in their knowledge of the assets of the estate. Their knowledge may range from detailed records of the management of assets to vague anecdotes about property supposedly obtained from remote ancestors.

The attorney should probe for information about who has been involved in the management of property. The client may have minimal information, but a sibling, aunt, family friend, or partner may have knowledge of the business and assets of the estate. The attorney should attempt to develop some history of the assets in question, the source of the wealth, information about others who were once co-owners or have information about the business dealings related to existing assets, and the possibility of inheritances that can be traced through probate records. For example, an estate tax return or decree of distribution dealing with a grandparent's estate may include details of assets that are now in dispute in the child or grandchild's estate and can provide property descriptions that can make tracing much easier.

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§4.9 2. Title Searches and Computer Programs

Real property can readily be searched in title records. A litigation guarantee issued by a title company is an inexpensive method of obtaining current title information and documents. Such documents sometimes are useful in evaluating the handwriting of a decedent and establishing a chronology of events in the disposition of assets. Computer search programs have made title inquiries much easier; the information is often delayed, however, and must be evaluated with some caution because of inaccuracies in descriptions. Nevertheless, computer programs can provide a wealth of information about individuals and assets subject to registration, such as automobiles, trucks, and mobilehomes.

An attorney who has no access to such search programs should question the client. The client may have resources available through his or her job or have friends with title or credit information programs. A private detective is a possible alternative if the assets in question are not readily available, but the attorney must be careful to avoid having an agent violate privacy laws or restrictions on confidential credit or banking information. Before hiring a detective, the attorney should check for references or ask colleagues for referrals.

A property search can reveal that valuable property should pass by joint tenancy, that it was held as community or separate property, that it was not transferred to a trust, or that it was transferred before the will in question. This information can be crucial in determining what proceeding to initiate and in isolating different time periods for claims of competence or undue influence.

Because inter vivos trusts are a common estate planning device, the attorney must determine if the assets in questions were in fact transferred to the trust. A search of title documents can provide the initial information for evaluating whether the crucial fight involves the trust or the underlying or previous will. When the settlor is also the trustee and the document announces that all property has been transferred to the trust, the property may be considered to have been transferred without a separate transfer document such as a deed. *Estate of Heggstad* (1993) 16 CA4th 943, 20 CR2d 433.

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II. ANALYZING CLIENT'S POTENTIAL INTERESTS

§4.10 A. Dispositive Documents

The attorney must determine the manner in which assets will pass in order to evaluate the potential success of the client's claim, regardless of whether the dispute concerns a joint tenancy account, community property claims, or claims about an inter vivos trust. A will or the rules of intestacy may ultimately determine the answer and point to the potential parties with a financial interest in a successful proceeding. For example, if a joint tenancy account was created as a result of the undue influence or conduct of someone lacking testamentary capacity, where will the proceeds of the account go once invalidity is determined?

The actual provisions of the will may be of crucial importance if the drafter has failed to provide for the creation of a new trust in the event the inter vivos trust is held invalid because of undue influence. Residuary clauses are also crucial because many dispositive documents provide for gifts to charities in the event beneficiaries predecease the decedent or trigger a no-contest clause.

Prior wills may be resuscitated if a later will is held invalid because of undue influence, incompetence, or failure of due execution. The doctrine of dependent relative revocation may determine whether a revocation was intended to be effective even if the subsequent will was not put into effect. *Estate of Anderson* (1997) 56 CA4th 235, 242, 65 CR2d 307. Similarly, if only a portion of a document is invalidated because of undue influence, the remaining provisions may dispose of all of the assets in the estate, making recourse to prior wills a futile effort.

To determine what will happen if a dispositive document is held invalid, the attorney should examine all existing wills and trusts (and their prior editions) to establish the persons who would take in the event each will or trust becomes effective. The terms of a no-contest clause in each instrument, codicil, or amendment also must be checked for applicability.

It may be helpful to create a chart showing key dispositive transfers. The chart should answer questions such as:

- Who takes under the known wills?
- Who would take by intestacy?
- Has property been transferred to inter vivos trusts?
- Is there a will that pours assets into an unfunded or underfunded inter vivos trust?
- If a trust is successfully invalidated, does a valid will transfer assets into a testamentary trust with the same provisions?

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Source: Estate Planning/California Trust and Probate Litigation/4 Dispute Analysis/§4.11 B. Spousal Property Rights

§4.11 B. Spousal Property Rights

There are several aspects of spousal property rights that must be considered in the attorney's initial evaluation. These include:

Pretermitted spouse provisions. A wife or husband may generally take as a pretermitted spouse if the testamentary document was executed before the marriage and fails to make provision for him or her. See Prob C §21610. For exceptions, see Prob C §21611. See also *Estate of Will* (2009) 170 CA4th 902, 88 CR3d 502 (prenuptial waiver that meets requirements of Prob C §§140-147, which govern waiver of surviving spouse's rights, is valid waiver of inheritance rights for purposes of Prob C §21611(c), even if it fails to meet requirements of Fam C §1615, which governs premarital agreements in general).

Undue influence claims. A claim of undue influence may be fruitless if the spouse wielding the influence can take under a community property agreement or prenuptial agreement that existed before the improper influence.

Spousal benefits. Insurance policies, pension plans, and brokerage house agreements are written to favor spouses, and benefits and payments are often transferred outside of probate under joint tenancy or survivorship provisions. Retirement plan benefits often are controlled by federal law, which may preempt state community property rules. *Boggs v Boggs* (1997) 520 US 833, 138 L Ed 2d 45, 117 S Ct 1754. But see *In re Lowenschuss* (9th Cir 1999) 170 F3d 923 (no ERISA preemption when pension plan is not ERISA-qualified). Under federal tax rules, pensions, individual retirement accounts, or other retirement plan assets can be enjoyed by a surviving spouse without estate tax or punitive income taxes. The assets in such plans may have little value to other relatives or strangers once the tax consequences are factored in. Counsel should make sure that the tax ramifications of pension assets are fully understood before launching quixotic litigation destined for the primary benefit of the tax collectors. For discussion of ERISA preemption, see §5.37.

Community assets. Assets acquired after marriage with community earnings or assets converted into community property can be reached by a spouse despite unilateral changes in deeds or beneficiary designations. The surviving spouse can also reach gifts of community property that were made by the deceased spouse without the consent of the surviving spouse. See Fam C §§1100(b) (gift of community personal property), 1102(a) (gift of community real property). Counsel should consider the various nonprobate transfer provisions available for community property. See, *e.g.,* Prob C §§13500-13600 (summary spousal property set aside).

Probate homestead rights. Probate homestead rights are at issue when a principal asset is the home where the surviving spouse or dependent children are residing. See Prob C §§6520-6528. Such rights may keep a surviving spouse or minor children housed during the pendency of litigation or longer, and may frustrate an adult child's attempt to wrest a deceased parent's ancestral home from a stepparent. For a detailed discussion of probate homestead proceedings, see California Decedent Estate Practice, chap 17 (2d ed Cal CEB 2009).

Family allowance. When litigation may tie up the administration of an estate, it is important to consider the effect of a family allowance petition on the litigation. See Prob C §§6540-6545. A spouse can obtain substantial assets during protracted litigation from family allowance awards that are wholly independent of inheritance rights. The differing tax treatment of family allowances and inheritances should be considered. A disinherited spouse can cushion the effects of disinheritance and the delays of litigation with monthly distributions from the corpus of the estate. The same is true if the matter involves a dependent child; an allowance for his or her care may result in a major portion of the assets going to the child.

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§4.12 C. Jointly Held Assets

Assets such as residences or bank accounts often pass outside of probate through joint tenancy or another form of multiple-party account recognized by statute. See Prob C §5000 (validity of nonprobate transfers). See also *Estate of Propst* (1990) 50 C3d 448, 464, 268 CR 114 (joint tenancy as "poor man's will").

If the joint title can be voided on grounds of incompetence, fraud, mistake, or undue influence, the assets may pass by will or be swept up in a broad funding provision of a trust. Before engaging in a protracted battle, the attorney should be sure to analyze who will receive the assets if the purported joint ownership is terminated.

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§4.13 1. Multiple-Party Accounts

Multiple-party accounts at banks and other defined financial institutions (see Prob C §5128) are governed by Prob C §§5100-5312 rather than by the common law of joint tenancies.

The transfer of funds to a joint or pay-on-death account or to an account qualifying as a Totten trust can be attacked on the same grounds as any other transfer of assets, but the burden of proof (clear and convincing evidence) is substantially higher. See Prob C §5302. A constructive trust may be imposed on an account that is wrongfully created. *Estate of Aiello* (1980) 106 CA3d 669, 676, 165 CR 207.

There is a rebuttable presumption that funds contributed to a joint account during marriage are community property. Prob C §5305. This presumption can be rebutted by a written agreement, separate from the deposit agreement, that expressly provides the funds are not community property. Prob C §5305(b)(2). For example, in *Estate of Petersen* (1994) 28 CA4th 1742, 1754, 34 CR2d 449, the court concluded that the designation of husband and wife as joint tenants on a money market account statement was insufficient, standing alone, to rebut the presumption of community property. The court suggested, however, that other evidence, such as a signature card or fund application, might be sufficient. On the other hand, the court in *Estate of Allen* (1993) 12 CA4th 1762, 16 CR2d 352, held that an omitted spouse was not entitled to a share of a Totten trust account because the account was not a part of the decedent's estate at the time of death, having passed to the beneficiary under its terms.

Funds in a joint account are presumed to belong to the parties in the proportion contributed, unless there is clear and convincing evidence of a contrary intent. Prob C §5301. One case, however, has held that this presumption of ownership matching contribution does not apply to funds that have been withdrawn. *Lee v Yang* (2003) 111 CA4th 481, 3 CR3d 819.

In many circumstances, the owner of an account puts the name of a relative, friend, or caretaker on the account for convenience only and with no intent of survivorship. In accounts covered by Prob C §5302, however, there must be clear and convincing evidence of some other intent to defeat the joint ownership rights of the survivor. The attorney should examine the account card with care to determine if the contention of a "convenience" account is available. If the decedent rejected the option, it may be more difficult to rebut the presumption of joint ownership. The attorney should not assume that the card was filled out when the donor signed it; there are no formalities required in many financial institutions to assure that the donor actually signed or that the card was filled out at the time.

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§4.14 2. Joint Tenancy Assets

Assets other than multiple-party accounts, such as real property, are covered by the general laws governing joint tenancies. See CC §683. However, accounts that are not at banks or other financial institutions as defined by Prob C §5128 may nonetheless be governed by the multiple-party accounts law codified at Prob C §§5100-5312, rather than by the common law of joint tenancies, since those statutes reflect legislative policy and thus may constitute an appropriate model for the court to adopt. *Estate of Propst* (1990) 50 C3d 448, 461, 268 CR 114.

For assets other than accounts covered by the Probate Code, the creation of a joint tenancy involves the creation of a current interest in the property; thus, even if the joint tenancy is severed, the cotenants hold the property as tenants-in-common with ownership of their fractional shares. 50 C3d at 455. Furthermore, there is a presumption of the validity of record title that may be dispositive on the existence of a joint tenancy in the absence of contrary evidence. Evid C §662.

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Source: Estate Planning/California Trust and Probate Litigation/4 Dispute Analysis/§4.15 D. Other Nonprobate Assets

§4.15 D. Other Nonprobate Assets

In addition to joint tenancy assets, counsel must evaluate and consider the client's interest in any of the decedent's assets that qualify for summary probate or set-aside proceedings. These may include, among others:

- Small estates and nominal property interests. See Prob C §§330 (immediate possession of certain undisputed personal property), 6600-6614 (small estate set-aside to spouse or children), 13100-13116 (collection or transfer of personal property by affidavit), 13150-13158 (summary determination of succession to property), 13200-13210 (transfer of real property of nominal value).
- Vehicles. See Veh C §§5910, 9916; Health & S C §18102.
- Employment compensation. See Prob C §§13600-13606.
- Securities registered under the Transfer on Death Securities Act. See Prob C §§5500-5512.

On nonprobate transfers, see California Decedent Estate Practice, chap 2 (2d ed Cal CEB 2009).

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§4.16 E. Durable Powers of Attorney

Use of durable powers of attorney to manage assets has increased substantially in conjunction with the rise in use of powers of attorney for health care. Minors and persons lacking mental competence may not appoint persons or institutions to act as holders of powers of attorney. See CC §2296 (person must have capacity to appoint an agent).

Generally, the competence necessary to execute a power of attorney is the same as that required to execute a will. *Brunoni v Brunoni* (1949) 93 CA2d 215, 218, 208 P2d 1028; *Tuttle v Bessey* (1955) 137 CA2d 725, 727, 290 P2d 884; see also Prob C §4120 (person who has capacity to contract has capacity to execute power of attorney). The complexity of the document and the prudence of the transfer of control of assets to the holder of the power of attorney may require application of a higher standard, however. Grounds for attacking other transfers of property (such as undue influence, fraud, mistake, or lack of compliance with execution formalities) should be available to attack the execution of a power of attorney. See *Torres v Torres* (2006) 135 CA4th 870, 37 CR3d 754 (valid power of attorney created even though principal marked powers granted on statutory form power of attorney with *X* instead of initials; form substantially complied with basic requirements for power of attorney in Prob C §§4100-4310 and there was no evidence of fraud or undue influence).

Disputes regarding the propriety of the execution of a durable power of attorney arise most frequently in conservatorship proceedings, but the personal representative has a similar obligation to determine the extent of the assets of the decedent and to assert claims against a holder of a power of attorney who has breached his or her duties. Probate Code §§4500-4545 provide a procedural vehicle for attacking the validity of a power of attorney for financial management or the propriety of the conduct of the holder of the power. The holder of the power, the principal, the conservator of the principal's person or estate, a spouse or relative, or a putative heir in intestacy (Prob C §4540) may file a verified petition to determine the existence of the power, pass on the acts or proposed acts of the holder, compel an accounting, or terminate the power (Prob C §4541). These remedies are nonexclusive (Prob C §4501); thus, the client also has recourse to the procedures available to personal representatives to compel discovery of estate assets or prosecute claims.

For further discussion of durable powers of attorney, see California Powers of Attorney and Health Care Directives (Cal CEB 2008).

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Source: Estate Planning/California Trust and Probate Litigation/4 Dispute Analysis/§4.17 F. Attacks on Disqualified Persons

§4.17 F. Attacks on Disqualified Persons

Transfers to parties who draft instruments that provide a benefit for themselves are specifically limited. Under Prob C §21350, no provision of an instrument is valid to make a donative transfer to

- A person who drafted the instrument;
- A relative, spouse, domestic partner, cohabitant, or an employee of the drafter;
- Any co-owner or employee of the law firm of the drafter (if the drafter is a co-owner of a law firm);
- Anyone who has a fiduciary relationship with the transferor who transcribes the instrument or causes it to be transcribed;
- A care custodian of a dependent transferor; or
- Anyone who is a relative or spouse, domestic partner, cohabitant, or employee of the fiduciary-transcriber or the care custodian.

Such transferees are "disqualified persons." Prob C §21350.5. Persons related by blood or marriage to the transferor are exempted, however, as is the transferor's cohabitant or domestic partner. Prob C §21351.

The restrictions on transfers to disqualified persons apply retroactively to instruments drafted or executed before September 1, 1993, if they become irrevocable on or after that date. *Bank of America v Angel View Crippled Children's Found.* (1999) 72 CA4th 451, 85 CR2d 117.

For additional discussion of transfers to disqualified persons, see chap 6A.

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§4.18 III. TIME BARS ON POTENTIAL CLAIMS

In evaluating a claim, it is important to consider the relevant time bars and statutes of limitation. For example, a will admitted to probate may generally be challenged only within 120 days from the time of admission. Prob C §8270(a). For exceptions, see Prob C §8270(b) (minors) and *Estate of Sanders* (1985) 40 C3d 607, 221 CR 432 (extrinsic fraud). See also §§17.20-17.24.

The time to contest a trust depends on whether the notice provisions of Prob C §16061.7 apply. If the provisions apply, the time to contest may be no more than 120 days from when notice is served on the beneficiaries or 60 days after mailing or delivery of a copy of the terms of the trust during that 120-day period, whichever is later. Prob C §16061.8. See also Prob C §16061.7(a)(1)-(2).

NOTE: When the trustee fails to give notification to a known beneficiary entitled to notice, the trustee is responsible for all damages, attorney fees and costs caused by the failure unless the trustee has made a reasonably diligent effort to comply with the notification requirements. If the failure affects a known heir entitled to notice, the trustee is responsible for all damages (but perhaps not attorney fees) unless the trustee has made reasonably diligent efforts to comply. Prob C §16061.9.

If the notice provisions of Prob C §16061.7 do not apply, the time limits for contesting a trust may be 3, 4, or 5 years, depending on whether the challenge is based on competency or tortious misconduct, and whether personal or real property is involved. *Morse v Crocker Nat'l Bank* (1983) 142 CA3d 228, 190 CR 839 (3 years for competency claims); *Brazil v Silva* (1919) 181 C 490, 185 P 174, disapproved on other grounds in 57 C2d at 133 (3 years for tort claims involving personal property, 5 years for claims involving real property).

Time limits for claims based on liability of the decedent are controlled by the one-year limitation of CCP §366.2 and by CCP §366.3, which specifically limits actions to enforce agreements to make testamentary bequests to one year as well.

For a further discussion of time bars and statutes of limitation, including time to respond to motions and obtaining relief when deadlines are missed, see §§5.15-5.21.

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§4.19 IV. WHEN PROCEEDING REQUIRES SPECIAL EXPERTISE

The practitioner embarking on probate and trust litigation needs to seek experienced help or to obtain the necessary learning and skill required for the subject matter. Litigation itself is often deceptively easy; an inexperienced attorney may confuse rules of pleading and discovery and trial techniques with knowledge of the subject matter and the tactical requirements needed to succeed. Several aspects of this type of litigation are traps for the unwary. For example, many areas of litigation are fraught with tax implications. There is a possibility that the attorney may ignore a major lever for settlement through lack of knowledge of the tax consequences of property transfers. On evaluating the need for tax expertise, see §4.22.

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§4.20 A. Ethical Duty to Act Competently

California Rules of Professional Conduct 3-110 requires that a member must not "intentionally, recklessly, or repeatedly fail to perform legal services with competence." For discussion of Rule 3-110, see §3.12.

The extent of the skill required under the rule is difficult to judge, particularly when a specialist may be necessary for some aspects of the litigation. Thus, an attorney cannot simply announce his or her limitations and escape liability if the client nonetheless chooses to rely solely on the attorney's services. An attorney who explains his or her lack of tax expertise or knowledge of the medical aspects of competence to a client is not protected by such disclosures unless the attorney also advises the client of all the factors the client should be considering. See *Nichols v Keller* (1993) 15 CA4th 1672, 1684, 19 CR2d 601 ("even when a retention is expressly limited, the attorney may still have a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of the retention").

Although violation of a rule of professional conduct cannot in itself establish an attorney's liability, the ethical duty to act competently may also be used as part of the balancing test to determine whether the attorney is negligent in not seeking expert advise or referring the case to a specialist in the subject matter involved. *Mirabito v Liccardo* (1992) 4 CA4th 41, 46, 5 CR2d 571. On negligence for failure to associate expert counsel, see §§3.8-3.10.

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§4.21 B. Malpractice for Failure to Refer to Specialist

In addition to the ethical risks involved in leaping into probate litigation without the necessary competence, there is a serious risk of malpractice. The elements of a cause of action for professional negligence include (1) a duty to use the skill, prudence, and diligence that other members of the profession possess, (2) breach, (3) proximate cause, and (4) actual damages. *Bucquet v Livingston* (1976) 57 CA3d 914, 920, 129 CR 514. See CACI 600 (see also BAJI 6.37 (Duty of Professional), 6.37.1 (Duty of Specialist)); Restatement of the Law Governing Lawyers §§71-74 (2000).

For further discussion, see §§3.6-3.10.

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§4.22 C. Need for Tax Expertise

Tax expertise is the major risk facing the general practitioner who is embarking on probate litigation. The attorney needs to identify the tax consequences of dispositive plans and of the decisions or omissions of fiduciaries. For example, a decision to claim property as joint tenancy rather than community may result in the loss of the step-up in basis of a surviving spouse's share. A decision to seek retirement plan assets for someone other than a spouse may lead to substantial estate and income tax liabilities and penalties. Seeking to obtain assets involving a generation skip for a relative or for an unrelated party 37-1/2 years younger than the decedent may result in generation-skipping transfer tax liability under IRC §2651(d)(2) that can be punitive in large estates.

In addition, the litigation plan needs to include the steps necessary to protect against the loss of postdeath elections while the validity of the dispositive scheme is being litigated. The litigation plan also needs to address the income tax liability for the years that the litigation may consume.

The attorney also needs to be aware of the respective estate and income tax consequences of inheritances, quasi-contract claims (see §7.10), and *Marvin* claims (see §7.11) in selecting causes of actions and settling claims.

Finally, the deductibility of attorney fees by the client is a major source of problems when some of the fees may need to be capitalized rather than deducted currently from income. In each of these areas, the attorney may need to get specialized tax advice for protection against unintended tax consequences.

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§4.23 D. Need for Medical and Capacity Expertise

A major area for concern in probate litigation is that of medical issues relating to the competence or susceptibility of a party to undue influence. Many medical practitioners do not understand the legal standards for capacity to transfer property or to make inter vivos or testamentary dispositions, and they may provide inadequate opinions on such issues at trial. Some medical practitioners confuse the tests for imposition of a conservatorship with those of lack of capacity or susceptibility to undue influence. The attorney must be careful to ascertain a medical practitioner's knowledge of the appropriate legal tests before relying on his or her opinions.

An attorney who is uncertain of the issues involved in the medical or psychiatric fact pattern of the case may need guidance from an experienced litigator or a medical expert. In a complex factual setting, it may be necessary to engage gerontological, psychiatric, or neurological experts as well as treating physicians. A gerontologist or psychiatrist may have a much better appreciation, for example, of the nuances of legal capacity than the treating physician. Some litigators construe the use of a forensic psychiatrist as an admission that capacity is questionable. Despite this claim, however, it may be better practice to obtain the services of an appropriate expert to parse out the elements of competence from the course of progressive disability or the impact of disease or medication side effects.

Often a decedent or victimized party has suffered from a variety of medical and psychiatric problems, and the interplay of these factors may be crucial to the case. Timing is also critical, because there is a general presumption that a document was executed during a lucid moment (*Estate of Mann* (1986) 184 CA3d 593, 229 CR 225), and therefore proof of transitory lack of capacity due to medication, hospital stress, isolation, lack of proper nutrition, or trauma may not be dispositive. A careful reading of the medical record and the treatment of the person shortly before or after the questioned act is essential. In this respect, getting an experienced nurse to translate the medical records may be useful.

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V. FINDING ALLIES

§4.24 A. Importance of Identifying Allies

There is strength in numbers, particularly when allies have characteristics sympathetic to judges and juries, when they have deep pockets, or when they can add the status of a fiduciary to the client's side of a dispute. Persons embarking on probate and trust litigation have no permanent allies, but only permanent interests. It is important to evaluate the short- and long-term interests of other persons concerned with the estate to determine if they can be recruited to assist in the matter at hand.

The attorney must examine the goals that are common among the interested parties. Everyone, for example, is generally allied against the IRS. Creditors and residuary beneficiaries or remainder beneficiaries often have to treat claims as debts that can be deducted from the gross estate. Transfers to spouses may provide a net benefit because of the shelter provided by the marital deduction. Opposition to a nominated or acting fiduciary may be common to a party challenging the underlying document, to creditors who want more favorable treatment of their claims, and to heirs who may profit from assuming the mantle and compensation of the fiduciary. There are usually allies and opponents surrounding any surviving spouse: Children from a former marriage, discarded friends, remainder beneficiaries, and creditors may all have reasons to oppose family allowances, the spouse acting as executor, trustee, or conservator, or preliminary distributions.

Alliances shift dramatically at times, so the attorney should ensure that attorney-client privilege issues and conflicts of interest are not turned against the client in the next phase of the litigation. Key documents, witnesses, or strategic plans should not be disclosed to allies who later may use such information against the client. While it is possible, the attorney should attempt to obtain from these fair weather allies statements on competence, undue influence, and other issues that might estop them later on from challenging the dispositive documents.

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§4.25 B. Beneficiaries: Danger of Triggering No-Contest Clauses

In finding allies, counsel should first determine if there is a risk of triggering a no-contest (in terrorem) clause. Carefully drafted no-contest clauses often seek to encompass indirect actions by persons who support triggering proceedings. The precise wording of these clauses is critical. If the house is given to a girlfriend, for example, and there is an expansively worded no-contest clause, support of a minor child's probate homestead claim may be construed as thwarting the testamentary plan. The no-contest clause may apply to children who join the petition, supply declarations, or assist in providing funds for an attorney. Phrases such as "direct or indirect support" of prohibited actions may be broad enough to cover voluntary actions in assistance, as well as the more direct action of joinder in the proscribed conduct. On no-contest clauses, see chap 5.

Using court process to compel parties to provide documents or testimony may be a better method of obtaining important supporting evidence while safeguarding allies: A subpoena duces tecum can provide cover for an ally to provide critical documentary and testimonial evidence without tripping over indirect participation language in the no-contest clause. See *Lobb v Brown* (1929) 208 C 476, 487, 281 P 1010.

An agreement not to assert violation of a no-contest clause after intemperate action by the parties can be a powerful tool for recruitment of support for the client's position or for settlement.

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C. Fiduciaries

§4.26 1. The Goal: Support or Neutrality

Often the key to obtaining a favorable result is obtaining the support or neutrality of the fiduciary holding the assets in question. The executor or trustee has the assets of the estate that can be used to defray the costs of the litigation, has access to records, holds medical and attorney client-privileges of the trustor, settlor, conservatee, or ward, and has the aura of an impartial party to distract attention from the client's unclean or greedy hands.

The fiduciary has a general duty to marshal the assets of the estate and to protect them from improper claims to the extent practicable. Prob C §16006; Restatement (Third) of Trusts §76 (2007). As the California Supreme Court held in *Estate of Goulet* (1995) 10 C4th 1074, 1080 n4, 43 CR2d 111: "The fiduciary duties of a personal representative and a trustee are in essential respects the same. Most importantly, both types of fiduciary are charged with preserving the fund entrusted to them until it is distributed to the beneficiaries."

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Source: Estate Planning/California Trust and Probate Litigation/4 Dispute Analysis/§4.27 a. Is There a Challenge to Estate?

§4.27 a. Is There a Challenge to Estate?

An initial question is whether the action in question poses a challenge to the estate or can be construed to be merely a dispute between heirs over their respective shares. If the dispute is one between heirs or beneficiaries, the fiduciary arguably can be excluded, even though, in reality, a dispute between heirs often affects the estate as a whole. The California Supreme Court has stated (*Estate of Goulet* (1995) 10 C4th 1074, 1082, 43 CR2d 111, citing *In re Heydenfeldt* (1897) 117 C 551, 553, 49 P 713):

> We "cannot see that it matters that a claim is made against the estate under the will, or by one who claims to be an heir, or a part of the family of the deceased, and as such entitled to an allowance. If it may diminish the estate to be finally distributed, or may make the fund from which the creditors are to be paid insufficient for that purpose, the administrator is interested."

Even in heirship proceedings, when the dispute may in fact be described as one between heirs over their respective shares, Prob C §11704(b) permits the personal representative to participate in the proceedings to assist the court.

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Source: Estate Planning/California Trust and Probate Litigation/4 Dispute Analysis/§4.28 b. Does Fiduciary Have Duty to Act?

§4.28 b. Does Fiduciary Have Duty to Act?

In some situations, the fiduciary may have an express duty to act. An inter vivos trust may direct the trustee to defend both the will and trust and thus provide an express obligation. Probate Code §8250(b) provides that an executor named in a will is under no duty to defend the contest of the will until he or she is appointed as executor by the court. See also *Estate of Stokley* (1980) 108 CA3d 461, 166 CR 587. When it is practicable to do so, the fiduciary may have a duty to defend the estate against invalid claims such as quiet title actions (*Estate of Corotto* (1954) 125 CA2d 314, 270 P2d 498), actions to construe the will (*Estate of Halsell* (1956) 138 CA2d 680, 292 P2d 300), and probates of subsequent wills (*Jay v Superior Court* (1970) 10 CA3d 754, 89 CR 466). The test of the fiduciary's obligation is whether it is prudent for the fiduciary to defend or prosecute the action. *Pillsbury v Karmgard* (1994) 22 CA4th 743, 27 CR2d 491 (beneficiary did not sustain burden of proof that trustee negligently or wrongfully declined to bring malicious prosecution action). See §§17.7 (personal representative's duty to defend will), 21.22-21.26 (trustee's duty to pursue claims).

If there are minors or unascertained class members who will require representation, the fiduciary may have standing. See, *e.g., Estate of Goulet* (1995) 10 C4th 1074, 43 CR2d 111 (fiduciary had standing to appeal court order declaring that proposed filing of creditor's claim would not constitute contest when no other beneficiary or heir who was aggrieved and financially or otherwise motivated or situated had pursued an appeal). When the interests of the heirs or beneficiaries are not ascertained or there are minors, or when the size of their interests or financial abilities precludes participation, the fiduciary may have a duty to act. See, *e.g., Estate of Ferrall* (1948) 33 C2d 202, 205, 200 P2d 1.

If the dispute involves the interests of minors, appointment of a guardian ad litem may be used to obtain an ally or moot the need for the estate's fiduciary to step in. The attorney must evaluate who will best protect the client's interests; if the fiduciary has personal or financial constraints on vigorous activity, a guardian ad litem may be sought. Such guardians for innocents or disabled persons generally have clean hands unsullied by questionable past conduct.

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§4.29 2. Eliminating Fiduciaries as Opponents

If the fiduciary supports the other side, and the dispute involves the interests of minors, a guardian ad litem may eliminate the need for fiduciary involvement on behalf of the minors if counsel can otherwise construe the dispute as merely being between heirs.

Seeking appointment of a special administrator or a trustee ad litem to guard the assets under Prob C §8540 may be of crucial importance if the nominated executor is likely to be a fierce opponent or if the fiduciary has conflicts. Such an appointment may force the opposing parties to finance the litigation before its conclusion and may be enough to neutralize the fiduciary. *Estate of Hammer* (1993) 19 CA4th 1621, 24 CR2d 190. See *Getty v Getty* (1988) 205 CA3d 134, 252 CR 342 (defining trustee ad litem as analogous to special administrator who maintains assets during will contest when nominated executor is challenged). For a discussion of the strategic considerations in obtaining the appointment of a personal representative, including appointment as special administrator, see §§16.1-16.2.

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Source: Estate Planning/California Trust and Probate Litigation/4 Dispute Analysis/§4.30 3. Appointment of Conservator to Recover Property

§4.30 3. Appointment of Conservator to Recover Property

The interested parties frequently face a quandary when attempting to recover assets of an elderly or disabled person that have been transferred by means of suspect business dealings, gifts, joint tenancy accounts, purported trusts, and powers of attorney. The problem is that the expenses of recovery may not be readily available to reimburse the relative or friend and the imminence of death may make recovery of such assets a lengthy ordeal. In this situation, appointment of a conservator may be the best alternative because it allows the remaining assets to be used in the attempt to recover assets. It also allows the client to avoid the risk of laboring without compensation for the benefit of others who may be less than grateful and enthusiastic about the amount of the attorney fees.

The relationship of guardian and ward or of conservator and conservatee is a fiduciary relationship that is governed by the law of trusts. Prob C §2101. A fiduciary must act with reasonable prudence and with a good faith belief that its actions will tend to accomplish the purpose of its trust by benefiting the ward or conservatee. See *Conservatorship of Lefkowitz* (1996) 50 CA4th 1310, 1314, 58 CR2d 299. Hence, the conservator or guardian must decide whether it is prudent to utilize estate assets to attempt to recover property or assets in the hands of others. Getting advance authorization for such actions may be necessary to protect the conservator from later objections and to assure that counsel will be compensated.

For further discussion of conservatorship proceedings, see §§2.23-2.24.

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D. Guardian Ad Litem

§4.31 1. Appointment

A guardian ad litem can be appointed to represent a minor, incapacitated individual, unborn person, or unascertained persons and classes. Prob C §§1003, 15405. Although other members of the class may represent such persons in certain circumstances under the doctrine of virtual representation (Prob C §15804), if the existing party has conflicts of interest, a guardian may be required (Prob C §15804(b)). *County of Los Angeles v Winans* (1910) 13 CA 234, 244, 109 P 640. When an existing party has differing financial or personal interests from other class members or clear conflicts with members of a succeeding class, appointment of a guardian ad litem can bring a new party into the fray. Because the guardian ad litem's compensation and attorney fees can come out of the estate, thus posing a risk of diminishing the estate assets, the threat of appointment of the guardian ad litem itself can often foster settlement.

Once appointed, the guardian ad litem has the obligation to protect his or her ward's interest and "has no power to consent to an act hostile and adverse to the interests of her wards, in the absence of some showing that such invasion of the wards' rights might be beneficial to them." *Leonardini v Wells Fargo Bank* (1955) 131 CA2d 9, 17, 280 P2d 81. If the guardian ad litem fails to protect the ward, the resulting judgment may be overturned. *Wogman v Wells Fargo Bank* (1954) 123 CA2d 657, 667, 267 P2d 423. Counsel can press the guardian vigorously to examine the details of the dispute in question and hopefully convince the guardian to adopt a position favoring the client.

NOTE: A "general family benefit accruing to the living members of the beneficiary's family" can be a basis for the agreement of the guardian ad litem to approve a modification or termination of a trust. Prob C §15405.

For a form appointing a guardian ad litem, see §20.10.

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§4.32 2. Practical Considerations

Appointment of a guardian ad litem can substantially delay matters, so the issue should be carefully weighed in determining whether such an appointment will provide a net benefit to the client's side.

Because many judges have an unwritten list of trusted attorneys to appoint as guardians ad litem, the guardian appointed by the court may have substantial influence, for good or for ill, in persuading the court to adopt a position. Counsel should therefore be prepared to propose the names of experienced practitioners whose past conduct indicates that they will readily understand and foster the rationale for the client's position or who will be effective in moving intractable parties towards settlement, if that is the goal. Counsel should be prepared to defend the independence of his or her nominees to both the opponent and the court. A familiarity with the probate bar is often critical in getting a positive result from such an appointment. Without some candidates in mind, counsel may find that the average friend of the judge who will otherwise be appointed may have little interest in pushing any position, let alone the client's.

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§4.33 E. Attorney General When Charitable Interests Are Involved

In common-law jurisdictions, the enforcement of charitable trusts and protection of charitable bequests is left to the Attorney General. Only when a beneficiary is granted "relator" status does a beneficiary or potential beneficiary have some ability to seek enforcement. Under *Holt v College of Osteopathic Physicians & Surgeons* (1964) 61 C2d 750, 40 CR 244, and Corp C §5142, the Attorney General is considered a necessary party, and beneficiaries are allowed to sue on behalf of the class of beneficiaries to enforce the trust. *San Diego Council of Boy Scouts v City of Escondido* (1971) 14 CA3d 189, 195, 92 CR 186. The Attorney General must be given notice when charitable interests are involved and there is not a trustee in this state. Prob C §§8111, 17203(c); Govt C §12591.

The Attorney General often lacks the staff to review most disputes. Although egregious behavior and substantial losses may trigger involvement, there are simply too many problem estates for active involvement in smaller disputes and even large disputes when the issue of right or wrong is not clear or the charitable interests are being adequately defended by interested parties.

When the issues are significant, the intervention of a Deputy Attorney General can lead to an early resolution. Most judges understand the practical constraints on intervention. Hence, the appearance of a representative of the Attorney General in the litigation is a signal that this is indeed a serious matter and that there is a significant public interest.

If it is not possible to obtain the involvement of the Attorney General's office, counsel should at least seek to get some written evidence of the Attorney General's knowledge and concern about the matters at issue. A letter on official stationery raising questions can frequently send scoundrels rushing back to balance the books or comply with their responsibilities.

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§4.34 F. District Attorney, IRS Agent, Elder Law Agencies, and Other Law Enforcement Officials

Absent physical abuse or current mismanagement or misappropriation of funds of the elderly, infirm, or minors, it is difficult to get law enforcement involvement. Tracking an apparent complex embezzlement scheme that may turn out to be loving gifts of a grateful octogenarian is not something that is high on the priority lists of most law enforcement agencies. Physical abuse of the elderly or of minors can bring a quick response. (On elder abuse remedies, see chap 8.) These agencies have higher priorities, however, than spending limited resources trying to determine whether financial abuse is involved.

The attorney must be careful not to violate the Penal Code and the California Rules of Professional Conduct by threatening criminal sanctions as a means of resolving a civil dispute. Pen C §519; Cal Rules of Prof Cond 5-100.

In addition, counsel should consider whether the involvement of criminal or taxing authorities is in the client's financial interest. Bringing in criminal authorities may result in the opposing side shifting priorities from settling the civil dispute to using all available funds to stay out of jail.

Turning the rascals in to the IRS poses the same risks. Proceeds of embezzlements or other misappropriations can be taxed as income to the miscreant. *James v U.S.* (1961) 366 US 213, 6 L Ed 2d 246, 81 S Ct 1052; *Buff v Commissioner* (2d Cir 1974) 496 F2d 847. Rather than scaring the opposition into returning the disputed funds, notifying the IRS or Franchise Tax Board may simply result in those agencies placing a lien on the remaining assets, in effect creating a new party with an interest in the client's pot of money.

Tax issues may be most easily made the subject of a settlement. These are issues, however, best kept from the public arena so that the settlement can be configured to obtain favorable tax treatment. Once the attorney has provided evidence incriminating the opposition to the local IRS agent, it may be very difficult to structure a settlement that shifts part of the expense to the government.

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5

No-Contest Clauses and Other Obstacles to Litigation

John A. Duncan
Andrew Zabronsky

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Source: Estate Planning/California Trust and Probate Litigation/5 No-Contest Clauses and Other Obstacles to Litigation/ §5.1 I. INTRODUCTION

§5.1 I. INTRODUCTION

Estate and trust litigation can present numerous obstacles that the practitioner should review with the client before preparing and filing an action. Conversely, defense counsel should review the potential obstacles for possible defenses. This chapter discusses potential obstacles to litigation, and where appropriate, gives advice on ways to avoid them.

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II. NO-CONTEST CLAUSES

A. Introduction

§5.2 1. Effect of No-Contest Clauses

Traditionally, no-contest clauses were probably the biggest single obstacle to estate and trust litigation. A no-contest clause is a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary if the beneficiary files a contest with the court; Prob C §21310(c) (operative January 1, 2010); former Prob C §21300(d) (repealed January 1, 2010). A typical no-contest clause provides that a beneficiary will forfeit his or her beneficial interest in the estate plan if he or she seeks to invalidate or impair the instrument or any of its provisions. For a standard form, see California Will Drafting §35.10 (3d ed Cal CEB 1992); Drafting California Revocable Trusts §19.5 (4th ed Cal CEB 2003).

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§5.2A 2. Deterrence Effect

Although no-contest clauses are intended to discourage litigation, a no-contest clause does not, in and of itself, preclude litigation. Rather, if enforceable, it requires the beneficiary to choose between accepting the gift provided in the instrument and pursuing a claim that is a contest. Of course, if the instrument makes no gift to the beneficiary, the no-contest clause is ineffective as a deterrent because the already disinherited beneficiary has nothing to lose by pursuing the claim.

Clauses disinheriting a beneficiary that also say that if the beneficiary contests the will, he or she shall receive one dollar and no more, likewise have no deterrent effect. A testator or settlor who wants a no-contest clause to actually deter contests must make a gift to the anticipated contestant that is large enough to provide a substantial disincentive to litigation.

Furthermore, broadly worded no-contest clauses that apply to "any beneficiary or heir" sometimes boomerang and trigger unintended consequences, forcing a favored beneficiary with a legitimate issue to remain silent to avoid risking the loss of a substantial gift (substantial because he or she is a favored beneficiary), whereas a disfavored beneficiary would face a smaller risk or no risk at all if already disinherited. Drafters should review with the client the possibility of using targeted no-contest clauses that identify by name the potential contestants to be silenced and call for a forfeiture by them only instead of using indiscriminate, broad classifications.

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§5.3 3. Traditional Enforcement of No-Contest Clauses

For more than a century, the general rule in California was that no-contest clauses are enforceable, subject to certain public policy exceptions. The underlying theory was that a testator or settlor should be free to condition a gift on the beneficiary's acquiescence to other terms of the instrument, provided those conditions did not violate public policy.

Over the years, no-contest clauses evolved to cover much more than traditional will contests based on claims of undue influence or lack of capacity. Practitioners developed broadly worded no-contest clauses that sought to disinherit a beneficiary who undertook almost any action that challenged the testator's or settlor's estate plan or its administration, except actions that were immune on public policy grounds.

Starting in 1989, the legislature developed statutory provisions codifying much of the case law concerning the enforceability of no-contest clauses. See former Prob C §§21300-21307, repealed January 1, 2010. In subsequent years, the legislature added refinements, including a procedure for potential litigants to seek a "safe harbor" ruling from the court in advance of filing a proposed action, to determine whether the proposed action would be a contest and trigger a forfeiture (former Prob C §21320, repealed January 1, 2010). While the safe harbor procedure was pending, the statute of limitations on the underlying action was tolled. Former Prob C §21308, repealed January 1, 2010.

In light of the drastic impact of violating a no-contest clause and the potentially wide scope of a broadly worded clause, it became essential to pay careful attention to whether a proposed action would amount to a contest. Thus, it became standard practice for potential litigants to seek a safe harbor ruling before filing anything that might be a contest. If the court ruled that a proposed action would not be a contest, the potential litigant was at liberty to proceed without fear of a forfeiture. If the court ruled that a proposed action would be a contest, the potential litigant could decide whether or not the potential benefits of the claim outweighed the possibility of forfeiture.

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§5.3A 4. Two Divergent Enforcement Regimes as Result of 2008 Legislation

Over time, some practitioners came to the conclusion that the increasingly common requests for safe harbor rulings were creating an unproductive burden on the courts and beneficiaries and causing delay in the administration of estates and trusts. This view led the legislature to request a study by the California Law Revision Commission. In January 2008, the Commission issued a report recommending revision of the no-contest clause statutes. See 37 Cal L Rev'n Comm'n Reports 359 (2007).

The Commission's report recommended that no-contest clauses in instruments that became irrevocable on or after January 1, 2001, should become enforceable only against three specified types of contests, starting January 1, 2010. The Commission's report also recommended that the safe harbor procedure should apply only to three specific types of contest for instruments that became irrevocable on or after January 1, 2001. Regarding enforcement of no-contest clauses in instruments that became irrevocable before January 1, 2001, the report recommended that existing law continue to apply.

In 2008, the legislature enacted Stats 2008, ch 174, repealing the existing Part 3 of Division 11 of the Probate Code (former Prob C §§21300-21308 and 21320-21322) and adding a new Part 3 (Prob C §§21310-21315), operative January 1, 2010. In doing so, the legislature generally followed the Commission's recommendations, except that it repealed the statutory safe harbor procedure completely for instruments that became irrevocable on or after January 1, 2001.

The result was to establish two divergent enforcement regimes regarding no-contest clauses, starting January 1, 2010. The first regime applies to enforcement of no-contest clauses in instruments that became irrevocable before January 1, 2001. See Prob C §21315(b). This regime is governed by former law, including the repealed former Prob C §§21300-21308 and 21320-21322 (containing, among other things, the statutory safe harbor petition procedures); Prob C §3, regarding the applicability of repealed laws; relevant case law; and, when applicable, the common law.

The second regime applies to enforcement of no-contest clauses in instruments that became irrevocable on or after January 1, 2001. See Prob C §21315(a). This regime is governed by new Prob C §§21310-21315 (which do not contain a statutory safe harbor procedure); Prob C §3 regarding applicability of new laws; relevant case law; and, when applicable, the common law.

Thus, the starting point for any analysis of the enforceability of a no-contest clause is the question of whether or not the instrument containing the no-contest clause became irrevocable before January 1, 2001. This seemingly simple question may require case law development, because it has been common practice for an integrated trust instrument executed by a married couple to provide for the establishment of an irrevocable bypass subtrust and an irrevocable marital subtrust on the death of the first spouse, which might have occurred before January 1, 2001, leaving a revocable survivor's subtrust that became irrevocable on the death of the second spouse, which might have occurred on or after January 1, 2001. Probate Code §45, defining the term "instrument," does not elaborate whether an integrated trust instrument should be severed into subparts for purposes of determining whether the "instrument" has become irrevocable within the meaning of the new law.

The following discussion of no-contest clauses is presented in two main sections, reflecting the two divergent regimes governing enforcement of no-contest clauses: the law applicable to instruments that became irrevocable (1) before January 1, 2001 (§§5.3B-5.12), and (2) on or after January 1, 2001 (§§5.12A-5.12I).

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§5.3B B. Law Applicable to Instruments That Became Irrevocable Before January 1, 2001

The current Part 3 of Division 11 of the Probate Code (Prob C §§21310-21315), added by Stats 2008, ch 174, does not apply to instruments that became irrevocable before January 1, 2001. Prob C §21315(b). For these instruments, former Part 3 (former Prob C §§21300-21308 and 21320-21322), repealed by Stats 2008, ch 174, will continue to apply by virtue of Prob C §3(g). See Comment to Prob C §21315: "An instrument that is not governed by this chapter would be governed by the law applied to the instrument prior to the operative date of this chapter. See [Prob C] Section 3(g)."

Law Revision Commission comments are persuasive evidence of legislative intent, particularly when the proposed statute is adopted without any change and the comment is brief. *Brian W. v Superior Court* (1978) 20 C3d 618, 623, 143 CR 717; *Van Arsdale v Hollinger* (1968) 68 C2d 245, 250, 66 CR 20, overruled on other grounds by *Privette v Superior Court* (1993) 5 C4th 689, 21 CR2d 72. Probate Code §21315(b) was adopted without change from the Commission proposal, except for a nonsubstantive change, using the word "part" instead of "chapter."

Furthermore, in 2009 the Legislature enacted Stats 2009, ch 348, which amended CCP §§366.2 and 366.3 by referring to "former" Part 3 as grounds for tolling the 1-year statute of limitations, and amended Prob C §§1303 and 1304, by referring to "former" Chapter 2 of Part 3 (the statutory safe harbor procedure) in a list of appealable orders.

As a result, the safe harbor procedure that may have motivated the legislative change is still available for instruments that became irrevocable before January 1, 2001. The applicability of former law to these instruments provides a good reason for practitioners and courts to retain the code books, annotations, practice books, and research concerning enforceability of no-contest clauses and safe harbor procedures that predate the operation of new Part 3.

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§5.3C 1. General Enforceability of No-Contest Clauses

The enforcement of no-contest clauses for instruments that became irrevocable before January 1, 2001 will continue to be governed by former Prob C §§21300-21308 and 21320-21322.

Former Prob C §21303 generally provides that a no-contest clause is enforceable against a beneficiary who brings a contest within the terms of the clause. Under the former law, no-contest clauses are favored by the public policy principles of discouraging litigation and giving effect to the expressed intent of the testator or settlor. *Burch v George* (1994) 7 C4th 246, 27 CR2d 165. Nevertheless, because no-contest clauses involve a forfeiture, they are strictly construed and will not be extended beyond what was plainly intended by the testator or settlor. *Burch v George, supra*. See §5.4. Furthermore, their enforcement is subject to certain statutory and common law exceptions. See §§5.8-5.9.

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Source: Estate Planning/California Trust and Probate Litigation/5 No-Contest Clauses and Other Obstacles to Litigation/ §5.4 2. Statutory Definition of 'Contest'

§5.4 2. Statutory Definition of "Contest"

Under the Probate Code, a "no-contest clause" means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary if he or she files a contest with the court. Former Prob C §21300(d). A "contest" means any action identified in a no-contest clause as a violation of the clause. Former Prob C §21300(a). It includes "direct" and "indirect" contests. A "direct contest" is a pleading that alleges that an instrument or any of its terms is invalid based on any of the following grounds (former Prob C §21300(b)):

- Revocation;
- Lack of capacity;
- Fraud;
- Misrepresentation;
- Menace;
- Duress;
- Undue influence;
- Mistake;
- Lack of due execution; or
- Forgery.

An "indirect contest" is a pleading that indirectly challenges the validity of an instrument or any of its terms based on any ground that is not the basis of a direct contest under former §21300(b). Former Prob C §21300(c).

NOTE: The new law applicable to instruments that became irrevocable on or after January 1, 2001, refers only to direct contests and no longer includes a definition of "indirect contests." Prob C §21310.

The first step in evaluating whether a proceeding under former law is a contest is to locate and examine the instrument. For a testamentary trust, this means examining the decree of distribution, since the decree, once final, supersedes the will. See *Estate of Callnon* (1969) 70 C2d 150, 156, 74 CR 250. A no-contest clause contained in a will but not included in the decree of distribution will not apply to a testamentary trust created by the will unless language in the decree incorporates the clause into the decree by reference. *Meyer v Meyer* (2008) 162 CA4th 983, 76 CR3d 546.

Whether a particular proceeding constitutes a contest under a given instrument depends on the scope of the no-contest clause, the circumstances of the particular case, and the language of the instrument. *Burch v George* (1994) 7 C4th 246, 254, 27 CR2d 165; *Estate of Black* (1984) 160 CA3d 582, 587, 206 CR 663; *Estate of Kazian* (1976) 59 CA3d 797, 802, 130 CR 908. A proceeding that constitutes a contest under one instrument might be permissible under another. For example, in *Kazian,* an action to determine ownership was held to be a contest because the will specifically declared that all property in which the decedent had an interest was her separate property, whereas in *Black* a similar action was held not to be a contest because the decedent only expressed an intent to dispose of property he had the right to dispose of by will.

Many actions have been held not to constitute a contest. See, *e.g., Estate of Kruse* (1970) 7 CA3d 471, 476, 86 CR 491 (action seeking interpretation of will); *Estate of Crisler* (1950) 97 CA2d 198, 217 P2d 470 (attack on jurisdiction of court). For discussion of types of action that cases have held did not trigger a no-contest clause, see §17.35. Although these exceptions are sometimes stated in absolute language, other cases suggest that these proceedings may trigger a particular no-contest clause if the intent to prohibit the action is clearly expressed in the clause.

For example, in *Estate of Kruse, supra,* quoting *Estate of Miller* (1964) 230 CA2d 888, 903, 41 CR 410, the court stated:

> [I]t is the privilege and right of a party beneficiary to an estate at all times to seek a construction of the provisions of the will. An action brought to construe a will is not a contest within the meaning of the usual forfeiture clause, because it is obvious that the moving party does not by such means seek to set aside or annul the will.

In *Estate of Ferber* (1998) 66 CA4th 244, 248, 77 CR2d 774, however, the court upheld a provision specifically disinheriting anyone who "objects to any construction or interpretation of my Will… that is adopted or proposed by my executor." This portion of *Ferber* was apparently superseded by the enactment of former Prob C §21305(b)(9), which provides that, as a matter of public policy, a pleading regarding the interpretation of an instrument containing a no-contest clause does not violate the clause. Former §21305(b)(9) is applicable to instruments of decedents dying on or after January 1, 2003, but only if the instrument became irrevocable before January 1, 2001.

PRACTICE TIP: When a former §21305(b) public policy exception does not apply because the decedent died or the instrument became irrevocable before the statute's effective date and it is unclear whether a common-law public policy exception would apply, the litigator should consider seeking a declaratory relief order under former Prob C §21320-21322. See §§5.9-5.11.

An action asserting an interest in property disposed of by the instrument also may trigger a no-contest clause in the case of a "forced election" estate plan in which a spouse is required to give up property interests in exchange for other interests received from the decedent. See, *e.g., Burch v George, supra; Estate of Kazian, supra*.

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§5.5 3. Actions That Thwart Estate Plan

For instruments that became irrevocable before January 1, 2001, a no-contest clause will be strictly construed to avoid forfeiture. Former Prob C §21304. Accordingly, the clause will be applied only in those situations in which the testator or settlor plainly intended it to apply. Nevertheless, it is the testator's or settlor's intent that controls, and the court will not, under the guise of strict construction, immunize from the reach of the no-contest clause legal proceedings plainly intended to frustrate the testator's unequivocally expressed intent. *Burch v George* (1994) 7 C4th 246, 255, 27 CR2d 165.

Courts have not been entirely consistent in their application of the standard adopted in *Burch*. For example, one court rejected use of a generalized "frustration of testator intent" as the test for applying a no-contest clause (*Jacobs-Zorne v Superior Court* (1996) 46 CA4th 1064, 1075, 54 CR2d 385), but others have held that a no-contest clause must be applied based on the testator's clearly expressed intent to prohibit any attempt to set aside or thwart provisions of the estate plan. See *Estate of Pittman* (1998) 63 CA4th 290, 73 CR2d 622. (*Jacobs-Zorne* purported to overrule *Kazian* but was criticized in *Pittman* for relying on the dissenting opinion in *Burch v George, supra*). In *Genger v Delsol* (1997) 56 CA4th 1410, 1420, 66 CR2d 527, the court held that an attack on a stock redemption agreement that was the cornerstone of the decedent's integrated estate plan was an action intended to thwart the estate plan and therefore triggered the no-contest clause, even though the clause prohibited only contests of "this trust" or "the settlor's will" and did not specifically mention the agreement.

The concept first adopted in *Burch v George, supra,* of construing the decedent's intent from the instruments comprising the decedent's "integrated estate plan" and followed in *Genger* was limited by the enactment of former Prob C §21305(a), which provides that, effective for instruments executed on or after January 1, 2001 (except certain codicils specified in former Prob C §21305(c)), certain actions, including a challenge to the validity of an instrument, other than the instrument containing the no-contest clause, are not a contest unless "expressly identified" in the no-contest clause as a violation of the clause.

The limitations set forth in former Prob C §21305(a) seemingly have little continuing application, since by its terms the section applies only to instruments executed on or after January 1, 2001, yet under the new law, the section no longer applies to instruments that became irrevocable on or after January 1, 2001. Instruments that became irrevocable before January 1, 2001, are not subject to the requirements of former Prob C §21305(a) since they necessarily would have been executed before that date. Instead, they "continue to be governed by the rule of strict construction and the common law" (former Prob C §§21301, 21304-21305). See *Estate of Rossi* (2006) 138 CA4th 1325, 1333, 42 CR3d 244.

Notwithstanding the rule of strict construction in former Prob C §21304, for instruments that became irrevocable before January 1, 2001, the practitioner should be concerned that a broadly worded no-contest clause might be applicable to almost any proceeding involving a decedent's property, even if it does not directly attack the instrument containing the clause.

Counsel should exercise caution and consider filing a protective safe harbor petition under former Prob C §21320 before launching an attack. For example, a claim asserted as a creditor's claim may nonetheless be a contest in substance, and the substance may control over the label. See *Zwirn v Schweizer* (2005) 134 CA4th 1153, 36 CR3d 527. In *Zwirn,* the decedent's nephew's claim to enforce the decedent's alleged oral agreement with her late husband to leave half of their combined estate to the nephew was held to be a contest of the decedent's estate plan, even though the nephew labeled his claim a creditor's claim and the no-contest clause did not expressly identify creditor's claims as violations. The court held that the claim went "directly to testator's plan of distribution" and was not merely for money on a contract for goods or services.

PRACTICE TIP: In defending against an attack on the instrument, counsel must gather and evaluate evidence of the decedent's intent. Counsel should interview and prepare declarations for the attorneys who drafted the documents containing the no-contest clause and other related documents and any friends, relatives, professional advisers, or business associates who may shed light on implementation of the estate plan or the testator's intent. In attacking

the instrument, counsel should consider deposing the attorneys.

In specific cases, the clause itself must be carefully analyzed to determine if it applies to persons who indirectly assist in the litigation, financially or otherwise. Too often the bravest child fronts the litigation for the timid who don't want to lose their inheritances. If a significant other is a beneficiary only for a pittance, counsel should review the documents to see if the no-contest clause specifies that a quasi-contract or *Marvin* claim will be treated as a triggering act under the no-contest clause. See §7.11.

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§5.6 4. Proceedings to Characterize Property

Probate Code §§13650-13660, allowing the passage of property to a surviving spouse, present a novel problem in contests. When final, an order determining that property is property passing to a surviving spouse or confirming ownership of property belonging to the surviving spouse is conclusive on all persons, whether or not they are alive. Prob C §13657.

Whether an action to determine spousal property would be a prohibited will contest depends on the language of the no-contest clause and the circumstances of each case. An instrument containing a no-contest clause should be reviewed to determine if it clearly characterizes property, *e.g.,* as separate or community, so that a challenge to the characterization of property may be held to thwart the testamentary plan.

Under the statutory scheme that became operative January 1, 2010, for instruments that became irrevocable on or after January 1, 2001 (Prob C §21315), a no-contest clause will not be enforced against a pleading challenging a transfer of property on the grounds that it was not the transferor's property at the time of transfer, unless the no-contest clause expressly provides for that application. Prob C §21311(a)(2). See §5.12G.

For no-contest clauses in instruments that became irrevocable before January 1, 2001, compare *Estate of Pittman* (1998) 63 CA4th 290, 73 CR2d 622 (petition challenging accuracy of listings of property as separate or community property of decedent and decedent's spouse on schedule attached to living trust constituted a contest), with *Jacobs-Zorne v Superior Court* (1996) 46 CA4th 1064, 54 CR2d 385 (petition to determine ownership of joint property was not a contest when will referred to decedent's separate property and one-half interest in community property in general and did not designate items of separate and community property), and *Estate of Richter* (1993) 12 CA4th 1361, 16 CR2d 108 (petition to determine community property assets was not a will contest when will did not specify estate property). In *Estate of Pittman*, *supra,* the decedent's children lost the right to receive distributions from trusts containing the decedent's assets even though the only trust being attacked was the trust containing the decedent's spouse's assets.

The conduct that may cause forfeiture is not limited to actions challenging the characterization of property actually owned by the decedent. In *Burch v George* (1994) 7 C4th 246, 263, 27 CR2d 165, the California Supreme Court held that proposed actions of the decedent's wife asserting her claimed community property interest in disputed assets disposed of by the decedent's trusts would trigger a forfeiture of trust interests left to the wife, even if it were found that she was merely challenging the decedent's attempt to devise property that he did not own. The terms of the decedent's trusts and surrounding circumstances showed an unequivocal intention to preclude the wife from taking under the trust while at the same time asserting independent ownership claims, and the wife's proposed actions were designed to thwart this intention.

AUTHOR'S ADVICE: When in doubt about whether a particular action would trigger a no-contest clause, the practitioner should consider seeking declaratory relief under former Prob C §21320, which applies to wills, trusts, and other instruments that became irrevocable before January 1, 2001. See §§5.10-5.12, 17.36-17.40.

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§5.7 5. Amendments and Other Instruments

Counsel should determine whether a no-contest clause applies to amendments to a will or trust. A codicil no longer republishes a will unless it so specifically states. See former Prob C §25. The same is true of an amendment to a trust. Therefore, a no-contest clause in a will or trust document may not apply to a codicil to a will or an amendment to the trust document.

Estate of Rossi (2006) 138 CA4th 1325, 42 CR3d 244, involved a post-January 2001 estate plan with no-contest clauses that did not expressly identify as a contest a challenge to the validity of an amendment. The initial plan was later modified by amendments. The amendment at issue did not include a no-contest clause. The court held that the amendment was separate from the initial plan, and thus an instrument other than the instrument containing the no-contest clause, and therefore a challenge to the validity of the amendment would not trigger the no-contest clauses in the initial plan. See also *Perrin v Lee* (2008) 164 CA4th 1239, 79 CR3d 885 (no-contest clause in trust did not apply to contest of trust amendment, even though amendment stated that it confirmed and ratified trust).

PRACTICE TIP: Estate planning counsel should avoid expressly providing in an estate plan that a challenge to an amendment would be a contest of the plan. Such a clause is extremely dangerous because it immunizes every potential future amendment from challenge by the intended beneficiaries under the initial plan, without any regard to the circumstances of the amendment, *e.g.,* egregious fraud, undue influence, or duress. Given that counsel cannot know nor control the circumstances of a future amendment, counsel should advise against including such a clause in the initial plan as it is highly unlikely to be in the best interests of the settlor or the settlor's intended beneficiaries.

NOTE: The statutory scheme that became operative January 1, 2010, and applies to instruments that became irrevocable on or after January 1, 2001, provides that a no-contest clause must expressly identify the separate instrument if the clause seeks to make a challenge to the instrument a contest. However, this statute provides that the referenced instrument must be in existence on the date that the instrument with the no-contest clause was executed. Prob C §21310(e)(2). Thus, it will apparently not be possible for drafters going forward to place a no-contest clause in an underlying document that will apply to future amendments not yet in existence.

A no-contest clause in a decedent's will may not automatically apply to the decedent's trust. In *Estate of Lindstrom* (1987) 191 CA3d 375, 236 CR 376, a no-contest clause specifically disinheriting each person contesting "this Will" was held not to apply to a contest of the decedent's inter vivos trust, regardless of the apparent intent of the decedent, because the clause did not plainly cover the trust and the will did not constitute an amendment or a revocation of the trust. By the same rationale, a no-contest clause in a trust may not automatically apply to a will.

On the other hand, in *Genger v Delsol* (1997) 56 CA4th 1410, 66 CR2d 527, a no-contest clause expressly covering contests of "this trust" or "settlor's will" was held to apply to the contest of a separate stock redemption agreement because it was an indirect attack on the trust.

A no-contest clause does not apply to omitted heirs. Omitted heirs do not contest or challenge the will but take in spite of it. *Estate of Smith* (1973) 9 C3d 74, 80, 106 CR 774; *Estate of Leonetti* (1981) 115 CA3d 378, 383, 171 CR 303. The right to take an omitted share is not impaired by a no-contest clause, even if the omitted heir also files an unsuccessful will contest. *Estate of Katleman* (1993) 13 CA4th 51, 16 CR2d 468.

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6. Exceptions to Enforcement of No-Contest Clauses

§5.8 a. Public Policy Exceptions

For instruments that became irrevocable before January 1, 2001, former Prob C §21305(b) contains certain public policy exceptions to the application of no-contest clauses.

The following actions will not trigger a no-contest clause as a matter of public policy, even if the action is expressly identified in the clause as a violation:

- A pleading to modify or terminate a trust (former Prob C §21305(b)(1));
- A pleading to establish or terminate a conservatorship (former Prob C §21305(b)(2));
- A pleading under the California Power of Attorney Law (former Prob C §21305(b)(3));
- A pleading regarding an order annulling a marriage of the person who executed the instrument containing the no-contest clause (former Prob C §21305(b)(4));
- A conservatorship or guardianship pleading seeking instructions (former Prob C §21305(b)(5));
- A pleading challenging the exercise of a fiduciary power (former Prob C §21305(b)(6));
- A pleading regarding the appointment or removal of a fiduciary (former Prob C §21305(b)(7));
- A pleading regarding an accounting or report of a fiduciary (former Prob C §21305(b)(8));
- A pleading regarding the interpretation of the instrument containing the no-contest clause or an instrument or other document expressly identified in the no-contest clause (former Prob C §21305(b)(9));
- A pleading regarding the approval of a settlement or compromise whether or not it affects the term of an instrument (former Prob C §21305(b)(10));
- A pleading regarding the reformation of an instrument to carry out the intention of the person creating the instrument (former Prob C §21305(b)(11)); and
- A petition to compel an accounting or report of a fiduciary, if that accounting or report is not waived by the instrument. (former Prob C §21305(b)(12)).

A pleading includes a petition, complaint, response, objection, or other document filed with the court that expresses a party's position. Former Prob C §21305(f).

The exceptions listed in Prob C §21305(b)(1)-(8) and (10) apply only to instruments of decedents dying on or after January 1, 2001, that became irrevocable on or after that date. Former Prob C §21305(d). See, *e.g., Hermanson v Hermanson* (2003) 108 CA4th 441, 133 CR2d 486. The exceptions in former Prob C §21305(b)(9) and (11)-(12) apply only to instruments of decedents dying on or after January 1, 2003, that become irrevocable on or after that date. Former Prob C §21305(d). In addition, the exceptions listed in former Prob C §21305(b)(6), (9), and (11) do not apply if the court finds that the filing of the pleading is a "direct contest" of an instrument or any of it terms. Former Prob C §21305(e). A pleading constitutes a direct contest if it alleges that the instrument or one of its terms is invalid as the result of revocation, lack of capacity, fraud, misrepresentation, menace, duress, undue influence, mistake, lack of due execution, or forgery. Former Prob C §21300(b).

NOTE: Although the statutory public policy exceptions do not apply to decedents who died before the dates contained in former §21305(d), common-law exceptions may still apply. Former Prob C §21301. See §5.9.

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§5.8A b. Other Statutory Exceptions

Former Prob C §§21306-21307 contain additional exceptions to the application of no-contest clauses. Former Prob C §21306 provides that a no-contest clause is not enforceable if the contest is brought with "reasonable" cause on the grounds of forgery, revocation, or an action to establish the invalidity of any transfer described in Prob C §21350 (a transfer to a "disqualified person"). For this purpose, revocation includes the attempt to probate a supposedly valid will that would revoke the earlier instrument containing the no-contest clause. *Estate of Gonzalez* (2002) 102 CA4th 1296, 1303, 126 CR2d 332. Other exceptions are provided in former Prob C §21307 concerning actions brought with "probable" cause against a beneficiary who participated in drafting or witnessing the instrument.

Former §21306 provides that the no-contest clause is not enforceable against a beneficiary to the extent that the action is commenced "with reasonable cause." For purposes of former §21306, "reasonable cause" means that the contesting party "has possession of facts that would cause a reasonable person to believe that the allegations and other factual contentions in the matter filed with the court may be proved or, if specially so identified, are likely to be proven after a reasonable opportunity for further investigation or discovery." Former Prob C §21306(b).

Former §21307, on the other hand, provides that the no-contest clause is not enforceable against a beneficiary to the extent that the action is commenced "with probable cause," which the statute itself does not define, but which is "generally considered synonymous" with reasonable cause. See *Estate of Gonzalez* (2002) 102 CA4th 1296, 1305, 126 CR2d 332. Under former §21307, the contestant need have only probable cause to believe that a beneficiary was a person described in former §21307. The contestant is not required to definitively establish that the beneficiary was such a person. *Estate of Peterson* (1999) 72 CA4th 431, 85 CR2d 110.

NOTE: Before its amendment effective January 1, 2001, former §21306 required probable cause. It is unclear why the legislature provided the specifically defined reasonable cause test in former §21306 while maintaining the probable cause test in former §21307.

Unfortunately, the prospective litigant does not know at the commencement of the action whether the court will agree that he or she has "reasonable cause" under former §21306 or "probable cause" under former §21307 to bring the action. Declaratory relief to have a court determination before the outset of the litigation that there is reasonable or probable cause to bring an action described in former Prob C §§21306-21307 is specifically prohibited under former Prob C §21320(d). See *Genger v Delsol* (1997) 56 CA4th 1410, 1426, 66 CR2d 527. The court in *Genger* held that declaratory relief cannot be obtained from the court to determine whether there is "probable cause" to bring an action that will not be a violation of a no-contest clause on any of the grounds provided for in former Prob C §§21306-21307. (Note: *Genger* was decided before former §21306 was amended to require reasonable cause rather than probable cause. See discussion above.) There is an exception, however, for an action to determine that application of a no-contest clause would violate public policy, at least when the issue can be decided as a matter of law. *Estate of Ferber* (1998) 66 CA4th 244, 251, 77 CR2d 774. See §5.9.

Under the statutory scheme that became operative on January 1, 2010, and applies to instruments that became irrevocable on or after January 1, 2001, former Prob C §§21306-21307 were repealed and replaced by more general Prob C §21311, which states in pertinent part that a no-contest clause will only be enforced against a direct contest brought without probable cause. Under this scheme, "probable cause" exists if the facts known at the time of filing would cause a reasonable person to believe that there is a reasonable likelihood of prevailing after an opportunity for further investigation and discovery. Prob C §21311(b). The "reasonable likelihood" standard requires more than a mere possibility but less than a likelihood that is "more probable than not." 37 Cal L Rev'n Comm'n Reports 359 (2007). See §5.12F.

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§5.9 c. Nonstatutory Exceptions

The exceptions listed in former Prob C §§21305-21307 (see §5.8) are not exclusive. The common-law exceptions still apply to certain actions not provided for in former Prob C §§21305-21307. Former Prob C §21301; see also Comments to former Prob C §§21306, 21307; *Estate of Ferber* (1998) 66 CA4th 244, 252, 77 CR2d 774.

The primary basis for nonstatutory exceptions to enforcement of no-contest clauses is public policy. The question of how far a no-contest clause may go before it impermissibly violates public policy was addressed in *Estate of Ferber*. In that case, the testator had directed his attorneys to prepare the "strongest possible" no-contest clause. The attorneys complied, drafting an extremely broad clause, and the case therefore provided an excellent vehicle for testing public policy limits.

The no-contest clause in *Estate of Ferber* purported to disinherit any beneficiary who, among many other things, (a) sought to impair any provision of the will, (b) objected in any manner to any action taken by the executor, (c) objected to any construction of the will proposed by the executor, or (d) unsuccessfully requested removal of the executor. In determining the enforceability of the clause, the court balanced two competing policies. On the one hand, no-contest clauses that purport to insulate executors completely from vigilant beneficiaries violate the public policy behind court supervision of executors. On the other hand, the court recognized that no-contest clauses are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator.

The court struck a balance by holding the no-contest clause unenforceable on public policy grounds against beneficiaries who attempt to remove a fiduciary, or who object to a fiduciary's accounting unless the challenge is frivolous The court found no public policy preventing enforcement of the no-contest clause against beneficiaries who challenge the fiduciary's construction of the instrument, at least when malfeasance is not claimed.

Estate of Ferber made litigators wary about filing fiduciary removal actions, because whether conduct was frivolous could be determined only after the fact, *i.e.,* after the no-contest clause may have in fact been triggered. In response to this uncertainty, the legislature enacted former Prob C §21305(b), which was later expanded, specifically providing that as a matter of public policy certain actions will not constitute a contest, with no requirement that the action be deemed not frivolous. See §5.8.

An understanding of *Ferber* and of the public policy exceptions specified in former Prob C §21305(b) remain important to the estate and trust litigator. Other matters that might be excepted for public policy reasons, *e.g.,* a request for instructions and many of the other proceedings listed in Prob C 17200(b), are not covered by the unconditional public policy exceptions of former Prob C §21305(b) or the conditional exceptions of former Prob C §§21306-21307. See §5.8. Thus a litigator might use *Ferber* as support when asking for safe harbor protection (see §5.10) and argue that public policy should render a no-contest clause inapplicable even though the anticipated proceeding is not covered by former §§21305(b) or 21306-21307.

For a case that rejected the beneficiary's public policy argument, see *Tunstall v Wells* (2006) 144 CA4th 554, 50 CR3d 468. In *Tunstall*, a beneficiary unsuccessfully argued *Ferber* and related case law for the proposition that a no-contest clause violated public policy by voiding one beneficiary's gift if another beneficiary contested the trust. See also *Colburn v Northern Trust Co.* (2007) 151 CA4th 439, 59 CR3d 828 (beneficiaries unsuccessfully argued that public policy made no-contest clause unenforceable because it would interfere with enforcement of spousal and child support; the court noted that clause merely forced an election and did not hinder their ability to assert support rights).

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§5.10 7. Declaratory Relief: "Safe Harbor" Provisions

Former Prob C §§21320-21322 (the so called "safe harbor" provisions) provide a statutory procedure to obtain a ruling from the probate court before commencement of a proposed action that the filing of the action will not trigger a no-contest clause. A petition may be filed if the instrument containing the no-contest clause has become irrevocable. Former Prob C §21320(a). Any statute of limitations will be tolled during the period that the declaratory relief is being sought. Former Prob C §21308. For further discussion, including a form for use in a declaratory relief action, see §§17.36-17.40.

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§5.11 a. Limitations on Petition for Declaratory Relief

For instruments that became irrevocable before January 1, 2001, former Prob C §21320 creates a statutory safe harbor procedure by providing that a petition for declaratory relief will not itself trigger a no-contest clause as long as it is limited to the procedure and purpose described in former Prob C §21320(a). Former Prob C §21320(b). The court may not make a determination whether a proposed action violates a no-contest clause under former §21320 if this would require a determination of the merits. Former Prob C §21320(c). See Senate Judiciary Committee Analysis of SB 1878 (May 7, 2002).

NOTE: Former Prob C §21320(c) was amended in 2002 to resolve the issue raised by of *Estate of Kaila* (2001) 94 CA4th 1122, 114 CR2d 865, in which the court concluded that it should consider and rule on a petition requiring a determination on the merits, but the petition would not be entitled to safe harbor protection and could therefore itself be a contest.

In addition, under former Prob C §21320(d), the petition for declaratory relief may not require a determination that the no-contest clause would not apply to the proposed action under the statutory exceptions of former Prob C §§21306-21307, because that determination would require the court to decide whether the beneficiary had reasonable (former §21306) or probable (former §21307) cause to bring the action. *Genger v Delsol* (1997) 56 CA4th 1410, 1427, 66 CR2d 527. In these cases and under the rule in *Estate of Ferber, supra,* the beneficiary must take the proposed action in order to find out whether the action constitutes a contest.

The petition also may not require the court to determine whether any nonstatutory exceptions to the application of no-contest clauses would apply to the proposed action, unless application of provisions of the no-contest clause would violate public policy. *Estate of Ferber, supra*. Even in that case, the determination of whether a provision, *e.g.,* prohibiting a challenge to the executor, violated public policy might depend on whether the proposed action was frivolous. The court in *Ferber* also held that a beneficiary cannot seek a blanket determination of what portions of a clause violate public policy.

If the court rules that a proposed petition would trigger the no-contest clause and the moving party does not file the proposed petition, the moving party will not be constrained by the doctrine of "conclusiveness of pleadings" from filing some other petition with different allegations. *Betts v City Nat'l Bank* (2007) 156 CA4th 222, 235, 67 CR3d 152.

PRACTICE TIP: The practitioner, when seeking declaratory relief under former Prob C §§21320-21322, should attach an unsigned copy of the proposed pleading to the petition seeking declaratory relief. The petition should state that the filing of the attached petition will not trigger the no-contest clause. See example of format for petition for seeking declaratory relief in §17.39.

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§5.12 b. Appeal of "Safe Harbor" Order

An order providing a "safe harbor" under former Prob C §§21320-21322 is directly appealable. Prob C §1303(j); *Graham v Lenzi* (1995) 37 CA4th 248, 43 CR2d 407. As a practical matter, it is suggested that, even if counsel obtains a favorable ruling under former Prob C §21320 that the filing of the proposed pleading will not violate a no-contest clause, he or she should give notice of entry of the order and wait for the period for filing of a notice of appeal to expire before filing the proposed action to make certain that the protection of the order providing that the no-contest clause will not be triggered will apply.

The time for filing a notice of appeal is generally 60 days after service of the notice of entry of the order. Cal Rules of Ct 8.104(a). A ruling that a no-contest clause was enforceable, however, in an action seeking a determination that a petition challenging a no-contest clause was not itself a contest, was held to be premature and not final, and therefore not appealable, in *Genger v Delsol* (1997) 56 CA4th 1410, 1430, 66 CR2d 527.

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C. Law Applicable to Instruments That Became Irrevocable On or After January 1, 2001

§5.12A 1. Operative Date and Limited Retroactivity of New Law

Operative January 1, 2010, Stats 2008, ch 174 enacted a new statutory scheme concerning enforcement of no-contest clauses (Stats 2008, ch 174, §3). Chapter 174 repealed the existing Part 3 of Division 11 of the Probate Code (former Prob C §§21300-21322) and added a new Part 3 (Prob C §§21310-21315). The new Part 3 applies to any instrument, whenever executed, that became irrevocable on or after January 1, 2001, and does not apply to an instrument that became irrevocable before then. Prob C §21315. Additional sources of applicable law include Prob C §3 (regarding application of new law and repealed law), relevant case law, and the common law. Prob C §21313.

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§5.12B 2. Three Exceptions to General Unenforceability of No-Contest Clauses

The new law adopts a general rule that a no-contest clause "shall only be enforced" against contests that fall within one of three types (Prob C §21311):

(1) Direct contests brought without probable cause (see §§5.12C-5.12F);
(2) Challenges to certain property transfers if expressly barred by the no-contest clause (see §5.12G); and
(3) Filing or prosecution of creditor's claims if expressly barred by the no-contest clause (see §5.12H).

Thus, after January 1, 2010, for all instruments that became irrevocable on or after January 1, 2001 (Prob C §21315), no-contest clauses are not enforceable against contests that are outside these three types. As with the former law, however, the statute states that the common law governs enforcement of a no-contest clause to the extent that the statute does not apply. Prob C §21313. See §5.9 for discussion of common law, including public policy exceptions to enforcement.

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3. Direct Contests Without Probable Cause

§5.12C a. General Rule

For an instrument that became irrevocable on or after January 1, 2001 (Prob C §21315), a no-contest clause shall be enforceable against a direct contest only if the direct contest is brought without probable cause. Prob C §21311(a).

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Source: Estate Planning/California Trust and Probate Litigation/5 No-Contest Clauses and Other Obstacles to Litigation/ §5.12D b. Direct Contest

§5.12D b. Direct Contest

A direct contest means a pleading filed with the court by a beneficiary that alleges the invalidity of a protected instrument or one or more of its terms on the basis of one or more of the following grounds (Prob C §21310(b)):

- Forgery;
- Lack of due execution;
- Lack of capacity;
- Menace, duress, fraud, or undue influence;
- Revocation of a will under Prob C §6120, revocation of a trust under Prob C §15401, or revocation of an instrument other than a will or trust under the procedure for revocation that is provided by statute or by the instrument; or
- Disqualification of a beneficiary under Prob C §6112 or §21350.

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Source: Estate Planning/California Trust and Probate Litigation/5 No-Contest Clauses and Other Obstacles to Litigation/ §5.12E c. Protected Instrument

§5.12E c. Protected Instrument

A protected instrument means both of the following (Prob C §21310(e)):

- The instrument that contains the no-contest clause; and
- An instrument that is in existence on the date that the instrument containing the no-contest clause is executed and that is expressly identified in the clause, either individually or as part of an identifiable class of instruments, as being governed by the clause.

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§5.12F d. Probable Cause

Probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery. Prob C §21311(b).

The Comment to Prob C §21311 indicates that "reasonable likelihood" means "more than merely possible, but less than 'more probable than not'" and cites *Alvarez v Superior Court* (2007) 154 CA4th 642, 653, n 4, 64 CR3d 854, and *People v Proctor* (1992) 4 C4th 499, 523, 15 CR2d 340. The comment also indicates that by tying "reasonable likelihood" to "requested relief," the standard refers not only to the contestant's factual contentions but also to the legal sufficiency of the grounds for the requested relief. Apparently this standard is intended to be more demanding than the "legally tenable" standard adopted in *Estate of Gonzalez* (2002) 102 CA4th 1296, 1304, 126 CR2d 332, referred to in the comment.

However, estimation of the likelihood of obtaining the requested relief is not limited to only the facts actually known to the contestant at the time of filing. Instead, it is judged by what a reasonable person would believe given what the contestant knows and what that reasonable person expects may turn up after an opportunity for further investigation or discovery.

It seems reasonable that the statutory phrase "facts known to the contestant" is not limited to facts within the contestant's personal knowledge but should also include reasonably reliable information acquired by pre-filing investigation, even if based on the personal knowledge of third party witnesses, on business records or other apparently authentic documents, or on reasonably reliable hearsay evidence. The existence of probable cause is measured by what a reasonable person would have believed at the time of filing. The determination should not be affected by whether subsequent investigation or discovery turned out to strengthen or weaken the claim and should not depend on a continuing assessment of the likelihood of obtaining relief as investigation and discovery unfold.

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§5.12G 4. Challenges to Ownership of Property

A no-contest clause may be enforced against a pleading to challenge a transfer of property on the grounds that it was not the transferor's property at the time of transfer, but only if the no-contest clause expressly provides for that application. Prob C §21311(a)(2).

As distinguished from a direct contest, it makes no difference whether or not the contestant had probable cause to bring this type of contest. The existence of probable cause will not protect a contestant from forfeiture.

The Comment to Prob C §21311 states that this section restates the substance of former Prob C §21305(a)(2), which referred to a proceeding "to determine the character, title, or ownership" of property. The Law Revision Commission's report noted that the former language allowed a transferor to create a forced election but appeared overbroad for that purpose because any action that would determine a beneficiary's right to a gift under an estate plan could be characterized as an action to determine the "ownership of property." Thus, the recommendation was intended to continue the substance of the provision while preventing overbroad interpretation. 37 Cal L Rev'n Comm'n Reports 394 (2007).

Although the Commission recommended that the statutory safe harbor procedure be available to test whether a no-contest clause could be enforced against a particular pleading under this provision (37 Cal L Rev'n Comm'n Reports 396, 405 (2007)), the legislature did not follow this recommendation.

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§5.12H 5. Filing or Prosecuting Creditor's Claim

A no-contest clause may be enforced against the filing of a creditor's claim or the prosecution of an action based on the claim, but only if the no-contest clause expressly provides for that application. Prob C §21311(a)(3). This section continues former Prob C §21305(a)(1) without substantive change. Comment to Prob C §21311.

As distinguished from a direct contest, the existence of probable cause will not protect a contestant from forfeiture. A no-contest clause that triggers a forfeiture for any beneficiary or heir filing a creditor's claim carries a substantial risk of unintended consequences. If a family member beneficiary who paid a decedent's expenses of last illness seeks reimbursement from the estate by filing a creditor's claim, that might trigger a forfeiture of the beneficiary's interest—seemingly unjust punishment for the voluntary act of paying the decedent's debts.

AUTHOR'S ADVICE: If a no-contest clause is intended to cover creditors' claims, drafters should consider a targeted clause against only specified persons or specified debts or claims.

As with challenges to ownership of property, the legislature did not follow the Law Revision Commission's recommendation to retain a statutory safe harbor procedure (37 Cal L Rev'n Comm'n Reports 396, 405 (2007)).

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§5.12I 6. No Statutory Safe Harbor Procedure

The safe harbor procedures of former Prob C §§21320-21322 were repealed by Stats 2008, ch 174 and not replaced. Thus, for instruments that became irrevocable on or after January 1, 2001 (Prob C §21315), the statutory safe harbor procedures will not apply except as may be provided in Prob C §3, which specifies general rules for the applicability of repealed Probate Code sections.

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D. Triggering No-Contest Clause

§5.13 1. Avoidance of Inadvertent Triggering of No-Contest Clause

Certainly the most important consideration in estate and trust litigation concerning no-contest clauses is that counsel must avoid inadvertently triggering a no-contest clause. The first step is to determine which body of law applies, either current Prob C §§21310-21315, or former Prob C §§21300-21308 and 21320-21322, depending on whether the instrument became irrevocable on or after January 1, 2001, or before that date, respectively. The next step is to parse the no-contest clause carefully, compare its provisions with the intended action, and determine whether there is a conflict. The third step is to analyze whether the potential conflict could trigger enforcement of the no-contest clause under applicable law. In case of any doubt, the risks should be explained to the client in writing. If the proceeding involves an instrument that became irrevocable before January 1, 2001, a safe harbor petition under former Prob C §21320 should be filed.

A trap may exist when an instrument contains both a no-contest clause and an exculpatory clause, which might give rise to the argument that if a complaining beneficiary does not explicitly "plead around" the exculpatory language when asking for relief such as surcharge or removal, the beneficiary will be contesting the instrument. Although there may be questions about whether that result would be consistent with public policy and the requirement to strictly construe forfeiture clauses, at least one court has held that failure to plead around an exculpatory clause would result in a contest. *Hearst v Ganzi* (2006) 145 CA4th 1195, 52 CR3d 473.

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§5.14 2. Intentional Triggering of Potential No-Contest Clause

Counsel should review the "penalty" for triggering the no-contest clause. If the penalty is small and the chance of recovery is great, the potential litigant may want to risk triggering the no-contest clause. Naturally, counsel should obtain a letter from the client indicating he or she understood the ramifications of triggering the no-contest clause in making the decision to go ahead. If the entire instrument is invalidated due to a claim of, *e.g.,* undue influence, lack of capacity, or improper execution, the no-contest clause will be invalidated along with the instrument.

The client in a particular case may want to take the risk of having the entire instrument invalidated, which would include the no-contest clause, without seeking declaratory relief. For example, a beneficiary who is entitled to a nominal amount (*e.g.,* $1000) under the instrument but may recover much more if the instrument is invalidated, might be willing to forego the declaratory relief procedure because the cost of the declaratory relief action probably would exceed the amount of the forfeiture. In such a case, counsel should have a letter from the client indicating an understanding that the client is essentially gambling, that the cost and benefits have been evaluated, and that it has been decided, on the informed written consent of the client, to proceed to trigger a no-contest clause, notwithstanding the possibility that a forfeiture might occur.

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Source: Estate Planning/California Trust and Probate Litigation/5 No-Contest Clauses and Other Obstacles to Litigation/ §5.14A 3. Interrelationship With Statute of Limitations for Persons Receiving Trustee Notice (Prob C §16061.7)

§5.14A 3. Interrelationship With Statute of Limitations for Persons Receiving Trustee Notice (Prob C §16061.7)

When evaluating the potential triggering of a no-contest clause and the possible forfeiture resulting from its violation, the estate and trust litigator also may be confronted with the time limits for contesting a trust under Prob C §§16061.7-16061.8. For discussion of trustee notice requirements (Prob C §16061.8) and limitations period (Prob C §16061.8), see §5.17.

During the relatively short 120-day period under Prob C §16061.8 (with possible 60-day extension from date of service of "terms of the trust" on beneficiary), the litigator must decide whether to contest the trust and what to do about potential triggering of the no-contest clause.

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III. PROCEDURAL OBSTACLES TO ACTION

§5.15 A. Statutes of Limitation and Other Time Requirements

Trust and estate litigation consists of many different forms of action, each with its own time requirements. The myriad of different time bars presents numerous traps for the unwary. Moreover, some time bars are short, and it is not uncommon for some avenues to be foreclosed before the prospective client consults counsel. Sections 5.16-5.19 discuss some of the important time requirements that may apply to a case under evaluation, and direct the reader to the appropriate substantive sections of this book for more detailed discussion.

NOTE: For claims concerning persons dying on or after January 1, 2001, an action on an oral or written agreement regarding distribution from an estate or trust (or under other instrument) must be brought within 1 year after the date of the promisor's death. CCP §366.3.

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§5.16 1. Will Contests

To contest a will before its admission to probate, an objection must be filed before the hearing on the petition for probate. Prob C §8250. It is generally preferable to contest a will at this stage, because potential obstacles—including the estate's advancing payment of the adversary's costs to defend the will contest—may thereby be avoided.

Once a will has been admitted to probate, a petition for revocation of probate must be filed within 120 days. Prob C §8270(a). Generally, a will is "admitted to probate" by a judicial decision at the hearing. The decision is recorded in a minute order. Prob C §8225. Thus, the 120 days begins to run from the date of the hearing, even if the formal Order for Probate is delayed, as it frequently is. *Wolfson v Superior Court* (1976) 60 CA3d 153, 159, 131 CR 265. This creates a dangerous potential pitfall because parties do not routinely see minute orders and may assume that their time begins to run from notice of entry of a formal order, as it does in many other areas of the law.

WARNING: A "confusion" argument to excuse late filing may now be difficult to make, because Judicial Council Form DE-140 (Order for Probate) recites that the will "was admitted to probate by Minute Order on (date)."

"One hundred twenty days" means just that. A will contestant does not have 4 months to act, as does, *e.g.,* a creditor of the decedent. Prob C §9100(a)(1). It is not clear why the legislature would give will contestants "120 days" to file suit but give other litigants, *e.g.,* estate creditors, "4 months." One hundred twenty days usually is less and never is more than 4 months, depending on the month, and should be calculated carefully.

If a minor or an incompetent is interested in the estate, and he or she has no guardian or conservator, he may file a will contest any time before final distribution. Prob C §8270(b). Because a minor with standing to contest a will frequently exists, the 120-day limitation period often may be extended.

In some courts, if an interested party appears when a petition for probate is called for hearing and declares that he or she wishes to contest the will, the court will continue the hearing to allow the person to file the written contest. See, *e.g*., San Diego Ct R 4.8.9; Los Angeles Ct R 10.61. Counsel should take care to make such a request for a continuance in a timely manner, if it is permitted under local rules. If possible, it is best to request the extension before the hearing on admission of the will to probate.

For detailed discussion of time requirements relating to will contests, see §§17.56-17.76.

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§5.17 2. Trust Contests

When the notice provisions of Prob C §16061.7 apply, the time to contest a trust may be as little as 120 days from the time notice is served. Prob C §16061.8. The 120-day time limit is triggered when:

- A revocable trust becomes irrevocable because of the death of the settlor or if the terms of the trust expressly provide that the trust becomes irrevocable within 1 year of the death of the settlor because of a contingency related to the settlor's death, or
- There is a change of trustees of an irrevocable trust.

Under either of these circumstances, the trustee must give notice to the beneficiaries, to the heirs of the deceased settlor (when the event requiring notice is the death the settlor or the above described contingency related to the settlor's death), and to the Attorney General (when the trust is a charitable trust). Prob C §16061.7(b)(1)-(3). When there is a change of trustee, the successor trustee is responsible for the notification. Prob C §16061.7(a)(2).

A person receiving the notice has 120 days to contest the trust from the date the notice is served on him or her, or 60 days from the date when a copy of the terms of the trust is mailed or personally delivered to the person during that 120-day period, whichever is later. Prob C §16061.8. "Terms of the trust" is defined in Prob C §16060.5 to include any document irrevocably exercising a power of appointment. For proceedings regarding an instrument that became irrevocable before January 1, 2001, if a beneficiary files a petition for declaratory relief under former Prob C §21320, to determine whether an action will trigger a no-contest clause, the limitations period is tolled beginning with the date of the former §21320 application and ending on the date that the court's determination becomes final. Former Prob C §21308.

When the notice provisions of Prob C §16061.7 are inapplicable, the time limits on contesting a trust may be 3, 4, or 5 years, depending on whether the challenge is based on competency or tortious misconduct, and whether personal or real property is involved. CCP §337; *Brazil v Silva* (1919) 181 C 490, 185 P 174, disapproved on other grounds in 57 C2d at 133 (3 years for tort claims involving personal property, 5 years for claims involving real property); *Morse v Crocker Nat'l Bank* (1983) 142 CA3d 228, 190 CR 839 (3 years for competency claims).

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§5.18 3. Creditor Claims

Creditors of a decedent must comply with several time requirements. They must file a claim within the 4-month claims period of Prob C §9100(a)(1) (or the 60-day notice period of Prob C §9100(a)(2)) and before the expiration of the applicable statute of limitations, and, if the claim is due, they must file suit within 90 days after notice of rejection of their claim under Prob C §9353.

Under limited circumstances, a creditor can file a late claim in a decedent's probate estate under Prob C §9103. The late creditor's claim procedure is fraught with technicalities, but does sometimes offer a creditor the opportunity to assert a claim that would otherwise be barred. The creditor can file a petition for the court to allow a late claim if either (Prob C §9103(a)):

- The personal representative failed to send proper and timely notice of administration of the estate to the creditor, and the petition is filed within 60 days after the creditor has actual knowledge of the administration of the estate; or
- The creditor had no knowledge of the facts reasonably giving rise to the existence of the claim more than 30 days before the time for filing a claim as provided in Prob C §9100, and the petition is filed within 60 days after the creditor has actual knowledge of both the existence of the facts reasonably giving rise to the existence of the claim and the administration of the estate.

Granting of the petition is discretionary with the court. Prob C §9103(a). The procedure in Prob C §9103 cannot be used to gain allowance or approval of a claim otherwise barred by CCP §366.2. Prob C §9103(f). If the application to file the late claim is filed within 1 year of the decedent's death, however, the 1-year statute of limitations in CCP §366.2 is tolled until the claim is allowed, approved, or rejected. If the claim is allowed or approved in whole or part, the statute is further tolled during the administration of the estate as to the part allowed or approved. Prob C §9352; CCP §366.2(b)(2).

If the trustee initiates the discretionary claims procedure under Prob C §§19000-19403, time limits similar to those applicable to claims against the estate apply to claims against the trust of a deceased settlor. See Prob C §§19100, 19255. For a detailed discussion of these time requirements in connection with creditor claims, see §§22.49-22.52.

NOTE: Creditor claims against an estate are cut off 4 months after letters are issued, if notice of administration was given to creditors at least 60 days earlier. The 4-month period of limitations for filing a claim against a trust begins to run only after publication notice is given to creditors.

Actions against the decedent generally must be commenced within 1 year after the date of death, unless the period is tolled or extended by a holiday, by the creditor claims procedures or by a safe harbor petition under former Prob C §§21320-21322, applicable to instruments that became irrevocable before January 1, 2001 (see §5.12l). CCP §366.2. However, an action to enforce a claim that arises from a promise or agreement with a decedent to distribution from an estate or trust must be commenced within 1 year of death unless tolled or extended by a holiday or safe harbor petition; the period is not tolled by the creditor claims procedures, even if the claim is asserted in the form of a demand for payment of money as damages for breach. CCP §366.3. *Stewart v Seward* (2007) 148 CA4th 1513, 1521, 56 CR3d 651 (applicable statute of limitations is determined by nature of claim, not nature of the relief or remedy being requested).

For discussion of how this limitation period affects particular actions, see §§19.5 (ownership disputes) and 15.31 (survival actions).

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§5.19 4. Distribution and Ownership Actions

Sometimes a form of action other than a creditor claim is available to obtain the same or similar relief, thereby avoiding the relatively short time bars involved with creditor claims. For example, petitions for conveyance of property under Prob C §850 (see chap 19) or to determine entitlement to distribution under Prob C §11700 (see chap 18) and claims to enforce marital rights under Prob C §13650 may be filed any time before final distribution (but within the applicable limitations period). These proceedings are available to assert ownership of property held either in the decedent's estate or in a trust that includes the decedent's share of property of a revocable trust.

Such proceedings against the estate must be brought before the order for final distribution because this order "binds and is conclusive as to the rights of all interested persons." Prob C §11605. After distribution, or if the property was held in trust, regular civil actions may in appropriate cases be brought against distributees or against a successor trust.

Because these proceedings are "actions" for statute of limitations purposes, however, they also must be brought within the limitations period, if any, applicable to the underlying claim of ownership. *Parker v Walker* (1992) 5 CA4th 1173, 1186, 6 CR2d 908. For example, in *Estate of Brenzikofer* (1996) 49 CA4th 1461, 57 CR2d 401, the court held that a petition under former Prob C §9860 (now see Prob C §850) for quasi-specific performance by declaration of a constructive trust on real property, based on the decedent's breach of an oral contract to make a will, could be filed within a 4-year statute of limitations. If the decedent died on or after January 1, 2001, claims for breach of a promise for distribution from an estate or trust or under other instrument must be commenced within 1 year. CCP §366.3. For detailed discussion of actions outside the creditor claims statute, see §§15.37-15.39.

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§5.20 5. Breach of Trust Litigation

An action for breach of trust must be commenced within 3 years of an interim or final account in writing or other written report that adequately discloses the existence of the claim, or, if no writing adequately discloses the claim's existence, within 3 years after the beneficiary discovered, or reasonably should have discovered, the subject of the claim. Prob C §16460. For detailed discussion of this statute of limitations, see §§21.56-21.58.

A beneficiary seeking to contest the actions of a trustee, either through a petition or a challenge to the trustee's accounting, must raise his or her claims before or at the hearing. Otherwise the claims may be foreclosed by res judicata or collateral estoppel. The courts may grant relief from a judgment on a petition or accounting, however, when the trustee has breached his or her fiduciary duty through extrinsic fraud. *Estate of Sanders* (1985) 40 C3d 607, 221 CR 432. See §21.62.

If a deadline has passed, there may be some basis for obtaining relief when the proponent of the action has failed to provide appropriate notice. The notice requirements of the Probate Code generally are jurisdictional, so failure to comply with the statutory requirements may render the resulting proceedings void. *Estate of Jenanyan* (1982) 31 C3d 703, 183 CR 525.

On the relief available for extrinsic fraud in accountings by trustees or personal representatives, see chap 13. On breach of a trustee's fiduciary duties, see chap 21.

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§5.21 6. Time to Respond to Probate and Trust Petitions

The time for hearing probate and trust petitions may be quite flexible. Probate and trust matters often are set on uncontested calendars, on the assumption that contested testimony or evidence will not be taken. Therefore, a timely objection may be all that is required to move the matter to a later date. If objections are filed sufficiently far in advance of the hearing date, the hearing may be continued as a matter of court procedure to a contested calendar. If the hearing is not continued, the attorney should make sure that objections are on file in any event, and that he or she appears at the hearing to ask for a continuance to gather facts and evaluate the matter with the client. If the attorney fails to take these steps, the court may pregrant the matter. If the court grants a continuance to allow a written response or objection to be made and the response or objection is not timely filed and served, the court may deem it waived. Cal Rules of Ct 7.801.

Counsel should examine the local probate rules to see if matters involving testimony must be specially set. Filing a request for special setting may allow the proceeding to be set for an afternoon calendar of the probate judge or commissioner or sent out to the presiding judge for assignment, depending on the length of the matter and local practice.

On hearings in probate matters, discovery, and law and motion procedures, see chap 10.

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§5.21A 7. Time to Object to Account or Report

A provision in the trust instrument may release a trustee from liability for all adequately disclosed items in an account or report if—after proper notice has been given—the beneficiary fails to object to the documents within a specified time period that may not be less than 180 days. Prob C §16461(c) (effective for accounts or reports submitted on or after January 1, 2005). If the trust instrument creates an ineffective objection period, *i.e.,* less than 180 days, the trustee may still elect to be governed by Prob C §16461(c), and "180 days" will be substituted for the ineffective period. Prob C §16461(d).

An exculpatory clause is not effective, however, to release the trustee from liability when the trustee breached the trust intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary. Prob C §16461(b), (e), (i). See §5.32. The provision probably is effective, however, in relieving a trustee of liability for negligent breaches of trust, except liability for profit that the trustee derives from the breach. See Prob C §16461(b).

Compliance with Prob C §16461(c) excuses failure to comply with Prob C §16063(a)(6), which otherwise requires notice to beneficiaries of the applicable 3-year statute of limitation period on receipt of an account or report. Prob C §16461(h). On 3-year statute of limitation, see §21.56.

For discussion of other requirements the exculpatory trust clause must satisfy, see discussion in §13.5A.

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B. Statute of Frauds and Other Writing Requirements

§5.22 1. Contracts to Make Wills

In some cases, the statute of frauds may be an obstacle to litigation. If made on or after January 1, 2001, contracts to make a will, not to revoke a will, or to die intestate can be established by a writing or by clear and convincing evidence of an agreement or a promise between the decedent and the claimant, or between the decedent and another person for the benefit of the claimant, that is enforceable in equity. Prob C §21700. The execution of joint or mutual wills does not create a presumption of a contract not to revoke the will or wills. Prob C §21700(c). Contracts made before January 1, 2001, are to be construed under former Prob C §150 (post-1984 wills) or former CC §1624 (pre-1985 wills). See Prob C §21700(c).

An oral agreement may also be enforceable under the doctrine of equitable estoppel when the plaintiff, in reliance on the promise, so changes his or her position that unconscionable injury would result if the contract were not enforced. For cases applying equitable estoppel, decided under former law, when a writing was statutorily required, see *Estate of Housley* (1997) 56 CA4th 342, 65 CR2d 628 (post-1984 wills); *Estate of Watson* (1986) 177 CA3d 569, 223 CR 14 (pre-1985 wills).

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§5.23 2. Spousal Property Transmutation Agreements

A potential obstacle to litigation by the surviving spouse is the possible existence of a marital property agreement. Similarly, the absence of a marital property agreement, when required, may also present an obstacle to litigation. Spouses may have a clear understanding of how they wish to characterize their property, but, if not properly documented, their understanding may be unenforceable if it differs from statutory presumptions about the character of marital property. See Fam C §§760-803.

Agreements to transmute marital property generally are not valid unless made in writing by an express declaration made, joined in, consented to, or accepted by the spouse whose interest is adversely affected. Fam C §852(a). A writing is not an "express declaration" unless "it contains language which expressly states that the characterization or ownership of the property is being changed." *Estate of MacDonald* (1990) 51 C3d 262, 272, 272 CR 153. See §18.45 for examples of writings held to satisfy, or not satisfy, this requirement.

The doctrine of equitable estoppel cannot be used to make extrinsic evidence admissible in circumvention of Fam C §852(a). *Marriage of Campbell* (1999) 74 CA4th 1058, 88 CR2d 580. Moreover, the part-performance exception that may apply under the more general statute of frauds cannot be used to satisfy the Fam C §852 writing requirement. *Marriage of Benson* (2005) 36 C4th 1096, 32 CR3d 471.

Section 852 does not apply, however, to agreements made before January 1, 1985. *Estate of Blair* (1988) 199 CA3d 161, 167, 244 CR 627. Before January 1, 1985, the form of title presumption could be rebutted by showing that the character of the property had been changed by oral or written "agreement or common understanding between the spouses." *Estate of Levine* (1981) 125 CA3d 701, 705, 178 CR 275. For further discussion of spousal transmutations, see §18.45.

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§5.24 3. Spousal Waivers

Another potential obstacle to litigation by the spouse is the possible existence of a waiver. Similarly, the absence of a written waiver, when required, may also present an obstacle to litigation. Any waiver of the numerous spousal rights set forth in Prob C §141(a) must be in writing and signed by the surviving spouse. Prob C §142(a). These rights include the right to inherit under a will of the spouse that was executed before the waiver and the right to be appointed personal representative of the decedent's estate. Even a signed waiver generally is not enforceable unless (a) a fair and reasonable disclosure of the decedent's property or financial obligations was provided to the surviving spouse, or (b) the spouse was represented by independent legal counsel. Prob C §143.

The waiver nevertheless may be enforced if the court determines that the waiver at the time of signing made a fair and reasonable disposition of the rights of the surviving spouse, that the spouse had or reasonably should have had an adequate knowledge of the decedent's property, and that the decedent did not violate the fiduciary duty imposed by Fam C §721(b), although the court may refuse to enforce the waiver if it finds that enforcement of the waiver would be unconscionable under the circumstances. Prob C §144. These waiver provisions do not apply, however, to agreements made before January 1, 1985. Prob C §147.

A prenuptial waiver that meets the requirements of Prob C §§140-147 is a valid waiver of spousal inheritance rights for purposes of Prob C §21611(c), even if it fails to meet the requirements of Fam C §1615, which governs prenuptial agreements in general. *Estate of Will* (2009) 170 CA4th 902, 88 CR3d 502.

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C. Evidentiary Issues

§5.25 1. Attorney-Client Privilege

Estate and trust litigation often involves the effect of instruments that were drafted by attorneys in consultation with a now-deceased client or the acts of fiduciaries who are advised by attorneys in their official conduct. For this reason, the attorney-client privilege is a potential obstacle to both types of litigation. As a practical matter, however, the privilege is a much greater problem for the latter type of litigation.

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§5.26 a. Privilege of Decedent Client

The attorney-client privilege generally is not an obstacle to trust and estate litigation involving the intent of the decedent concerning disposition of the decedent's property or the validity of an instrument executed by the decedent. Under these circumstances, the attorney-client privilege does not apply to communications between the now-deceased client and the attorney who drafted the instrument. Evid C §§960-961.

There also is no privilege concerning communications relevant to an issue between parties all of whom claim through the decedent. Evid C §957. Additionally, in a more narrow exception, the attorney-client privilege does not apply "to a communication relevant to an issue concerning the intention or competence of a client executing an attested document of which the lawyer is an attesting witness or concerning the execution or attestation of such a document." Evid C §959.

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§5.27 b. Privilege of Trustee or Personal Representative

The attorney-client privilege is of far greater concern in trust and estate litigation involving the conduct of the current or former trustee or personal representative. Whether the attorney-client privilege applies to a particular communication depends on the subject of the communication and on who has the power to assert the privilege.

In *Moeller v Superior Court* (1997) 16 C4th 1124, 69 CR2d 317, the supreme court held that the attorney-client privilege could not be asserted by a former trustee against a successor trustee "with respect to confidential communications between a predecessor trustee and an attorney on matters of trust administration." 16 C4th at 1131. The predecessor trustee retains the privilege if it seeks legal advice in its personal capacity out of concern for possible future charges of breach of fiduciary duty by hiring a separate lawyer paid for out of its personal funds. 16 C4th at 1134. In contrast, trust beneficiaries generally do not have a right to obtain disclosure of trustee attorney-client communications, even about trust administration. *Wells Fargo Bank v Superior Court* (2000) 22 C4th 201, 91 CR2d 716. For a more complete discussion of the trustee's attorney-client privileges, see §21.50A.

The successor personal representative becomes the holder of the attorney-client privilege for those confidential communications that occurred when the predecessor, in his or her fiduciary capacity, sought the attorney's advice for guidance in routine estate administration. See *Borissoff v Taylor & Faust* (2004) 33 C4th 523, 529, 15 CR3d 735, citing *Moeller v Superior Court* (1997) 16 C4th 1124, 1133, 69 CR2d 317. For further discussion of the attorney-client privilege, see §10.76.

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§5.28 2. Availability of Witnesses

Witnesses in estate and trust litigation sometimes become unavailable for a number of reasons. A critical problem is a potential witness who may become incapacitated or die before trial. Counsel are advised in such a situation to immediately schedule a deposition (counsel should also consider videotaping the deposition) to preserve the testimony of the witness for trial. Deposition transcripts of unavailable witnesses generally may be used at trial. CCP §2025.620; Evid C §§1290-1292.

Another witness problem presents itself when the witness is "geographically unavailable." Estate and trust litigation commenced in California often involves out-of-state witnesses. It is necessary that these witnesses be deposed, either in their own state under their own state's discovery laws (see CCP §2026.010), or that arrangements be made for the deponent voluntarily to come to California. Because of the logistics of an out-of-state deposition, early scheduling of the deposition is recommended.

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§5.29 3. Voluminous Documents

Estate and trust litigation often involves voluminous documents. It is particularly helpful to cooperate with opposing counsel at the outset of a voluminous document case to plan exhibit numbers and preparation of exhibit books.

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§5.30 4. Evidentiary Problems With Audiotapes and Videotapes

It is often suggested that an elderly or mentally deteriorating settlor or testator be videotaped to preserve the integrity of an estate plan at a later date from potential claims of, *e.g.,* undue influence, incapacity, or improper execution. See §§2.16-2.17. It is the author's opinion that an audio recording or videotape of a mentally deteriorating settlor or testator at or near the time of the signing of the estate planning documents is often more detrimental than helpful in defending the estate plan.

PRACTICE TIP: If a recording or videotape is made, the estate and trust litigator will find it is much more credible if: (a) the recording or videotaping was performed by a professionally qualified person; (b) the circumstances of the preparation of the recording or taping also were recorded; and (c) a professional psychiatrist or other mental professional was concurrently retained to make a determination on mental capacity and to negate claims of undue influence.

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IV. SUBSTANTIVE BARRIERS TO ACTION

§5.31 A. Fiduciary Protections

Parties contemplating suits against trustees and personal representatives need to consider the protections that such fiduciaries sometimes enjoy. These protections are discussed in §§5.32-5.35.

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§5.32 1. Exculpatory Provisions

Settlors choose fiduciaries they trust. Frequently they try to protect their trustee by including exculpatory provisions in their trust instruments. Such provisions are valid, although they are not effective to relieve the trustee of liability "(1) for breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary, or (2) for any profit that the trustee derives from a breach of trust." Prob C §16461(b). Exculpatory provisions are strictly construed. *Estate of Collins* (1977) 72 CA3d 663, 673, 139 CR 644; Restatement (Second) of Trusts §222 (1959).

For discussion of exculpatory provision in trust instrument regarding adequately disclosed item in account or report (Prob C §16461(c)-(j)), see §13.5A. For time to object to trust accounts or reports, see §5.21A. For detailed discussion of exculpatory provisions, see §21.53.

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§5.33 2. Limited Review of Discretionary Decisions

Many trust decisions are committed to the sound discretion of the trustee. When discretion is conferred on the trustee, the court will not substitute its judgment for the trustee's and must find some abuse of discretion or bad faith before it will interfere. Prob C §16080; *Estate of Genung* (1958) 161 CA2d 507, 512, 326 P2d 861. When the trustee is granted "absolute," "sole," or "uncontrolled" discretion, the court will review an exercise of discretion for bad faith or disregard of the purposes of the trust. Prob C §16081. The beneficiary bears the burden of establishing abuse of discretion. *Estate of Marre* (1941) 18 C2d 184, 190, 114 P2d 586; *Estate of Ferrall* (1949) 92 CA2d 712, 716, 207 P2d 1077. For detailed discussion of the limited scope of the court's review of discretionary decisions, see §§21.40-21.46.

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§5.34 3. Personal Representative Taking Property in Good Faith

A personal representative who in good faith takes possession of property of a third person, reasonably believing the property is part of the estate, is not criminally or civilly liable for taking the property. Prob C §9651. A personal representative who in bad faith wrongfully takes, conceals, or disposes of property of the estate, however, is liable to the estate for twice the value of the property recovered in a proceeding under Prob C §§850-859. Prob C §859.

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§5.35 4. Court May Excuse Breach of Fiduciary Duty

Even when a breach of fiduciary duty is shown, if the fiduciary acted reasonably and in good faith under the circumstances, the court may, in furtherance of equity, excuse the fiduciary from liability. Prob C §§9601(b) (estates), 16440(b) (trusts). Technical breaches of fiduciary duty may not result in any recovery.

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§5.36 B. Arbitration Provisions

Estate plans may contain binding arbitration clauses. A binding arbitration clause in a trust or will may be made enforceable by, among other things, a no-contest clause providing for a forfeiture of a gift if the beneficiary refuses to arbitrate. If the trust or will contains a mandatory arbitration clause, the prospective litigant may find that the litigation will proceed by arbitration rather than through the usual court procedure. The primary benefit of such arbitration is potential early closure on the case. An additional benefit may be reduced costs.

Any practitioner confronted with a binding arbitration clause in an estate planning document should review the enforceability of the clause under CCP §§1281-1281.95. If arbitration cannot be avoided, counsel must make the best of the arbitration. Arbitration awards can be vacated and are appealable, but the grounds are extremely limited. See CCP §§1286.2, 1294.

PRACTICE TIP: Often, an arbitration clause directs arbitration under the rules of a particular arbitration service, *e.g.,* JAMS/ENDISPUTE, AAA. The litigator should refer to the rules of the particular arbitration entity. The practitioner will usually find the arbitration procedure much more restrictive concerning limits on discovery, lack of ability to order provisional remedies, and damages. Arbitrators are often not required to strictly follow rules of evidence and procedure. No hearing record is made unless specifically requested.

For further discussion of arbitration procedures, see chap 11; California Civil Procedure Before Trial §§45.22-45.52 (4th ed Cal CEB 2004).

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§5.37 C. ERISA Preemption

More and more wealth is concentrated in retirement plans. Frequently, retirement accounts now constitute the largest part of a decedent's estate. Most retirement plans are governed by the Employee Retirement Income Security Act of 1974 (ERISA) (29 USC §§1001-1461), previously the exclusive territory of employee benefits specialists. Although it still pays to consult an ERISA specialist when complex issues are presented, given the proliferation of retirement plans, every probate litigator must be familiar with ERISA in general and the potential obstacles it presents. For the probate litigator, chief among these obstacles is preemption.

A state law is preempted if it relates to an ERISA plan. 29 USC §1144(a); *Egelhoff v Egelhoff* (2001) 532 US 141, 149 L Ed 2d 264, 121 S Ct 1322. A state law that conflicts with the provisions of a federal law or operates to frustrate its objectives is likewise preempted. *Boggs v Boggs* (1997) 520 US 833, 138 L Ed 2d 45, 55, 117 S Ct 1754. These deceptively simple statements have proven fertile ground for dispute.

Except for preemption, the spouse of a participant in a qualified pension plan would have a community property interest in the plan, which presumably could be devised in the event that the nonparticipant spouse predeceases the participant spouse. See, *e.g., Marriage of Shelstead* (1998) 66 CA4th 893, 898, 78 CR2d 365; *Marriage of Powers* (1990) 218 CA3d 626, 645, 267 CR 350. However, the United States Supreme Court has held that ERISA preempts any community property law that might allow a predeceased nonparticipant spouse to transfer an interest in undistributed pension plan benefits by testamentary instrument. *Boggs v Boggs, supra*. The Supreme Court has also held that ERISA preempts a state law that automatically revoked upon divorce all pre-divorce beneficiary designations in favor of the former spouse. *Egelhoff v Egelhoff* (2001) 532 US 141, 149 L Ed 2d 264, 121 S Ct 1322. The broad rationale of *Egelhoff* could result in the preemption of almost any state law that would require a plan administrator to pay benefits to beneficiaries other than those identified in the plan documents.

ERISA generally provides that a qualified plan must prohibit the assignment or alienation of benefits. Although an exception is provided for Qualified Domestic Relations Orders (QDROs), probate orders generally do not qualify as QDROs, and domestic relations orders that may provide for payment of benefits to someone other than a participant, designated beneficiary of a participant, or alternate payee within the meaning of ERISA (*i.e.*, spouse, former spouse, child, or other dependent of a participant) are not QDROs. 29 USC §1056(d). See, *e.g., Ablamis v Roper* (9th Cir 1991) 937 F2d 1450, 1456 (death of spouse divests her of title of "spouse or other dependent" and makes her an unqualified recipient under ERISA); *Marriage of Shelstead* (1998) 66 CA4th 893, 902, 78 CR2d 365 (nonparticipant spouse who is first to die has no power to transfer qualified plan community property interest to third person). The Ninth Circuit held that a deceased former spouse is not an alternate payee within the meaning of ERISA because the QDRO no longer relates to "marital property rights to a spouse [or] former spouse." *Branco v UCFW—N. Cal. Employers Joint Pension Plan* (9th Cir 2002) 279 F3d 1154. Therefore, a nonparticipant spouse or former spouse cannot devise his or her community interest in a qualified plan. Apparently, the interest of the transferee terminates on the transferee's death.

Even without ERISA preemption, similar antialienation provisions in pension plans of the University of California, the Public Employees' Retirement System, and the State Teachers' Retirement System prevent a nonparticipant spouse from devising a community property interest in the plan, absent a QDRO. *Regents of Univ. of Cal. v Benford* (2005) 128 CA4th 867, 27 CR3d 441.

A predeceased *participant* spouse likewise generally cannot transfer an interest in qualified pension plan benefits by testamentary instrument. ERISA provides that, if a married participant dies before retirement, the benefit must be paid to the surviving spouse in the form of a qualified preretirement survivor annuity (QPSA), unless a written waiver was signed by the spouse. 29 USC §1055(a)(2), (c)(2). Similarly, ERISA provides that, if a married participant retires before death, the benefit must be paid in the form of a qualified joint and survivor annuity (QJSA) (an annuity paid during the lifetime of the participant and continuing to the survivor after death), unless both spouses waive the QJSA. 29 USC §1055(a)(1), (c)(2). The interest of the participant spouse therefore terminates at death in favor of the surviving spouse.

NOTE: Current California law provides that a nonemployee spouse has a divisible community property interest in an employee spouse's IRA, even if the funds were rolled over from a qualified pension plan. *Estate of MacDonald*

(1990) 51 C3d 262, 272 CR 153. Whether this community property interest is preempted by federal law in the wake of *Boggs* was expressly left to be decided. See *Boggs v Boggs* (1997) 520 US 833, 138 L Ed 2d 45, 57, 117 S Ct 1754.

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V. PRACTICAL PROBLEMS

§5.38 A. Shifting of Defense Costs

The payment or deduction of attorney fees and defense costs by the estate or trust is an obstacle to litigation by claimants and beneficiaries who must front their own fees and costs. Not all defense costs may be paid or deducted by the estate or trust, however, and in some cases the attorney fees and costs of beneficiaries in litigation challenging the conduct of the trustee may be paid by the trust.

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§5.39 1. Payment of Defense Costs by Estate or Trust

Attorney fees and defense costs (and extraordinary commissions of a personal representative) incurred by the prospective fiduciary in a will contest filed before the will is admitted to probate will be reimbursed by the probate estate only if the defense benefited the estate. After the will is admitted to probate, however, the defense need only be maintained "in good faith." See §17.19.

To determine whether the trustee is authorized to pay attorney fees and expenses to defend litigation, counsel should review the trust instrument. A common provision in trust instruments is that the trustee is authorized (and often obligated) to defend the trust against all litigation and to pay the reasonable attorney fees and costs from trust assets. When the trustee has incurred attorney fees in a successful defense of his or her conduct as trustee, reasonable attorney fees can be awarded if the litigation benefited the trust. *Estate of Beach* (1975) 15 C3d 623, 644, 125 CR 570.

When the trustee is found to have acted improperly, the court will generally deny the trustee compensation for attorney fees. *Estate of Miller* (1968) 259 CA2d 536, 548, 66 CR 756. When the trustee successfully defends some, but not all, of the claims made against the trustee, the court may award the trustee fees for a portion of the legal costs and expenses. *Estate of Cassity* (1980) 106 CA3d 569, 165 CR 88; Restatement (Second) of Trusts §243 (1959).

All attorney fees were denied, however, when the trial court found an intentional breach of trust arising from the trustee's threat to burden the objecting beneficiaries with the full expense of an audit in order to intimidate them into dropping their objections. *Estate of Gump* (1991) 1 CA4th 582, 604, 2 CR2d 269.

When the beneficiary is successful in challenging the conduct of the trustee, the reasonable attorney fees of the beneficiary may be paid from the trust if the litigation brought by the beneficiary resulted in a benefit to the trust or vindicated the intent of the settlor. *Wells Fargo Bank v Marshall* (1993) 20 CA4th 447, 458, 24 CR2d 507; *Churchill v Peters* (1943) 57 CA2d 521, 531, 134 P2d 841. Attorney fees were denied in *Estate of Gump* (1982) 128 CA3d 111, 118, 180 CR 219, however, when five of six beneficiaries successfully had the trustee's fees reduced for negligence because the increased assets did not "substantially benefit any parties other than the litigators." For a detailed discussion of attorney fees in breach of trust cases, see §§21.72-21.78.

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§5.40 2. Deductibility of Attorney Fees and Costs

Attorney fees and costs incurred by the trustee or personal representative generally may be deducted from income of the trust or estate as expenses for the management and conservation of property under IRC §212(2) or deducted from the value of the estate as expenses of administration under IRC §2053(a). At least one court has allowed an estate to deduct attorney fees paid for the unsuccessful but good faith defense by a named executor of a later will not admitted to probate. See *Kessler v U.S.* (ND Cal 2008) 2008-1 USTC ¶60,559, 101 AFTR2d 1409.

In some cases, attorney fees in estate and trust litigation may be deductible as expenses in connection with a trade or business under IRC §162. Attorney fees and costs for tax advice or tax litigation also may be deductible as expenses in connection with the determination of tax under IRC §212(3). Expenses allowed as an estate tax deduction, however, cannot also be taken as an income tax deduction. IRC §642(g).

In estate and trust litigation, characterizing attorney fees and costs as an estate tax deduction usually results in greater savings. If no estate tax is payable by the decedent's estate, or for some reason the income tax rate is higher than the estate tax rate (usually not the case), taking attorney fees as an income tax deduction should be considered.

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§5.41 a. Limitations on Deductibility of Fees and Costs

Under IRC §2053(a), the personal representative or trustee may deduct attorney fees and costs as administrative expenses, with certain limitations. Deductible attorney fees are limited to such expenses as are actually and necessarily incurred in the administration of an estate and to fees actually paid or reasonably expected to be paid. Reg §20.2053-3(c)(1). Actual and necessary expense items in the administration of an estate are (Treas Reg §20.2053-3(a)):

- The collection of assets;
- Payment of debts; and
- Distribution of property to those entitled to it.

No deduction of attorney fees as administrative expenses may be taken on the basis of a "vague or uncertain estimate." The deduction can be taken on the estate tax return, however, even though the exact amount of attorney fees for litigation is not known, provided that the amount is ascertainable with reasonable certainty and will be paid. Reg §20.2053-1(d)(4). If the actual amount of attorney fees cannot be ascertained at time of final audit but is later ascertained, the estate or trust can make a claim for refund.

A test concerning contingent attorney fees is whether the contingent fee agreement was executed at arm's length. An additional test concerning contingent attorney fees may be whether such a fee was "reasonable remuneration" to the attorney. If an attorney enters into a contingent fee contract with an executor or trustee and spends very few billable hours to obtain a very large settlement, will the attorney fees be an allowable estate tax deduction?

The decision of a local court concerning the amount and allowability of payment from an estate or trust under local law will ordinarily be accepted as "actual, necessary and reasonable" if the court passes on the facts on which the deductibility depends. The court must actually pass on the merits of the claim. In an active and genuine contest, this will be presumed. Reg §20.2053-1(b)(3). If attorney fees claimed as a deduction were not "awarded" by the court, however, the fees must not exceed a "reasonable remuneration for the services rendered." Reg §20.2053-3(c)(1).

PRACTICE TIP: Counsel must obtain court approval before attorney fees are paid by the executor. See Prob C §10811; Cal Rules of Ct 7.703(d). When negotiating a contingent fee agreement, counsel should send the prospective client to "independent counsel" before entering into the agreement, and then obtain a court finding that the contingent fee contract was reasonable. The court, seeing a review by independent counsel of the client before execution, is much more likely to make a finding of "reasonableness" concerning large contingent attorney fees.

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§5.42 b. Deductibility of Beneficiary's Fees and Costs

Expenses incurred by a beneficiary in estate or trust litigation usually are not deductible from the gross estate, because they are incurred by the beneficiary personally and are not necessary for settlement of the estate. Reg §20.2053-3(c)(3); *Estate of Leo J. Dutcher* (1960) 34 TC 918. See, *e.g., Estate of William A. Landers, Sr.* (1962) 38 TC 828, 840 (attorney fees incurred by widow to obtain family allowance are not administrative expense).

Attorney fees incurred on a petition to determine entitlement to distribution from an estate (Prob C §11700) or trust (Prob C §17200) may be deductible, however, if paid by the executor or trustee and necessary for settlement of the estate or trust. See, *e.g., Estate of Peter W. Reilly* (1981) 76 TC 369, acq 1981-2 Cum Bull 2 (attorney fees incurred by widow for claims against husband's estate and paid by estate in settlement are deductible as administrative expense).

Attorney fees and costs incurred by a beneficiary might also be deductible if the beneficiary recovers them from the estate or trust under a valid legal theory such as the common fund doctrine (*i.e.*, litigation serves to preserve or increase estate assets) and the expenses otherwise satisfy the regulations that would apply to personal representatives and trustees. *Kessler v U.S.* (Bankr ND Cal 2007) 100 AFTR2d 5423.

Payment of the claimant's attorney fees may be demanded or offered as part of a settlement agreement, and the potential deductibility of fees may provide an incentive for settlement of litigation by the executor or trustee. If the settlement is approved by the court and the adverse interests to the claimant have all joined in, deduction of attorney fees as an administrative expense for federal estate tax purposes probably will not be challenged unless it is at variance with state law. See Treas Reg §20.2053-1(b)(2).

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§5.43 B. Award of Fees for "Unreasonable" Litigation

In some cases, attorney fees and costs may be awarded to the executor or trustee. Not all fees and costs may be awarded to the executor or trustee, however, and in some cases attorney fees and costs may be awarded to the claimant or beneficiary.

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§5.44 1. Contests of Accounts

In a contest of accounts, the court may award attorney fees and costs incurred to defend the account or contest the account if the court determines that the contest or opposition to the contest was in bad faith and without probable cause. See Prob C §§11003 (estates), 17211 (trusts).

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§5.45 2. Creditor Claims

In an action concerning creditor claims against an estate or trust, litigation expenses, including attorney fees, may be awarded to the prevailing party if the court determines that the prosecution or defense of the action was unreasonable. See Prob C §§9354(c) (estates), 19255(e) (trusts).

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§5.46 C. Complexity of Challenges to Accountings

Challenging accountings in estate and trust litigation often involves special considerations. The practitioner should be aware that it may be necessary to present voluminous documents and many figures to the trier of fact, and should consider carefully whether the costs and benefits of making the objections make the case worth pursuing.

Assuming that the practitioner determines that the objections should be made, the objections should be stated in a pleading entitled "Objections to Accounting" in which each objection is stated separately. Each objection should specifically refer to the section of the accounting that is being objected to. The reason should be stated for the objection, and the dollar amount of the objection should be stated if applicable. See §13.52 for sample pleading.

The objections should be stated in two categories: (1) objections concerning the "presentation" of the accounting, *i.e.,* whether the accounting conforms to present accounting rules (see Prob C §§1060-1064), and (2) "surcharge" objections. The surcharge objections should state the actual dollar value request for surcharge.

At the outset, when preparing the objections to the accounting, the practitioner should be aware that at hearing or trial on the objections the "presentation" objections should be first presented to the trier of fact to correct the errors in the "presentation" of the accounting. Then, having made the corrections in the accounting, the trier of fact should present evidence on the surcharge claims.

PRACTICE TIP: With busy trial calendars, trial courts often do not have time to hear a long and convoluted "accounting objection" case. The practitioner presenting objections to accountings should consider the advisability of requesting that the matter be heard by reference. The probate court has authority to refer an "accounting objection case" to a referee under CCP §639(a)(2) and Prob C §11002.

When the court orders the reference to take place, it can often be stipulated between counsel that the matter will be referred to a referee who has knowledge of estate and trust litigation and can move quickly through the accounting objections. By using the reference procedure, a practitioner often can make an "accounting objection" case cost effective that would be ineffective if heard in court.

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§5.47 D. Retaliatory Malicious Prosecution Actions

The practitioner contemplating estate or trust litigation on behalf of his or her client should evaluate the potential for a retaliatory "malicious prosecution action" against the client in the event that the elements for the tort of malicious prosecution are present in the case. The essential elements of the tort of malicious prosecution are the following (*Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 871, 254 CR 336):

- The prior action was commenced by or at the direction of the present defendant and terminated in the present plaintiff's favor (in estate and trust proceedings the prior action may have been commenced by a petitioner and terminated in favor of a respondent).
- The prior action was initiated with malice.
- The prior action was brought without probable cause.

The practitioner considering a potentially frivolous or improper action should review the foregoing malicious prosecution elements before proceeding. The attorney also may be a defendant in the malicious prosecution action. See *Crowley v Katleman* (1994) 8 C4th 666, 674, 34 CR2d 386. Additionally, the practitioner should bear in mind when pleading several causes of action that a malicious prosecution action can lie on any cause of action not successfully litigated in favor of the party commencing the action. *Crowley v Katleman, supra*. The practitioner also is confronted with a situation in which there often are very short periods in which to gather facts to determine whether or not to commence an action, *e.g.,* a will contest before admission of the will. See §17.18.

For a time, *Crowley v Katleman* had an unsettling effect on estate and trust litigators. However, the environment has now somewhat stabilized. The practitioner should be fairly confident that, if causes of action are pleaded and promptly dropped when it is determined that there is not a factual ground to proceed, a malicious prosecution tort will not lie. The fact that the tort may not lie, however, may not in and of itself preclude the filing of a malicious prosecution action at termination of the litigant's case.

PRACTICE TIP: The attorney should advise the client in writing before commencing an action concerning a case that appears to have little evidence to support factual issues. Certainly, potentially frivolous or disfavored actions should receive much more scrutiny at the outset of the case concerning the possibility of a malicious prosecution action.

The actual threat of a successful recovery in malicious prosecution actions in estate and trust litigation has been diminished by the concept of "narrow application" found in *Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 873, 254 CR 336, and the grant of summary judgment in *Hufstedler, Kaus & Ettinger v Superior Court* (1996) 42 CA4th 55, 49 CR2d 551. The court in *Hufstedler* stated that the reasonable attorney standard used to determine frivolous appeals should be applied to the question of "probable cause" to "avoid a serious chilling effect on the assertion of litigants' rights" and that "[c]ounsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely they will win." 42 CA4th at 66, quoting *Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 885, 254 CR 336.

The author recommends that the practitioner move ahead with the client's potential causes of action as expeditiously as possible, with the understanding of the malicious prosecution problem and advice to the client concerning potential exposure to malicious prosecution in appropriate cases. In the author's opinion, in light of *Sheldon Appel* and *Hufstedler,* the threat of a viable malicious prosecution action, a frequent defense counsel tactic in estate and trust litigation, is currently much exaggerated.

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E. Nonlegal Retaliatory Actions

§5.48 1. Generally

Litigation breeds hostility. With the possible exception of divorce actions, nowhere is this more true than in estate and trust litigation. Unlike divorces, however, parties to trust and estate litigation often cannot simply walk away from one another when the litigation is over. Family and business (fiduciary/beneficiary) ties often continue. The possibility that litigation may cause trouble down the road must be considered at the outset.

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§5.49 2. Family Discord

Trust and estate litigation can destroy families. Ugly accusations about the living and the dead may be raised, and deep feelings of injustice can emerge. Wounds may never heal. The potential cost of family relationships must be considered and weighed *before* litigation begins.

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§5.50 3. Disinheritance

Children who litigate with their parents or stepparents sometimes find they have won the battle only to lose the war. Absent a binding contractual obligation, those parents or stepparents are free to disinherit whomever they may choose. The impact of litigation on expected bequests should be considered at the outset.

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§5.51 4. Hostile Fiduciaries

Trustees and personal representatives, like everyone else, can come to resent their litigation adversaries, especially if accusations of misconduct are raised. Unless the litigation results in their removal, they can continue indefinitely to wield discretionary powers. This can have a dramatic impact on the litigant's financial interests. The old advice still holds: If you shoot at the king, don't miss.

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§5.52 VI. POTENTIAL TAX CONSEQUENCES OF LITIGATION

Payments or distributions of property received in judgments and settlements in estate and trust contests may have adverse income and estate tax consequences for both the claimant or beneficiary and the estate or trust affecting the potential cost and value of the litigation for all the parties.

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§5.53 A. Income Taxation of Recoveries

In structuring a settlement, the litigator representing a beneficiary must take into account the potential taxation of recoveries when computing the settlement dollars that will be payable to the beneficiary client. Payment to the beneficiary in settlement of a will or trust contest ordinarily is not taxable income. In some cases, however, the recovery by the beneficiary may be taxable income, *e.g.,* payment of net income from the trust to a beneficiary (see *Quigley v Commissioner* (7th Cir 1944) 143 F2d 27), periodic payments (including possible receipt of imputed interest under IRC §483), and payment of income in respect of a decedent under IRC §691. For example, if retirement plan benefits are received in a judgment or settlement by someone other than a surviving spouse, the transfer may be treated as the sale or exchange of a right to receive income in respect of a decedent, with the result that the full amount of undistributed benefits may be realized as income. See Reg §1.691(a)-(4).

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§5.54 B. Deductibility of Payments and Distributions

The litigator representing both the estate or trust and all beneficiaries giving up or receiving interests in judgments or settlements also must take into account potential estate tax consequences, such as possible loss of a charitable or marital estate tax deduction or failure to receive an estate tax deduction for settlement payments.

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§5.55 1. Sham Contests

Payments made in settlement of bona fide claims against the estate or trust generally are deductible under IRC §2053(a)(3). If the payment is made to a person who is related or nonadverse to the person giving up the interest, however, the settlement may be characterized as a sham, resulting in the loss of the estate tax deduction. See, *e.g., Estate of Emanuel Trompeter,* TC Memo 1998-35, vacated on other grounds (9th Cir 2002) 279 F3d 767, in which a claimed deduction was disallowed for a setoff made in settlement of a claim against the estate by the decedent's former spouse, who was the mother of the heirs.

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§5.56 2. Nonqualified Disclaimers

The use of disclaimers is a possible technique to facilitate favorable tax treatment in connection with estate and trust litigation. Disclaimers must conform to both state and federal law. See Prob C §§260-295; IRC §2518. It is quite possible that a disclaimer may qualify under state law but not federal law. The litigation attorney should be careful that the disclaimer process is not labeled a sham. Under federal tax law, the disclaimer must be "irrevocable and unqualified" and the disclaimant must not have accepted any of the benefits of the disclaimed interest or received any "consideration" in return for executing the disclaimer. Reg §25.2518-2(a), (d). Thus, it cannot be part of a negotiated settlement.

In *Estate of Monroe v Commissioner* (5th Cir 1997) 124 F3d 699, a surviving spouse obtained disclaimers from remainder beneficiaries. Coincidentally, the surviving spouse also made gifts to the disclaimants in approximately the same amounts disclaimed. The Tax Court held that the disclaimers were essentially a sham and did not qualify under IRC §2518. Reversing the Tax Court, the court of appeals held that a disclaimant's mere expectation of a future benefit in exchange for executing a disclaimer is not "consideration" and that there was no actual consideration for most of the disclaimers. *Monroe* was litigated in the taxpayer-friendly Fifth Circuit and results may be less favorable in other jurisdictions.

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§5.57 3. Reformation of Wills and Trust Instruments to Obtain More Favorable Tax Result in Litigation

A petition for reformation of a will or trust instrument can result in tax savings. However, the person petitioning for reformation must remember that the IRS will be able to "take a second look" to make sure that the reformation conforms to local law. *Commissioner v Estate of Bosch* (1967) 387 US 456, 18 L Ed 2d 886, 87 S Ct 1776. If there is a problem with the proposed reformation, the desired tax treatment of the resulting estate or trust distribution may not be allowed.

California traditionally has had a liberal view concerning reformation of wills and trust instruments. California statute and case law allows a practitioner to introduce evidence, first to show that there is an ambiguity in language that appears unambiguous on its face, and then to introduce further extrinsic evidence to clear up the ambiguity. Prob C §6111.5; *Estate of Russell* (1968) 69 C2d 200, 70 CR 561.

A court has even broader statutory and common-law equity authority to modify or reform a trust to accomplish the purposes of the trust, provided a "peculiar" or "exceptional" circumstance makes modification necessary and there is some expression of the purpose in the trust. *Ike v Doolittle* (1998) 61 CA4th 51, 70 CR2d 887; *Moxley v Title Ins. & Trust Co.* (1946) 27 C2d 457, 165 P2d 15.

These liberal provisions facilitate reformation beneficial to all parties under a settlement agreement. However, many California courts are reluctant to allow rewriting of trust documents and wills merely to obtain favorable tax results. Therefore, reformation should be relied on as a "technique of last resort."

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6

Grounds for Setting Aside Will or Trust

James A. Barringer
Noël M. Lawrence

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§6.1 I. INTRODUCTION

This chapter discusses the substantive requirements and evidentiary rules that apply to the grounds most typically alleged to set aside all or part of a will or trust, including lack of capacity (see §§6.2-6.20), undue influence (see §§6.21-6.26), fraud (see §§6.27-6.29), duress or menace (see §6.30), mistake (see §6.31), and limitations on transfers to drafters and others (see §§6.32-6.33, chap 6A). Many of the elements of causes of action for contesting wills are identical or similar to those for contesting trusts. The statutory and case law rules for establishing lack of mental capacity in a will contest, for example, are for the most part equally applicable to trust contests. Mistake is a notable exception, however, serving as a ground for setting aside a trust but not normally useful in attacking a will.

On will contests generally, see chap 17. On attacks on trusts generally, see chap 20. On litigation tools generally for such litigation, see chap 10, and for discovery in particular, see §§10.14-10.37.

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Source: Estate Planning/California Trust and Probate Litigation/6 Grounds for Setting Aside Will or Trust/§6.2 II. LACK OF CAPACITY

§6.2 II. LACK OF CAPACITY

Will contests and attacks on trusts often involve the question of whether the testator or settlor had the requisite mental capacity at the time the instrument was executed. In most cases, the analysis of capacity to execute wills and trusts is the same. More stringent tests for capacity may apply to trusts, however, when they are irrevocable or when property is transferred to an independent trustee.

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Source: Estate Planning/California Trust and Probate Litigation/6 Grounds for Setting Aside Will or Trust/§6.3 A. Testamentary Capacity

§6.3 A. Testamentary Capacity

To make a valid will, the testator must be at least 18 years of age and of sound mind. Prob C §6100. More specifically, under Prob C §6100.5(a), a person is not mentally competent to make a will if at the time of making the will he or she either:

- Does not have sufficient mental capacity to (1) understand the nature of the testamentary act, (2) understand and recollect the nature and situation of his or her property, or (3) remember and understand his or her relations to living descendants, spouse, parents, and others whose interests are affected by the will; or
- Suffers from a mental disorder with symptoms including delusions or hallucinations that result in his or her devising property in a way that, except for the delusions or hallucinations, he or she would not have done.

A testator's beliefs may be inaccurate without being delusional. A mere unfounded belief does not justify overturning a will when there is any evidence supporting the belief. See *Estate of Shay* (1925) 196 C 355, 361, 237 P 1079; *Goodman v Zimmerman* (1994) 25 CA4th 1667, 1676, 32 CR2d 419; *Estate of Struve* (1929) 100 CA 255, 259, 279 P 846. To destroy testamentary capacity, a delusion must be one so irrational that no normal person could have it. 14 Witkin, Summary of California Law, *Wills and Probate* §124 (10th ed 2005).

NOTE: To justify setting aside a will, the alleged delusions or hallucinations must cause the testator to devise his or her property in a way that he or she would not have done in their absence. Prob C §6100.5(a)(2); *Estate of Perkins* (1925) 195 C 699, 235 P 45; *Goodman v Zimmerman* (1994) 25 CA4th 1667, 1677, 32 CR2d 419. It is not sufficient merely to establish that a testator was the victim of delusions or hallucinations.

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§6.4 B. Capacity to Create Trust

A person lacking capacity to make an ordinary transfer of property lacks capacity to create an inter vivos trust. *Walton v Bank of Cal.* (1963) 218 CA2d 527, 541, 32 CR 856; 13 Witkin, Summary of California Law, *Trusts* §25 (10th ed 2005); Restatement (Third) of Trusts §11 (2007). The test of capacity to transfer property is generally the same as for capacity to execute a will. *Tuttle v Bessey* (1955) 137 CA2d 725, 727, 290 P2d 884; *Hughes v Grandy* (1947) 78 CA2d 555, 565, 177 P2d 939. On capacity to execute a will, see §6.3.

Arguably, the test for capacity should be more stringent for irrevocable trusts, or when property is transferred to a third-party trustee, than for revocable trusts when the settlor serves as trustee. Also, a testator must understand the consequences of his or her bequests. *Estate of Lingenfelter* (1952) 38 C2d 571, 582, 241 P2d 990. That understanding may require a higher level of competence when a will (or trust) is complex. See *Estate of Ivey* (1928) 94 CA 576, 586, 271 P 559.

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§6.5 C. Presumptions and Burden of Proof

A competent testator or settlor may dispose of his or her property as he or she wishes, without regard to the desires of prospective beneficiaries or the views of anyone else, as long as the document's terms are not prohibited by law or contrary to public policy. *Estate of Markham* (1941) 46 CA2d 307, 115 P2d 866.

The testator is presumed sane and competent and the contestant has the burden of proving by a preponderance of the evidence that the testator lacked testamentary capacity at the time the will was signed. *Estate of Fritschi* (1963) 60 C2d 367, 372, 33 CR 264; *Estate of Locknane* (1962) 208 CA2d 505, 25 CR 292.

The same general presumption of competence exists with respect to the execution of trusts. *American Trust Co. v Dixon* (1938) 26 CA2d 426, 431, 78 P2d 449.

If a testator had a mental disorder but had lucid periods, there is a presumption that the will was executed during a period of lucidity. *Estate of Mann* (1986) 184 CA3d 593, 604, 229 CR 225; *Estate of Goetz* (1967) 253 CA2d 107, 114, 61 CR 181.

Once it is shown that testamentary incompetency exists and that it is caused by a mental disorder of a general and continuous nature, the inference is reasonable (and might even be a presumption) that the incompetency continued to exist at the time the instrument was signed. *Estate of Fosselman* (1957) 48 C2d 179, 308 P2d 336.

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§6.6 D. Due Process in Competence Determinations Act

The case law and standards under Prob C §6100.5 (see §6.3) are not the entirety of the law on the issue of mental capacity. The Due Process in Competence Determinations Act (Prob C §§810-813), enacted in 1995, provides a statutory framework for making determinations on competence, including a list of factors that may be dispositive in proving lack of mental capacity.

The statute is also applicable in many instances to proof of susceptibility to undue influence (see §§6.21-6.26). Often an important element of an undue influence case is proof that the testator or settlor suffered from a mental deficit that impaired his or her ability to resist undue influence.

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§6.7 1. Purpose and Applicability

In the Due Process in Competence Determinations Act, the legislature states that a person who has a mental or physical disorder may still be capable of performing a variety of actions with legal consequences. Prob C §810(a). Accordingly, the Act's purpose is to ensure that a judicial determination that a person should be deemed to lack the legal capacity to perform a specific act be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of the person's mental or physical disorder. See Prob C §810(b).

The Act applies to determinations that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, expressly including the incapacity to contract, make a conveyance, marry, make medical decisions, vote, or execute wills or trusts. See Prob C §811(a).

This legislation had its origins in efforts to set limits on competence determinations in conservatorships and other protective proceedings. There is, however, nothing in the Act that prevents its application in will and trust contests and, as noted above, it expressly applies to the actions underlying such proceedings.

The Act does not conflict with the statutory definition of testamentary incapacity under Prob C §6100.5 (see §6.3) or with case law standards for capacity to create a trust (see §6.4). The Act's section addressing what constitutes lack of capacity to make a decision expressly states that it applies "[e]xcept where otherwise provided by law, including … the statutory and decisional law of testamentary capacity." Prob C §812.

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Source: Estate Planning/California Trust and Probate Litigation/6 Grounds for Setting Aside Will or Trust/§6.8 2. What Constitutes Lack of Capacity

§6.8 2. What Constitutes Lack of Capacity

The Due Process in Competence Determinations Act provides that, except when otherwise provided by law, including the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless he or she has the ability to communicate the decision, by verbal or any other means, and to understand and appreciate, to the extent relevant (Prob C §812):

- The rights, duties, and responsibilities created by or affected by the decision;
- The probable consequences for the decisionmaker and, when appropriate, the persons affected by the decision; and
- The significant risks, benefits, and reasonable alternatives involved.

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Source: Estate Planning/California Trust and Probate Litigation/6 Grounds for Setting Aside Will or Trust/§6.9 3. Evidentiary Requirements

§6.9 3. Evidentiary Requirements

The Due Process in Competence Determinations Act requires, for a determination that a person lacks capacity to do a certain act, support by evidence of a deficit in at least one of a list of specific mental functions, grouped into the following categories (Prob C §811(a)):

- Alertness and attention;
- Information processing;
- Thought processes; and
- Ability to modulate mood and affect.

A deficit in one of the specified functions may be considered, however, only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions regarding the decision in question. Prob C §811(b). The court may take into consideration the frequency, severity, and duration of periods of impairment. Prob C §811(c). The mere diagnosis of a mental or physical disorder is not itself sufficient to support a determination that a person is of unsound mind or lacks the capacity to perform the act in question. Prob C §811(d).

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§6.10 4. Implications for Psychiatric Testimony

When prosecuting or defending a will or trust contest, it is often advisable to engage a psychiatric or psychological expert to give testimony regarding the mental capacity of the testator or trustor. Such testimony is useful on the issue of mental capacity, and also on the issue of the ability to resist undue influence (see §§6.21-6.26).

PRACTICE TIP: Counsel should ensure that the expert understands the statutory framework for determining mental capacity under Prob C §6100.5 and the Due Process in Competence Determinations Act. The expert's analysis should be focused on establishing or refuting deficits in the specific mental functions listed in the statute.

If the mental health professional did not directly examine a deceased testator or settlor, it will be necessary for the expert to conduct a retrospective evaluation. In such cases, it is essential to provide the expert with as much information as possible from the decedent's medical, personal, and business records, and from the decedent's friends, relatives, and business associates. Ideally, the expert would interview the drafter of the will or trust before forming an opinion. This is advisable because the opinion of a mental health expert who did not personally examine the decedent, which is based on inferences, can be overcome by the testimony of the estate planning attorney, which is entitled to "much weight," particularly when the drafting attorney is also a subscribing witness. *Estate of Goetz* (1967) 253 CA2d 107, 114, 61 CR 181.

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§6.11 E. Evidence Regarding Capacity

There is a large body of case law concerning presumptions, inferences, and types of evidence relevant to capacity determinations. The Due Process in Competence Determinations Act (see §§6.6-6.10) does not supplant the existing case law except to the extent that the statute sets a more rigorous framework for medical testimony.

Lack of capacity must be shown to have existed at the moment when the will or trust was executed. *Estate of Fritschi* (1963) 60 C2d 367, 33 CR 264 (will); *Walton v Bank of Cal.* (1963) 218 CA2d 527, 32 CR 856 (trust).

To prove a person's mental capacity on a given day, a party can introduce evidence of his or her capacity at times before and after that date. *Estate of Miller* (1936) 16 CA2d 154, 165, 60 P2d 498. But such evidence is important only insofar as it tends to show mental capacity at the time at issue. *Estate of Lingenfelter* (1952) 38 C2d 571, 580, 241 P2d 990; *Estate of Perkins* (1925) 195 C 699, 703, 235 P 45.

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§6.12 1. Medical and Psychiatric Testimony

Medical testimony is not conclusive on the issue of testamentary capacity. The weight of medical testimony is for the trier of fact to determine. *Estate of Martin* (1969) 270 CA2d 506, 75 CR 911. In *Estate of Wynne* (1966) 239 CA2d 369, 48 CR 656, it was noted that no principle of law compels the trial judge to reject testimony of the subscribing witnesses and of the testator's local doctor and acquaintances and to accept at its full face value the opinion of a specialist who never saw the decedent and whose testimony was given in response to a hypothetical question.

A similar result was reached in *Estate of Goetz* (1967) 253 CA2d 107, 61 CR 181, in which the opinion of a psychiatrist was not required to determine testamentary capacity. The psychiatric testimony in that case was overcome by the testimony of the estate planning attorney.

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§6.13 2. Testimony of Attorney

Although not conclusive, testimony of the attorney who drafted the will or trust is entitled to much weight, especially when he or she is a subscribing witness. *Estate of Goetz* (1967) 253 CA2d 107, 61 CR 181. In *Goetz,* the drafting attorney related a long series of relevant details that the testator had provided him to support a finding of testamentary capacity.

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§6.14 3. Testimony of Subscribing Witness

There is a presumption that the subscribing witnesses to the execution of a will had their attention drawn to and noted the testator's mental capacity. Consequently, the opinions of subscribing witnesses are given more weight than the opinions of nonsubscribing witnesses. *Estate of McDonough* (1926) 200 C 57, 251 P 916. See Evid C §870(b). The testimony of subscribing witnesses is not conclusive, however, against that of other witnesses who saw the testator within a few days after the execution of the will or against other evidence of circumstances in the case. *Estate of Bourquin* (1958) 161 CA2d 289, 326 P2d 604.

PRACTICE TIP: Although trusts normally do not have subscribing witnesses, the capacity of the settlor can be supported by the testimony of the subscribing witnesses to a contemporaneous pour-over will.

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§6.15 4. Adjudication of Incompetence

A judicial determination of incompetence, *e.g.,* in a conservatorship proceeding, will not be sufficient to support a finding of lack of testamentary capacity. See *Estate of Nelson* (1964) 227 CA2d 42, 38 CR 459. An adjudication of incompetence is, however, evidence of the testator's mental condition on the date of the finding and raises an inference of lack of testamentary capacity at that time. *Estate of Wochos* (1972) 23 CA3d 47, 54, 99 CR 782; *Estate of Fossa* (1962) 210 CA2d 464, 26 CR 687.

The mere fact that a person is under a conservatorship does not deprive him or her of the power to make a will. Prob C §1871(c). See *Estate of Johnson* (1881) 57 C 529; *Estate of Powers* (1947) 81 CA2d 480, 184 P2d 319.

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§6.16 5. Ability to Transact Business

The testator's ability to transact business is not a legal standard of testamentary capacity. *Estate of Goddard* (1958) 164 CA2d 152, 330 P2d 399.

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§6.17 6. History of Mental Disorder

The relevance of a testator's or settlor's past mental condition depends on the circumstances of the case. Evidence of the existence of a mental disorder over a long period of time is admissible to show that the condition developed early in life and was of such a fixed and permanent character that it would have existed at the time the will was signed. *Estate of Baker* (1917) 176 C 430, 168 P 881.

The contestant has the burden of proving that the mental disorder had a direct bearing on the act of executing the will or trust. In *Walton v Bank of Cal.* (1963) 218 CA2d 527, 32 CR 856, a widow with a history of mental illness transferred all of her assets into an irrevocable inter vivos trust. Later she changed her mind and filed an action to rescind the trust based on lack of capacity. The trial court upheld the trust, and the court of appeal affirmed. The settlor was held to have had sufficient capacity to create the trust, despite evidence in the record that, over a 12-year period ending six months after the execution of the trust, the settlor had been a patient in various hospitals, sanitariums, and rest homes on 31 separate occasions, that she had at one point been adjudicated incompetent (but was later ordered restored to capacity), and that she suffered from an anxiety neurosis, was subject to fits of depression, and sought relief and escape in the use of alcohol. Witnesses, including the attorney who drafted the trust, testified that, on the day she signed the trust, there was nothing in the settlor's manner, appearance, or speech to indicate that she was under the influence of alcohol or drugs and that, although the settlor was normally a nervous person, on the day in question she did not appear to be harassed or upset, and appeared to comprehend what she was doing.

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§6.18 7. Foibles and Eccentricities

Testamentary capacity cannot be refuted merely by showing a few isolated acts, foibles, idiosyncrasies, mental irregularities, or departures from the normal, unless they bear directly on and influence the testamentary act. *Estate of Woehr* (1958) 166 CA2d 4, 17, 332 P2d 818. "Old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absentmindedness, [or] mental confusion" do not establish that a testator lacked capacity. "Even hallucinations and delusions" do not show lack of capacity if they are unrelated to the testamentary act. *Moore v Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 CA4th 1287, 1300, 135 CR2d 888; *Estate of Mann* (1986) 184 CA3d 593, 603, 229 CR 225; *Estate of Fritschi* (1963) 60 C2d 367, 372, 33 CR 264. See Prob C §6100(b).

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§6.19 8. Senile Dementia

When an elderly person's mental condition deteriorates beyond isolated instances of forgetfulness or erratic behavior, there may be evidence of "senile dementia" that is inconsistent with testamentary capacity. See *Estate of Callahan* (1967) 67 C2d 609, 63 CR 277. Senile dementia is defined as a "chronic progressive mental disease of late life characterized by failing memory and loss of other intellectual functions." Blakiston's Gould Medical Dictionary, p 1238 (4th ed 1979). The sufferer may have failing memory, groundless suspicions of relatives or associates, confusion about time and place, use of obscene or profane language, slovenly personal habits, loss of concentration, impulsive changes of intention, and general incoherence. Senile dementia is frequently accompanied by decay of brain tissue or "chronic brain syndrome."

The presence of senile dementia can give rise to an inference that the condition was continuous and existed at the time the document was signed. *Estate of Fosselman* (1957) 48 C2d 179, 308 P2d 336.

The contestant has the burden of proving by a preponderance of the evidence that the testator or settlor suffered from senile dementia and that the condition directly interfered with capacity to execute the document. See *Estate of Schwartz* (1945) 67 CA2d 512, 155 P2d 76.

NOTE: Under the Due Process in Competence Determinations Act (see §§6.6-6.10), a mere diagnosis of senile dementia, without proof of a deficit in one or more specific mental functions, will not be sufficient to prove lack of capacity to execute a will or trust.

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§6.20 9. Alcohol and Drug Abuse

Alcohol abuse, even if chronic, does not prove lack of capacity unless there is proof that the decedent was drunk at the time he or she executed the document. *Estate of Arnold* (1940) 16 C2d 573, 107 P2d 25; *Estate of Warner* (1959) 166 CA2d 677, 333 P2d 848. The same principles would seemingly apply if a testator's or settlor's drug abuse were at issue.

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III. UNDUE INFLUENCE

§6.21 A. Underlying Law

For purposes of will and trust contests, undue influence is conduct that subjugates the testator's or settlor's will to that of another, causing a disposition different from that which the testator or settlor would have made if permitted to follow his or her own inclinations. *Estate of Ricks* (1911) 160 C 450, 117 P 532; *Estate of Baker* (1982) 131 CA3d 471, 480, 182 CR 550. Undue influence is established when it is shown that a testamentary disposition was brought about by undue pressure, argument, entreaty, or other coercive acts that destroyed the testator's freedom of choice so that it can fairly be said that the testator was not a free agent when making his or her will. *Estate of Truckenmiller* (1979) 97 CA3d 326, 158 CR 699. Proof of general influence or opportunity to influence is not enough; there must be proof that the influence was used directly to procure the instrument. *Estate of Kreher* (1951) 107 CA2d 831, 839, 238 P2d 150.

Some cases have suggested that a strong showing of undue influence is necessary, even going so far as to say that undue influence must be proved by clear and convincing evidence. *Estate of Ventura* (1963) 217 CA2d 50, 58, 31 CR 490. See *Estate of Anderson* (1921) 185 C 700, 707, 198 P 407.

Recognized indications of undue influence include (*Estate of Yale* (1931) 214 C 115, 122, 4 P2d 153; *Estate of Lingenfelter* (1952) 38 C2d 571, 585, 241 P2d 990):

- Provisions that are unnatural, cutting off from any substantial bequests the natural objects of the decedent's bounty;
- Dispositions at variance with the decedent's intentions, expressed before and after the document's execution;
- Relations existing between the chief beneficiaries and the decedent that afforded the former an opportunity to control the testamentary act;
- A testator whose mental and physical condition was such as to permit a subversion of his or her freedom of will; and
- A chief beneficiary under the will or trust who was active in procuring the execution of the instrument.

Different rules may apply when the alleged undue influence occurred in connection with an irrevocable inter vivos trust rather than a will. In this instance, the definitions of undue influence in contract formation set forth in CC §1575 may apply, and the rules regarding shifting the burden of proof may be different. See §6.23.

When only part of the instrument was procured by undue influence, the remaining portion is valid if it is not inconsistent with and can be separated from the invalid part. *Estate of Molera* (1972) 23 CA3d 993, 100 CR 696; *Estate of Stauffer* (1956) 142 CA2d 35, 297 P2d 1029. See Prob C §6104.

Although a claim of undue influence can be sustained without any proof of mental dysfunction, the issue of mental condition is often relevant to the testator's susceptibility to influence. If there is evidence that the testator was susceptible to outside pressures because he or she was in a weakened state of mind (*e.g.,* senile, lonely, ill, distraught from the death of a loved one), it is easier to demonstrate that pressure from another overcame the testator's free will. See *Estate of Yale* (1931) 214 C 115, 4 P2d 153; *Estate of Anderson* (1921) 185 C 700, 707, 198 P 407. A testator who had full testamentary capacity may nevertheless have been the victim of undue influence because his or her weakened physical or mental condition left him or her susceptible to it.

Under case law, the types of mental weakness that are probative of undue influence are of a less debilitating quality than the mental defects required for lack of capacity (see §§6.2-6.20). In *Estate of Yale*, *supra,* the decedent had suffered a stroke, but the supreme court noted that he had not been entirely incapacitated by it. 214 C at 119. The court indicated, however, that the decedent also suffered from incontinence and "myocarditis, chronic nephritis, arteriosclerosis, Parker's palsy and senility." 214 C at 120. The court noted that, among other indications of undue influence, "the decedent's physical and mental condition was such as to permit a subversion of his freedom of will." 214 C at 122.

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§6.22 B. Proof by Circumstantial Evidence

An undue influence case normally must be established by circumstantial evidence, *i.e.,* through inferences. Undue influence takes place between the proponent of the will or trust and the decedent. By the time the undue influence is under investigation, the decedent is no longer available to testify about it. Undue influence also normally takes place behind closed doors. Rarely will a case be decided on the basis of testimony or other direct evidence of the ultimate fact of undue influence. See, *e.g.*, *David v Hermann* (2005) 129 CA4th 672, 28 CR3d 622 (court inferred that settlor's sudden negative shift in attitude toward older daughter was caused by younger daughter falsely poisoning settlor's mind because it could find no other "rational explanation"). Usually, evidence of cumulative events must be introduced that, taken together, support a finding of undue influence but that, if taken alone, might not be sufficient. See *Estate of Graves* (1927) 202 C 258, 259 P 935.

Undue influence can be inferred from dispositions under the purported will that are at odds with the testator's stated intentions and desires during life, before or after execution of the will, or as reflected in earlier documents. Undue influence can also be inferred from the close relationship between the testator and the proponent of the will, and from participation by the proponent in procuring execution of the will. *Estate of Yale* (1931) 214 C 115, 122, 4 P2d 153; *Estate of Graves, supra*.

Activity on the part of the challenged beneficiary in procuring the instrument is one of the three factors that shifts the burden of proof to him or her. See §6.23. Reliance on circumstantial evidence is particularly necessary with respect to this factor. The court may consider facts bearing on undue influence both before and after execution of the document, as long as they warrant the inference that the document was the direct result of undue influence, and that the influence existed at the time of execution. *Estate of Baker* (1982) 131 CA3d 471, 481, 182 CR 550. See *Estate of Larendon* (1963) 216 CA2d 14, 19, 30 CR 697. The person using undue influence need not be present at the time of execution of the document, as long as the influence itself was present. *Estate of Greuner* (1939) 31 CA2d 161, 163, 87 P2d 872.

For an example of circumstantial evidence sufficient to prove undue influence, see *Estate of Garibaldi* (1961) 57 C2d 108, 17 CR 623. In *Garibaldi,* the California Supreme Court affirmed a judgment of undue influence, denying probate, based on circumstantial evidence of the decedent's weakened mental and physical condition and the proponents' opportunity to control the testamentary act, activity in procuring the will, and misrepresentations (57 C2d at 113):

> There was ample opportunity for proponents to control the testamentary act of decedent. They lived with her and managed most of her business affairs, and she trusted them and would sign any instruments they would present to her. At the time she made the will she was of advanced age, with a long history of illness, and her mind was "not too clear." It could be inferred that her mental and physical condition was such as to permit a subversion of her freedom of will….
>
> [T]here was evidence that [proponent] was present when the will was executed, that he gave decedent pen, ink and paper, that she wrote the will and immediately gave it to him, that he took it to his attorney, whom she did not know, and that contestants had no knowledge of its existence for several months after her death. The evidence relating to proponents' management of decedent's business affairs showed that, by taking advantage of their confidential relationship, they engaged in a course of fraudulent conduct designed to conceal from decedent the large increase in her net worth… and to mislead her into believing that an equal division of her property among her children would be accomplished by giving each contestant $7,000.

The use of circumstantial evidence is permitted "so long as the evidence raises more than a mere suspicion that undue influence was used." *Estate of Franco* (1975) 50 CA3d 374, 382, 122 CR 661. Mere proof of circumstances consistent with undue influence is insufficient to prove undue influence; the contestant must prove circumstances inconsistent with voluntary action by the testator. *Estate of Mann* (1986) 184 CA3d 593, 607, 229 CR 225; *Estate of Franco*, *supra*.

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§6.23 C. Shifting Burden of Proof

In general, the contestant has the burden of proof on the issue of undue influence. Prob C §8252(a). In the testamentary context, however, a presumption of undue influence may be raised by showing that (*Estate of Graves* (1927) 202 C 258, 262, 259 P 935; *Estate of Sarabia* (1990) 221 CA3d 599, 605, 270 CR 560):

- There was a confidential relationship between the testator and the person alleged to have exerted undue influence (see §6.24);
- The person actively participated in actual preparation or execution of the will (see §6.25); and
- The person unduly profited by virtue of the will (see §6.26).

The rules regarding the burden of proof may be different when the case involves an inter vivos trust rather than a will, if the trust was irrevocable on execution. For an inter vivos transfer, the presumption of undue influence arises if the grantor was susceptible to imposition and there is slight evidence that the instrument was the product of coercion. *O'Neil v Spillane* (1975) 45 CA3d 147, 155, 119 CR 245 (discussing differences between undue influence in testamentary and inter vivos contexts and applying CC §1575 when undue influence was alleged in connection with joint tenancy deed). Similarly, an inter vivos transfer is presumed invalid when a confidential relationship existed between the parties. *Strasberg v Odyssey Group, Inc.* (1996) 51 CA4th 906, 920, 59 CR2d 474. These rules may apply to other inter vivos acts such as the creation of an irrevocable trust.

When the trust was revocable, however, the court may be justified in treating it like a will and applying the testamentary rules, because the settlor retained control of the property until death. *Hagen v Hickenbottom* (1995) 41 CA4th 168, 182, 48 CR2d 197 (principles of undue influence applicable in testamentary context also apply to challenge of estate plan consisting of revocable inter vivos trust and pour-over will).

Regardless of which law triggers it, the presumption of undue influence affects the burden of proof. When the facts triggering the presumption are shown, the proponent of the instrument has the burden of proving that it was not procured by undue influence. *Estate of Sarabia, supra*. Some cases have indicated that, once the presumption applies, the proponent has the burden of proving his or her innocence by *clear and convincing* evidence. See, *e.g., Bank of America v Crawford* (1945) 69 CA2d 697, 701, 160 P2d 169. Although not indispensable to establishing undue influence, shifting the burden of proof is a powerful weapon for the contestant and can make or break a case.

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§6.24 1. Confidential Relationship

A confidential relationship exists whenever trust and confidence are placed by one person in the integrity and fidelity of another. *Estate of Rugani* (1952) 108 CA2d 624, 630, 239 P2d 500. Blood relation can be an important and material circumstance in considering whether a confidential relationship exists, but it is not necessarily sufficient. *Estate of Llewellyn* (1948) 83 CA2d 534, 562, 189 P2d 822. The relationship and duties involved need not be legal; they may be moral, social, domestic, or merely personal. *Estate of Bliss* (1962) 199 CA2d 630, 640, 18 CR 821. A confidential relationship often arises when the vulnerability of one party empowers the stronger party, leaving the weaker party unable to protect himself or herself. *Richelle L. v Roman Catholic Archbishop* (2003) 106 CA4th 257, 272, 130 CR2d 601.

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§6.25 2. Active Participation

Active participation in procuring the execution of a will or trust cannot be inferred from the fact that the beneficiary accompanied the testator or trustor to the attorney's office, in the absence of any evidence that the testator went there at the beneficiary's instigation or request or that the testator was otherwise not acting in accord with his or her own desire. *Estate of Lingenfelter* (1952) 38 C2d 571, 586, 241 P2d 990. Moreover, evidence that a beneficiary urged the testator to make a will does not establish undue influence in the absence of evidence that the beneficiary urged the testator to make any particular disposition. *Estate of Mann* (1986) 184 CA3d 593, 608, 229 CR 225. For a case illustrating active participation in procuring the document, see *Estate of Garibaldi* (1961) 57 C2d 108, 113, 17 CR 623 (proponent was present when will executed, gave testator pen, ink, and paper, was given the will by testator immediately after execution, and took it to his attorney, whom testator did not know).

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§6.26 3. Undue Profit

Determination of whether a beneficiary's profit was undue entails a qualitative assessment of the relationship between the decedent and the beneficiary. The court may examine a variety of factors, including dispositions in previous wills executed by the decedent and other past expressions of the decedent's intent. The mere fact that a beneficiary takes substantially more under the will than he or she would take without the will does not, by itself, establish undue profit. *Estate of Sarabia* (1990) 221 CA3d 599, 607, 270 CR 560.

The *Sarabia* case articulated a qualitative test for undue profit. In *Sarabia,* the decedent was an opera singer who spent almost all of his adult life living and working in Europe. He lived with and had an affectionate relationship with his manager, who looked after the decedent's finances and ran the decedent's household. The decedent's will left everything to the manager. The decedent's brother contested the will, lost, and appealed. The contesting brother argued that the decedent's manager unduly profited because he would have received nothing in the absence of the will, and the whole estate would have gone to the brother. The court of appeal rejected this quantitative approach, and said that the trier of fact must make a *qualitative* assessment of the respective relationships of the decedent with the contestant and beneficiary, as well as the decedent's prior expressions of intent. In *Sarabia,* numerous witnesses had testified that the decedent had often expressed a desire to leave everything to the manager.

For a case illustrating undue profit, see *Estate of Graves* (1927) 202 C 258, 259 P 935 (real estate agent, who removed testator from hospital to apartment over garage in rear of his own home where she executed will in his presence and that of doctor and nurse chosen by him, received virtually entire estate).

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Source: Estate Planning/California Trust and Probate Litigation/6 Grounds for Setting Aside Will or Trust/§6.27 IV. FRAUD

§6.27 IV. FRAUD

A will is ineffective, and will be denied probate, to the extent that its execution was procured by fraud. Prob C §6104. Fraud can also be a basis for attacking a trust instrument. Restatement (Third) of Trusts §12, 62, Comment a. When only part of a will or trust is procured by fraud, the rest of the instrument can be held valid. *Estate of Carson* (1920) 184 C 437, 194 P 5.

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§6.28 A. Elements and Pleading

The elements of fraud that will serve as the basis for a will contest are the same as those that would be relied on to vitiate a contract. *Estate of Newhall* (1923) 190 C 709, 719, 214 P 231; *Estate of Benton* (1901) 131 C 472, 477, 63 P 775.

Fraud must be pleaded with specificity, alleging ultimate facts rather than conclusions of law. *Estate of Streeton* (1920) 183 C 284, 191 P 16. A mere assertion that a will was procured by fraud, without setting forth the specific supporting facts, is insufficient. *Estate of Marler* (1957) 148 CA2d 30, 306 P2d 105.

PRACTICE TIP: The decedent's diminished mental capacity or mental pressure exerted on the decedent is not required for proof of fraud. See *Estate of Newhall* (1923) 190 C 709, 718, 214 P 231. The decedent's weakened mental state, however, may have facilitated the fraud, and should be pleaded.

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§6.29 B. Comparison and Overlap With Undue Influence

Fraud (see §§6.27-6.28) and undue influence (see §§6.21-6.26) are separate causes of action, although the terms are often used interchangeably. Fraud is sometimes an element of an undue influence cause of action, *e.g.,* when the party exerting undue influence uses false statements to poison the testator's attitude toward the contestant. When fraud alone is relied on as a ground of contest, the theory is that the testator, though acting of his or her own free will, was deceived into doing what he or she would not have done in the absence of fraud. *Estate of Newhall* (1923) 190 C 709, 718, 214 P 231.

Many of the concepts applicable to undue influence are relevant to fraud cases. Fraud, like undue influence, may be proved by circumstantial evidence. 190 C at 721. Although the contestant bears the initial burden of proof with respect to fraud, there is authority that the burden of proof shifts to the proponent of the instrument once there is proof of a confidential relationship, active participation in procuring the instrument, and undue profit. See *Estate of Baird* (1917) 176 C 381, 384, 168 P 561. The discussion of these elements in the context of undue influence (see §§6.24-6.26) should have equal application in shifting the burden of proof in a pure fraud case.

As in the case of undue influence, the mistaken belief induced by fraud must be proved to have existed at the time the instrument was signed, though the misrepresentation may have been made before then. *Estate of Newhall* (1923) 190 C 709, 722, 214 P 231.

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Source: Estate Planning/California Trust and Probate Litigation/6 Grounds for Setting Aside Will or Trust/§6.30 V. DURESS OR MENACE

§6.30 V. DURESS OR MENACE

Duress and menace are separate grounds for a will contest under Prob C §6104. Trusts may also be overturned for duress or menace. Restatement (Third) of Trusts §12, 62, Comment a. Under CC §1569, duress consists of the following:

- Unlawful confinement of a party, the party's spouse, or an ancestor, descendant, or adopted child of the party or the party's spouse;
- Unlawful detention of the property of any such person; or
- Confinement of any such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.

Menace consists of a threat of duress or of unlawful and violent injury to person, property, or character. CC §1570. Although the contestant has the burden of proving duress or menace (Prob C §8252(a)), there is authority that the burden of proof shifts to the proponent of the instrument if there is proof of a confidential relationship, active participation in procuring the instrument, and undue profit. See *Estate of Baird* (1917) 176 C 381, 384, 168 P 561.

Duress or menace must be pleaded with specificity. See *Estate of Streeton* (1920) 183 C 284, 191 P 16.

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§6.31 VI. MISTAKE

Generally, there is consistency between the rules applicable to the grounds for will contests and the grounds for trust contests. The rules applicable to mistake of law or fact, however, are a rare exception. What would suffice to set aside a trust often will not be enough to set aside a will.

A trust may be rescinded when there was a substantial mistake of law or fact in its execution. *Walton v Bank of Cal.* (1963) 218 CA2d 527, 542, 32 CR 856; Restatement (Third) of Trusts §12, Comment c, §62, Comment a. When the settlor received no consideration for creating the trust, the settlor's unilateral mistake is ordinarily a ground for rescission, although the mistake must have been material, *i.e.,* it must be relevant to the essence of the settlor's conduct. 218 CA2d at 543. If the settlor did receive consideration, the court would apply the rules pertaining to contracts (CC §§1576-1579). Furthermore, although mistake is a ground for setting aside a trust, it does not necessarily support a claim for reformation. *Getty v Getty* (1986) 187 CA3d 1159, 1178, 232 CR 603 (to support reformation, mistake must occur in reducing settlors' intent to writing).

By contrast, a will cannot be overturned on the basis of mistake when the will as a whole was executed with testamentary intent. *Estate of Smith* (1998) 61 CA4th 259, 270, 71 CR2d 424. The mistake must go to execution or to the formation of testamentary intent in its entirety, as when the testator executes an apparently testamentary instrument under the misapprehension that it is something else. 61 CA4th at 270 (citing example in which the testator signed an apparently testamentary instrument under the mistaken belief that it was a mortgage). See also *Estate of Carson* (1920) 184 C 437, 447, 194 P 5; *Estate of Strong* (1966) 244 CA2d 250, 255, 52 CR 919.

Under Prob C §8252(a), mistake, along with lack of capacity, undue influence, fraud, and duress, is a claim for which the contestant bears the burden of proof in a will contest.

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VII. LIMITATIONS ON TRANSFERS TO DRAFTERS AND OTHERS

§6.32 A. Disqualified Persons

Probate Code §21350(a) generally invalidates provisions in wills, trusts, and other instruments that make gifts to any of the following:

- The person who drafted the instrument;
- A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of the drafter;
- Any partner, shareholder, or employee of any law partnership or law corporation in which the drafter has an ownership interest;
- Any person who has a fiduciary relationship with the transferor (*e.g.,* a conservator or trustee) who transcribes the instrument or causes it to be transcribed. Transcribing refers to the physical preparation of the document, as opposed to the composing of its contents, *i.e.,* drafting. *Rice v Clark* (2002) 28 C4th 89, 120 CR2d 522 (person who provided information needed for preparation of instrument and encouraged donor to execute it, but did not direct or otherwise participate in its transcription to final written form, is not disqualified person under Prob C §21350(a)(4)); *Estate of Swetmann* (2000) 85 CA4th 807, 102 CR2d 457 (conservator who found company that produced will, arranged for appointments, introduced agent to decedent, and paid for legal services in capacity as conservator might have caused instruments to be drafted, but did not transcribe or cause instruments to be transcribed);
- A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of a person described in the immediately preceding paragraph;
- A care custodian of a dependent adult who is the transferor; or
- A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of a care custodian.

Under Prob C §21350(b), one "who is related by blood or marriage" to a person includes:

- The person's spouse or predeceased spouse;
- Relatives within the third degree of the person and of the person's spouse; and
- The spouse of any person described in the immediately preceding paragraph.

In determining relationships for this purpose, Prob C §§6406 (inheritance by relatives of the half blood) and 6407 (inheritance by afterborn heirs) are applicable. Prob C §21350(b).

Unless one of the exceptions in Prob C §21351 applies (see §§6A.17-6A.22), any transferee listed in Prob C §21350(a) is considered a "disqualified person." Prob C §21350.5.

Probate Code §21350 applies to all instruments that became irrevocable on or after September 1, 1993, even those drafted or executed before that date. Prob C §21355; *Bank of America v Angel View Crippled Children's Found.* (1999) 72 CA4th 451, 85 CR2d 117. For this purpose, if an instrument was revocable or amendable on that date but the transferor by reason of incapacity was unable to change the disposition of his or her property and did not regain capacity before dying, the instrument is considered to be irrevocable. Prob C §21355.

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§6.33 B. Statute of Limitations

There are statutory time limits for an action to establish the invalidity of a transfer under Prob C §21350. If the transfer was by will, the action must be commenced after letters are first issued to a general representative and before an order for final distribution is made. Prob C §21356(a). If the transfer is made by some instrument other than a will, it must be commenced within the later of 3 years after the transfer becomes irrevocable or 3 years from the date the person bringing the action discovers, or reasonably should have discovered, the facts regarding the transfer. Prob C §21356(b).

NOTE: It is not yet clear whether the statute of limitations for trust contests under Prob C §16061.7 (effective January 1, 1998) will control when there is conflict with the rules under Prob C §21356(b). Under Prob C §16061.7, a trust contest must be brought not more than 120 days after notification by the trustee that the trust has become irrevocable, or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered to the beneficiary, whichever is later.

For further discussion of transfers to disqualified persons, see chap 6A.

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6A

Statutorily Disqualified Donees and Trustees

David W. Baer
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I. INTRODUCTION

§6A.1 A. General Operation and Purpose

Probate Code §§21350-21356 invalidate donative transfers made to various categories of persons based on their relationship to the donor. These persons, referred to as "prohibited transferees," generally include drafters of the donative instrument and their law partners; fiduciaries who transcribe the instrument or cause it to be transcribed; care custodians of a donor who is a dependent adult; or blood relatives, spouses, domestic partners, cohabitants, or employees of the drafter, fiduciary-transcriber, or care custodians of a donor who is a dependent adult. Prob C §21350(a).

Gifts made to prohibited transferees are invalid unless one of the Prob C §21351 exceptions applies. See §§6A.16-6A.24. An exception applies when (Prob C §21351):

- The prohibited transferee is related by blood or marriage to, or is a cohabitant with or the registered domestic partner of the donor (see §6A.17);
- The instrument is reviewed by an independent attorney who counsels the donor and executes a "Certificate of Independent Review" (see §6A.18);
- The instrument is approved in a substituted judgment proceeding under Prob C §§2580-2586 (see §6A.20);
- The prohibited transferee, in limited circumstances, establishes by clear and convincing evidence, but not based solely on the testimony of any person described in Prob C §21350(a), that the transfer was not the product of fraud, menace, duress or undue influence (see §6A.21); and
- The transferee is a public agency or an entity exempt from taxation under IRC §§501(c)(3) or 501(c)(19) (see §6A.24).

A prohibited transferee who does not fall under one of these exceptions is referred to as a "disqualified person." Prob C §21350.5.

Probate Code §§21350-21356 is a broad remedial statute that shifts the normal burden of proof in establishing an undue influence claim. It reflects the legislature's desire to protect trustors and testators from certain individuals who "are uniquely positioned to procure gifts from elderly persons through fraud, menace, duress or undue influence." *Graham v Lenzi* (1995) 37 CA4th 248, 256, 43 CR2d 407.

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§6A.2 B. Legislative History

The statutory scheme for limitations on transfers contained in Prob C §§21350-21356 was enacted in 1993, primarily in response to reports that an attorney who represented a large number of elderly clients had drafted numerous wills and trusts naming himself as a major beneficiary and had also abused his position as trustee or conservator to benefit himself and his law partners. See *Rice v Clark* (2002) 28 C4th 89, 97, 120 CR2d 522; Assembly Judiciary Committee Analysis of AB 21 (Feb. 4, 1993). The legislature's response went far beyond targeting overreaching attorneys, and the statute invalidates not only gifts to drafting attorneys, but also donative transfers that benefit other fiduciaries who have participated in the creation of the instrument and specified others related to such fiduciaries or on whom the transferor is dependent.

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§6A.3 C. Advantages Over Will or Trust Contest

The transfer limitations in Prob C §§21350-21356 provide a potent tool to challenge the validity of testamentary and other gifts. They may be asserted as an independent ground for objecting to the probate of a testamentary instrument (or to any of its dispositive provisions), or may be asserted as an additional cause of action in a traditional will or trust contest predicated on undue influence or other grounds.

One advantage over a traditional will or trust contest is that a challenge brought under Prob C §21350 itself is not necessarily deemed to be a contest invoking the instrument's no-contest provision. See Prob C §21306(a)(3) (operative before January 1, 2010); Prob C §§20310(b)(6), 20311 (operative January 1, 2010, for instruments that became irrevocable before January 1, 2001; see chap 5); *Graham v Lenzi* (1995) 37 CA4th 248, 43 CR2d 407. See also §6A.29.

A second advantage is that a Prob C §21350 claim is easier to establish than a traditional undue influence claim. Under the common law, a presumption of undue influence arises when a contestant shows that the person charged with undue influence (1) had a confidential relationship with the testator; (2) actively participated in the procurement of the instrument; and (3) would unduly benefit under it. If these elements are established, the burden shifts to the instrument's proponent to prove the lack of undue influence. *Estate of Auen* (1994) 30 CA4th 300, 309, 35 CR2d 557. By contrast, under Prob C §§21350-21356, unless another exception applies, a prohibited transferee (other than the instrument's drafter) may rebut the presumption of invalidity only by proving "upon clear and convincing evidence," and not based solely on the testimony of any person described in Prob C §21350(a), that the transfer was not the product of fraud, menace, duress, or undue influence. Prob C §21351(d). A drafter is not afforded even that opportunity. Prob C §21351(e)(1). See §6A.21.

Third, in a traditional will or trust contest, attorney fees ordinarily will be borne by the parties or, in some instances, the estate. When a transfer is challenged under Prob C §21350, if the court finds that the transfer was the product of fraud, menace duress, or undue influence, the disqualified person bears all costs of the proceeding, including attorney fees. Prob C §21351(d). See §6A.21.

Fourth, Prob C §21350 claims have their own statute of limitations provisions (Prob C §21356), which, in some instances, are longer than the statute of limitations applicable in traditional will or trust contests. See §6A.27.

For full discussion of no-contest clauses, see chap 5.

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II. SCOPE OF STATUTE

§6A.4 A. "Instruments" Subject to Statute

The primary application of Prob C §§21350-21356 is to invalidate gifts to disqualified persons made in "instruments." Probate Code §45 broadly defines an "instrument" as a will, trust, deed or "other writing that that designates a beneficiary or makes a donative transfer of property." The statute therefore applies to, among others:

- Wills and trusts;
- Inter vivos gifts founded on written instruments such as deeds, bank or securities account transfers, or vehicle title transfers;
- Insurance or account beneficiary designations; and
- Retirement or pension plan beneficiary designations.

The applicability of Prob C §§21350-21356 to retirement and pension plan beneficiary designations is questionable. The Employee Retirement Income Security Act of 1974 (ERISA) (29 USC §§1001-1461) preempts state law to the extent that it relates to private employee benefit plans. 29 USC §1144(a). For example, ERISA preemption of state testamentary law furthers the congressional goal of avoiding a patchwork scheme of regulation. *MacLean v Ford Motor Co.* (7th Cir 1987) 831 F2d 723 (plan's method for determining beneficiary in absence of written beneficiary designation controlled over provision in will). Determining the validity of a beneficiary designation by applying Prob C §§21350-21356, a statutory scheme peculiar to California, would appear to conflict with the goal that employee benefit plans be subject to a uniform body of law with a set of standard procedures to guide processing of claims and disbursement of benefits. *Egelhoff v Egelhoff* (2001) 532 US 141, 148, 149 L Ed 2d 264, 121 S Ct 1322; *Ingersoll-Rand Co. v McClendon* (1990) 498 US 133, 142, 112 L Ed 2d 474, 485, 111 S Ct 478.

Thus, if a beneficiary designation is consistent with the plan terms, an ERISA plan administrator might be required to make a distribution to the designated beneficiary, even if the beneficiary is a presumptively disqualified person under Prob C §§21350-21356. However, this might not prevent interested persons from recovering the funds from the presumptively disqualified person after the ERISA distribution. See *Kennedy v Plan Admin'r* (2009) __ US __, 172 L Ed 2d 662, 675 n10, 129 S Ct 865, 875, referring to *Sweebe v Sweebe* (Mich 2006) 712 NW2d 708, 712, holding that "while a plan administrator must pay benefits to the named beneficiary as required by ERISA," after the benefits are distributed "the consensual terms of a prior contractual agreement may prevent the named beneficiary from retaining those proceeds"; and *Pardee v Pardee* (Okla App 2004) 112 P3d 308, 315, holding that ERISA did not preempt enforcement of allocation of ERISA benefits in state-court divorce decree because "the pension plan funds were no longer entitled to ERISA protection once the plan funds were distributed."

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§6A.5 B. Effective Date

Probate Code §§21350-21356 apply to instruments that become irrevocable on or after September 1, 1993, regardless of when the instrument was executed. Prob C §21355. Under §21355, amendments to Prob C §§21350-21356 enacted after September 1, 1993, also apply to instruments that become irrevocable on or after that date, even if the instrument became irrevocable before the amendment's effective date. The constitutionality of the retroactive effect of Prob C §21355 was upheld in *Bank of America v Angel View Crippled Children's Found.* (1999) 72 CA4th 451, 85 CR2d 117.

A will becomes irrevocable on the death of the testator. Typically, trusts become irrevocable on the death of one or more of the trustors. Similarly, insurance beneficiary designations become irrevocable on the death of the insured party. Thus, Prob C §§21350-21356 will apply to these instruments whenever executed, as long as they became irrevocable no earlier than September 1, 1993.

Instruments that effect present transfers, *e.g.,* deeds and stock transfers, are generally irrevocable on delivery. In those cases, Prob C §21350 will apply if delivery was made on or after September 1, 1993.

In addition, for purposes of Prob C §21355, an instrument that is otherwise revocable or subject to amendment is deemed to be irrevocable if the transferor was incompetent to make the subject transfer on September 1, 1993, and did not regain capacity before death. The effect of this language is unclear because it does not specify when the instrument is deemed to be irrevocable. Arguably, this would be when the transferor became incompetent, in which case the statutory scheme would be inapplicable if this occurred before September 1, 1993. In practical effect, a donee may be unlikely to challenge the statute's applicability on grounds that the transferor was incompetent before September 1993, because incompetency would likely provide independent grounds to invalidate the transfer.

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Source: Estate Planning/California Trust and Probate Litigation/6A Statutorily Disqualified Donees and Trustees/§6A.6 C. Invalidity of Waivers

§6A.6 C. Invalidity of Waivers

Donative instruments are subject to the provisions of Prob C §§21350-21356, notwithstanding any contrary provision they might contain. Prob C §21354.

Any limitation or waiver in a trust instrument of the trustee's obligation to perform accountings is against public policy and void for a sole trustee who is a disqualified person under Prob C §§21350-21356. Prob C §16062(e).

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§6A.7 D. Grounds for Removal of Sole Trustee

In addition to invalidating transfers, Prob C §21350 can provide grounds for removal of a trustee. Subject to certain exceptions, on petition or on the court's own motion, a sole trustee who falls within one of the categories of prohibited transferees enumerated in Prob C §21350(a) may be removed, even if the trustee is not a beneficiary. Prob C §15642(a), (b)(6). The court will not, however, remove the trustee if it finds that the trustee's continued service is consistent with settlor's intent and that the appointment was not the product of fraud, menace, duress, or undue influence. Prob C §15642(b)(6). No opinion has considered whether a corporate trustee is subject to removal under §15642(b)(6) when a trust officer responsible for administration falls within one of the categories in Prob C §21350(a).

These grounds for removal of a trustee do not apply to instruments that became irrevocable on or before January 1, 1994. Nor do they apply when (Prob C §15642(b)(6)):

- The settlor is related by blood or marriage to, is the domestic partner of, or is a cohabitant with, the trustee;
- The instrument is reviewed by an independent attorney who counsels the settlor and executes a certificate of independent review; or
- The instrument is approved, after full disclosure of the relationship of the persons involved, in a substituted judgment proceeding under Prob C §§2580-2586.

For further discussion of a trustee's removal under Prob C §15642(b)(6), see §§6A.32-6A.36.

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§6A.8 III. GIFTS INVALIDATED BY PROB C §21350

The statute operates to invalidate gifts to certain categories of persons ("prohibited transferees") identified in Prob C §21350, unless one of the exceptions under Prob C §21351 applies. If no exception applies, the transferee is deemed a "disqualified person" under Prob C §21350.5.

If a gift is invalidated under Prob C §§21350-21356, the transfer is made as if the disqualified person had predeceased the transferor without spouse or issue, but only to the extent that the value of the transfer exceeds the intestate interest of the disqualified person. Prob C §21353. This prevents the invalid gift from passing to the spouse or issue of the disqualified person under Prob C §21110 (the "antilapse statute"). If the instrument does not provide for an alternative or residual beneficiary, the invalid gift will pass to the donor's intestate successors or beneficiaries under a prior instrument. See §6A.28.

NOTE: Although Prob C §21353 says that a transfer fails "only to the extent that the value of the transfer exceeds the intestate interest of the disqualified person," this language has become irrelevant following the amendment of Prob C §21351(g) (effective January 1, 2003), because the amendment added heirs of the transferor to the definition of persons related by blood or marriage to the transferor, who are excluded from the application of Prob C §21350. Thus no heir, *i.e.*, no person with an intestate interest in the estate (see Prob C §44) can be a disqualified person.

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§6A.9 A. Prohibited Transferees

Probate Code §21350(a) identifies categories of persons, referred to as "prohibited transferees," who are presumptively disqualified from receiving donative transfers. See §§6A.10-6A.15A. A contestant or other party seeking to invoke the application of Prob C §§21350-21356 has the burden of establishing that the transferee falls under one or more of these categories. *Graham v Lenzi* (1995) 37 CA4th 248, 255, 43 CR2d 407.

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§6A.10 1. Drafter

A person who "drafted" the instrument is a prohibited transferee. Prob C §21350(a)(1). The drafter will often be an attorney but need not be. The term drafter connotes someone who does more than merely handwrite, type, or input the physical instrument, but rather someone who performs the act of creating or composing its contents. *Estate of Swetmann* (2000) 85 CA4th 807, 819, 102 CR2d 457.

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§6A.11 2. Drafter's Relatives, Spouse, Domestic Partner, Cohabitant, and Employees

A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of the drafter is also a prohibited transferee. Prob C §21350(a)(2).

In this context, a person "related by blood or marriage" means (1) the person's spouse or predeceased spouse and (2) relatives, and spouses of relatives, within the third degree of the person and of the person's spouse, including half-blood, unborn, and adopted relatives. Prob C §21350(b). Note that this is a different definition of "related by blood or marriage" than is used for purposes of Prob C §21351(a), which creates an exception preventing disqualification of the donor's blood relatives. There, the term includes relatives within the fifth degree and heirs. Prob C §21351(g). See §6A.17.

"Domestic partner" in this context means a domestic partner as defined under Fam C §297. Prob C §21350(d).

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Source: Estate Planning/California Trust and Probate Litigation/6A Statutorily Disqualified Donees and Trustees/§6A.12 3. Drafter's Law Partners and Employees

§6A.12 3. Drafter's Law Partners and Employees

If the drafter is an attorney with an ownership interest in a law partnership or law corporation, his or her partners, fellow shareholders, and employees are also prohibited transferees. Prob C §21350(a)(3).

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§6A.13 4. Fiduciary Who Transcribes Instrument or Causes Its Transcription

Any person who has a fiduciary relationship with the transferor, including, but not limited to, a conservator or trustee, who "transcribes" the instrument or "causes it to be transcribed" is a prohibited transferee. Prob C §21350(a)(4).

Although the section specifically identifies conservators and trustees as fiduciaries, Prob C §39 more broadly defines "fiduciary" to include personal representatives, attorneys-in-fact under powers of attorney, custodians under the California Uniform Transfers to Minors Act (Prob C §§3900-3925) and any "other legal representative subject to [the Probate Code]."

The term "transcribe" means to perform the physical act of typing or handwriting the instrument. *Rice v Clark* (2002) 28 C4th 89, 101, 120 CR2d 522. Transcription is the act that follows the composition of the document and reduces the creation to its final, written form. Because a transcriber has an opportunity to alter the document, he or she is uniquely positioned to undermine the true intention of the donor. *Estate of Swetmann* (2000) 85 CA4th 807, 819, 102 CR2d 457.

The term "causes [the instrument] to be transcribed" has been interpreted to refer only to the person who directs, oversees, or otherwise participates directly in the instrument's transcription. *Rice v Clark* (2002) 28 C4th 89, 105, 120 CR2d 522. Like the transcriber, such a person is also in a position to thwart the donor's intention by changing the instrument's provisions. The term does *not* refer to a person who merely procures the attorney who drafts the instrument, or who facilitates the drafting of the instrument without being directly involved in its transcription. *Estate of Swetmann,* (2000) 85 CA4th 807, 819, 102 CR2d 457; *Rice v Clark* (2002) 28 C4th 89, 105, 120 CR2d 522.

In *Estate of Swetmann, supra,* the court analogized the term "caused to be transcribed" to the judicially created presumption of undue influence applicable when a person in a confidential relationship with the testator has "actively participated in procuring" the will and unduly benefited under it. 85 CA4th at 820 (citing *Estate of Mann* (1986) 184 CA3d 593, 229 CR 225 (merely taking testator to attorney or paying for drafting of will does not constitute "active participation" in procurement of will)). Thus, in arguing whether a person's acts meet the "caused to be transcribed" requirement under Prob C §21350(a)(4), the practitioner may look to whether similar acts have been considered sufficient to satisfy the "active participation" requirement in common-law undue influence cases.

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§6A.14 5. Fiduciary-Transcriber's Relatives, Spouse, Domestic Partner, Cohabitant, and Employees

As with a drafter, a fiduciary-transcriber's spouse, predeceased spouse, relatives within the third degree (and their spouses), domestic partner, cohabitant, and employees are prohibited transferees. Prob C §21350(a)(5), (b). Notably, there is no prohibition against gifts to the fiduciary-transcriber's partners or fellow shareholders similar to the prohibition that applies to attorney drafters under Prob C §21350(a)(3).

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§6A.15 6. Care Custodian of Dependent Adult

A care custodian of a dependent adult is a prohibited transferee when the dependent adult is the transferor. Prob C §21350(a)(6). For this purpose, "care custodian" has the meaning given in Welf & I C §15610.17. Prob C §21350(c).

Welfare and Institutions Code §15610.17 defines "care custodian" broadly to include the administrators and employees, including the maintenance and support staff, of more than 20 enumerated public or private facilities or agencies, as well as "persons providing care or services for elders or dependent adults." The enumerated agencies include clinics, home health agencies, adult day care centers, respite care facilities, area agencies on aging, regional centers for persons with developmental disabilities, and offices of patient's rights advocates, public conservators, and public guardians. Welf & I C §15610.17(a)-(x).

In addition, the definition of "care custodian" contains a catchall provision encompassing "[a]ny other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults." Welf & I C §15610.17(y). Thus, the term applies broadly to any person who provides health or social services to an elder or dependent adult, regardless of whether any affiliation exists with any of the listed entities and agencies.

In *Bernard v Foley* (2006) 39 C4th 794, 47 CR3d 248, the supreme court resolved conflicting opinions of the courts of appeal by holding that an unrelated person who renders "substantial, ongoing health services" to a dependent adult may be a potentially disqualified care custodian, even if the service relationship arose out of a preexisting personal friendship rather than a professional or occupational connection. The court disapproved *Conservatorship of Davidson* (2003) 113 CA4th 1035, 6 CR3d 702, which had held that a person providing care is not barred as a transferee if the service relationship is a direct result of a preexisting genuinely personal relationship. 39 C4th at 815 n14.

Despite the court's customary reticence in urging legislative action, one of the majority noted in a concurring opinion that the legislature would do well to consider modifying the statute to accord separate treatment to long-term care custodians who undertake that role as a consequence of a personal relationship rather than as an occupational assignment. 39 C4th at 816. On the same theme, the dissenters noted that the majority had imported the words "substantial" and "ongoing" into the statute, leading to an irony that persons who provide only trivial or undependable care may inherit, while those who provide substantial and ongoing care may not. 39 C4th at 823 n3.

The majority in *Bernard* suggested that concern about fairness to volunteer health care providers is unfounded because Prob C §21351(b) provides a pathway to avoiding disqualification by means of a certificate of independent review. This pathway may in turn create duties for estate planning attorneys. *Osornio v Weingarten* (2004) 124 CA4th 304, 21 CR3d 246, holds that an estate planning attorney may owe a duty of care to advise a testator to obtain a certificate of independent review for the benefit of a potential beneficiary known to be a care custodian.

Another issue is the scope of the terms "health services" and "social services," as used in Welf & I C §15610.17(y). In *Bernard,* the caregivers prepared meals for the dependent adult, assisted her in getting to and from the bathroom, helped her into bed, fixed her hair, cleaned her bedroom, did her laundry, washed her face and hands, administered oral medications including liquid morphine, antidepressant drugs, anxiety medication, and codeine cough syrup, and applied ointments to a rash and salves and antibiotics to leg sores. The court held that these services included health services within the meaning of the statute. In *Conservatorship of Davidson*, *supra,* the assistance consisted of cooking, gardening, driving the dependent adult to the doctor, running errands, grocery shopping, and assisting with banking. The *Davidson* court questioned whether these "unsophisticated" chores and household tasks should be equated with health or social services under the statute.

The *Bernard* majority did not expressly disapprove *Davidson* on this ground. Indeed, the majority noted, seemingly with approval, a court of appeal conclusion that the services in *Bernard* were a "far cry" from the services in *Davidson*. 39 C4th at 806. Yet, the majority also seemed to conclude that preparing meals would be a service within the meaning of the statute, disagreeing with the caregiver's assertion that, in ordinary parlance, one who prepares meals for another person does not provide a service. 39 C4th at 807. Thus, *Bernard* does not clearly resolve whether the services in *Davidson* fall within the statutory scope of health and social services.

This issue was squarely addressed in *Estate of Odian* (2006) 145 CA4th 152, 51 CR3d 390, in the context of a paid nonprofessional in-home care provider who cooked, cleaned, drove the dependent adult to appointments and shopping, and generally took care of the dependent adult. The court concluded that "an expansive interpretation of 'social services' to include personal services provided by an in-home caregiver best promotes the Legislature's objective of protecting vulnerable dependent adults from exploitation." 145 CA4th at 167. Thus, it held that a "paid live-in caregiver" provides social services within the meaning of Prob C §21350(a) and is, therefore, a care custodian.

Only care custodians of dependent adults are prohibited transferees. Prob C §21350(a)(6). For this purpose, Probate Code §21350(c) adopts the definition of "dependent adult" contained in Welf & I C 15610.23, *i.e.*, any California resident between the ages of 18 and 64 years

> who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.

Probate Code §21350(c) extends the definition of "dependent adult" to also include persons older than age 64 who have such limitations. The findings made when a conservatorship is established (see Prob C §1801(a), (b)) support an argument that any conservatee should be considered a dependent adult as a matter of law.

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§6A.15A 7. Care Custodian's Relatives, Spouse, Domestic Partner, Cohabitant, and Employees

As with a drafter (see §6A.11), a care custodian's spouse, predeceased spouse, relatives within the third degree (and their spouses), domestic partner, cohabitant, and employees are prohibited transferees. Prob C §21350(a)(7), (b).

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§6A.16 B. Exceptions to Prob C §21350

Donative transfers to the prohibited transferees listed in Prob C §21350(a)(1)-(6) are invalid unless one of the exceptions set forth in Prob C §21351 applies. The donee has the burden of proving that an exception applies. *Estate of Swetmann* (2000) 85 CA4th 807, 816, 102 CR2d 457; *Graham v Lenzi* (1995) 37 CA4th 248, 255, 43 CR2d 407. Section 21351 sets forth five categories of exceptions, discussed in §§6A.17-6A.24.

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§6A.17 1. Transferor's Blood Relatives, Spouse, Cohabitant, or Domestic Partner

Probate Code §21350 does not apply if the transferor is related by blood or marriage to, is a cohabitant with, or is the registered domestic partner (under Fam C §§297-299.6) of the transferee or the person who drafted the instrument. Prob C §21351(a). Read literally, even if the transferor and transferee are unrelated, are not cohabitants, and are not domestic partners, this exception still applies if the transferor and the drafter have one of these relationships. This exception applies to any instrument that becomes irrevocable on or after July 1, 1993. Prob C §21351(a).

Blood or marriage: The term "related by blood or marriage" includes persons within the fifth degree and heirs of the transferor. Prob C §21351(g). The fifth degree includes first cousins once removed and great- or granduncles, aunts, nieces, and nephews. (See San Francisco Superior Court Local Rules, Probate, Appendix A; California Decedent Estate Practice §7.105 (2d ed Cal CEB 2009).) Heirs are all persons entitled to take property of the decedent by intestate succession. Prob C §44. This is different and broader than the definition of the same term used in Prob C §21350(a)(2), (a)(5), and (a)(7) invalidating gifts to those related by blood or marriage to a drafter, fiduciary-transcriber, or care custodian. There, the term applies to relatives within the donor's and his or her spouse's third degree. Prob C §21350(b).

Cohabitant: Probate Code §21351(a) was amended in 2002 to give the term "cohabitant" the definition set forth in Pen C §13700. Cohabitant is defined as (Pen C §13700)

> two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to: (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship.

By amending the statute to include this definition, the legislature confirmed that the cohabitant exception does not apply to all persons who simply live in the same dwelling as the transferor. This clarification is consistent with the legislative purpose of the statute: to protect elderly or infirm testators from persons uniquely positioned to procure gifts. See, *e.g., Dunn v Superior Court* (1993) 21 CA4th 721, 727, 26 CR2d 365. If cohabitant was broadly defined to include all persons who live under the same roof, an exception to Prob C §21350 would exist for a live-in caregiver of a dependent adult. In most instances, however, a live-in caregiver is in a better position to take advantage of a dependent adult than an outside caregiver.

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§6A.18 2. Certificate of Independent Review

Probate Code §21350 does not apply if the instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature and consequences of the intended transfer, (2) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (3) signs and delivers to the transferor an original certificate, with a copy to the drafter, that substantially follows the form provided in Prob C §21351(b). For certificate of independent review, see §6A.19.

This exception requires an attorney-client relationship between the reviewing attorney and the transferor; however, an attorney whose written engagement signed by the client/transferor is expressly limited to the preparation of the certificate and the counseling associated with it shall not be considered to otherwise represent the client. Prob C §21351(b).

The statute does not describe the nature of the advice the reviewing attorney is to give nor the level of inquiry the attorney must make to determine that the transfer is not the product of fraud, menace, duress, or undue influence. The form of the certificate indicates that the reviewing attorney is aware that the relationship between the transferor and transferee implicates Prob C §21350. The statute does not define the term "independent attorney" or what it means to be "so disassociated" from the transferee as to be in a position to provide impartial and confidential advice. Presumably, these terms will be interpreted under general conflict of interest laws and further governed by the Cal Rules of Prof Cond 3-300, 3-310, and 4-400.

At a minimum, it seems clear that an "independent attorney" cannot concurrently represent the transferee, be compensated by the transferee, or be disqualified from taking under Prob C §21350(a). The 1995 amendment to Prob C §21351(b) eliminating the former requirement that the certificate be prepared by an attorney not related to or associated with the drafter of the instrument (Stats 1995, ch 730, §14) indicates that the instrument's drafter can prepare the certificate, provided that he or she is an "independent attorney."

The statute is silent on when the review must be conducted and the certificate must be prepared. Presumably this may be done before or after the instrument is executed. However, the certificate must be completed before the transferor's death, because the statute requires delivery of the original certificate to the transferor. Prob C §21351.

NOTE: A drafting attorney who fails to advise a client of the need for a certificate may be liable for malpractice to a *presumptively disqualified donee*. In *Orsonio v Weingarten* (2004) 124 CA4th 304, 21 CR3d 246, a nonclient who was the testator's care custodian sued the drafting attorney for failing to take steps to obtain the certificate. The court held that, as an intended beneficiary, the nonclient could state a cause of action against the drafting attorney for professional negligence because the attorney owes a duty of care (1) to advise the client that, absent steps taken under Prob C §21351(b), a proposed transfer, if challenged, will have a significant likelihood of failing because of the proposed transferee's presumptive disqualification under Prob C §21350(a); and (2) to recommend that the client seek independent counsel in an effort to obtain a certificate under Prob C §21350(b).

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§6A.19 3. Form: Certificate of Independent Review

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CERTIFICATE OF INDEPENDENT REVIEW

I, _ _[*attorney's name*]_ _, have reviewed _ _[*name of instrument*]_ _ and counseled my client, _ _[*name of client*]_ _, on the nature and consequences of the transfer, or transfers, of property to _ _[*name of potentially disqualified person*]_ _ contained in the instrument. I am so disassociated from the interest of the transferee as to be in a position to advise my client impartially and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer, or transfers, in the instrument that otherwise might be invalid under Section 21350 of the Probate Code are valid because the transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.

_ _[*Name of Attorney*]_ _ _ _[*Date*]_ _

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§6A.20 4. Instruments Approved by Substituted Judgment

Probate Code §21350 does not apply to instruments that have been approved, after full disclosure of the relationships involved, under an order issued in substituted judgment proceedings under Prob C §§2580-2586. Prob C §21351(c). This procedure applies only when the transferor is subject to a conservatorship. A conservator or other interested person may petition the court for any order authorizing or requiring that the conservatee take certain actions including making gifts; entering into contracts; conveying property; creating or transferring property to a trust; designating beneficiaries under insurance policies, retirement plans, and other instruments; and making a will. Prob C §2580(a)(1)-(13).

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§6A.21 5. Evidence Clearly and Convincingly Disproving Fraud, Menace, Duress, or Undue Influence

A limited exception to Prob C §21350 applies when a court determines "upon clear and convincing evidence" but not based solely on the testimony of any person described in Prob C §21350(a), that the transfer was not the product of fraud, menace, duress, or undue influence. Prob C §21351(d).

This is a limited exception, given the difficult burden of proof and because it applies only to the following (Prob C §21351(d)):

- Any instrument other than one making a transfer to a drafter of the instrument under Prob C §21350(a)(1);
- Any instrument executed on or before July 1, 1993, by a person who was a California resident at the time the instrument was executed; and
- Any instrument executed by a California resident who was not a resident at the time of execution.

Accordingly, the exception is not available to the instrument's drafter, and applies only to instruments executed by nonresidents (who are now California residents), or by residents before July 1, 1993. The latter limitation, however, seems to have been overlooked in some of the cases that discuss Prob C §21351(d) in connection with instruments executed by residents after 1993. See, *e.g.*, *Estate of Shinkle* (2002) 97 CA4th 990, 1009, 119 CR2d 42, disapproved on other grounds in *Bernard v Foley* (2006) 39 C4th 794, 815 n14, 47 CR3d 248; *Rice v Clark* (2002) 28 C4th 89, 97, 120 CR2d 522.

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§6A.22 a. Disproving Undue Influence

The presence or absence of undue influence is difficult to prove. Often, the most important witness (*i.e.*, the transferor) has died before a Prob C §21350 challenge is made. Undue influence is also difficult to recognize, because it may be the result of subtle psychological dependencies by the donor on another developed over an extended period of time. As one court observed, "undue influence, obviously, is not something that can be seen, heard, smelt or felt." *Estate of Peters* (1970) 9 CA3d 916, 88 CR 576.

Given these difficulties, the party who bears the burden of proving or disproving undue influence is severely disadvantaged. Probate Code §21351(d) makes the task more difficult by imposing a heightened "clear and convincing" standard of proof.

As originally enacted, testimony of persons described in Prob C §21350(a) was excluded in meeting the "clear and convincing" standard. For example, testimony of the drafter, fiduciary/transcriber, or care custodian could not be considered by the court in determining that the burden had been met. Effective January 1, 2003, Prob C §21351(d) was amended to eliminate this exclusion, and now provides that the determination may not be based "solely upon" the testimony of any person described in Prob C §21350(a). Presumably this means that the testimony of a person described in §21350(a) may now be considered by the court, as long as some other corroborative evidence exists that the instrument was not the product of fraud, menace, duress, or undue influence. Because there will normally be *some* extrinsic evidence from which a lack of fraud, undue influence, etc., can be inferred, the "but not based solely on the testimony" limitation of Prob C §21351(d) may not, as a practical matter, have a significant effect.

NOTE: It is unclear whether the determination can be based solely on the testimony of two or more persons listed in §21350(a).

The potential transferee will still find it difficult to fall under the exception. The "clear and convincing" standard is the highest burden of proof in civil cases. To meet this burden, the party must "persuade [the jury] that it is highly probable that the fact is true." CACI 201 (see BAJI 2.62, requiring "evidence of such a convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered"); *Mattco Forge, Inc. v Arthur Young & Co.* (1997) 52 CA4th 820, 848, 60 CR2d 780.

PRACTICE TIP: Likely witnesses who may help a party meet this burden are: independent attorneys who were involved in the instrument's creation; close friends and relatives; the donor's physician, psychiatrist, or psychologist. If the facts allow, a party may attempt to disprove fraud, undue influence, etc., by offering the testimony of an independent attorney who counseled the donor concerning the transfer without preparing a certificate of independent review, *e.g.,* when the instrument predated Prob C §21351 or the attorney was unaware of Prob C §21351(b). Such evidence might demonstrate that the protections inherent in the §21351(b) exception were de facto or substantially present.

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§6A.23 b. Liability for Costs

Probate Code §21351(d) also provides that if the court finds that the transfer *was* the product of fraud, undue influence, etc., the disqualified person shall bear all costs of the proceeding, including reasonable attorney fees. Thus, a contestant is entitled to an award of fees if he or she can affirmatively prove fraud, undue influence, etc., based on common-law principles. (The contestants in a Prob C §21350 proceeding often assert undue influence as an independent ground to invalidate the transfer in any event.) Once again, Prob C §21351(d) represents a significant departure from the common law, because fee awards ordinarily are not available in traditional will or trust contests. Note too that the fee provision is not reciprocal: A donee who establishes the validity of a donative transfer based on the Prob C §21351(d) exception is not entitled to a fee award.

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§6A.24 6. Gifts to Public Entities or Charities

Prob C §21350 does not apply if the transferee is a federal, state, or local public entity. Nor does it apply to an entity that is tax exempt under IRC §501(c)(3) or (c)(19), or to a trust to the extent that it holds an interest for such an entity. This exception applies to any instrument that becomes irrevocable on or after July 1, 1993. Prob C §21351(f).

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§6A.25 7. Gifts That Do Not Exceed $3000

A de minimis exception to Prob C §21350 was added effective January 1, 2003, for gifts that do not exceed $3000. Prob C §21351(h). This exception does not apply if the "total value of the property in the estate of the transferor does not exceed the amount prescribed in Prob C §13100," *i.e.,* $100,000.

NOTE: Although the statute is silent on whether the value of property listed in Prob C §13050 is excluded when calculating whether the estate exceeds $100,000, it is unlikely that the legislature intended to *exclude* from the value of the estate such things as joint tenancy property, revocable trust property, property passing to a spouse, motor vehicles, and salary, since it appears that the reference to Prob C §13100 was used as a shorthand way of ensuring that the $3000 exception would not apply when the donor would consider $3000 to be a substantial amount.

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§6A.26 8. Gifts by Nonresidents

Probate Code §21350 does not apply if "the transfer is made by an instrument executed by a nonresident of California who was not a resident at the time the instrument was executed, and that was not signed within California." Prob C §21351(i). The exception applies to persons who were previously nonresidents but who become California residents by the time the transfer is challenged. See *Estate of Clementi* (2008) 166 CA4th 375, 82 CR3d 685.

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§6A.27 C. Statute of Limitations

An action to establish the invalidity of a transfer under Prob C §21350 may be commenced only in these cases:

- "In the case of a transfer by will, at any time after letters are first issued to a general representative and before an order for final distribution is made" (Prob C §21356(a)); or
- "In the case of any transfer other than by will, within the later of three years after the transfer becomes irrevocable or three years from the date the person bringing the action discovers, or reasonably should have discovered, the facts material to the transfer" (Prob C §21356(b)).

These time limits are more liberal than the statutes of limitations generally associated with will and trust contests. A postprobate will contest must be filed within 120 days after the will is admitted (Prob C §8270(a)), which is normally long before the order of distribution. The 120-day limit is jurisdictional, and the probate of the will is deemed conclusive if no objection was made within that time. Prob C §8226(a); *Estate of Sanders* (1985) 40 C3d 607, 613, 221 CR 432. Personal representatives should be aware that Prob C §21356(a) appears to provide a limited exception.

The statute of limitations generally applicable to trust contests varies depending on the grounds for attack. See chap 20. However, Prob C §16061.8 provides for a much shorter statute of limitations than Prob C §21356(b) when the trustee serves a notice of irrevocability under Prob C §16061.7. The statute of limitations on a trust contest in that case is 120 days from service of the notification of the trust's irrevocability or 60 days from service of copy of the terms of the trust, whichever is later. Prob C §16061.8. Case law has not yet clarified whether Prob C §16061.8 or Prob C §21356(b) will control when the two sections conflict.

PRACTICE TIP: If at all possible, eliminate any doubt by filing your Prob C §21350 claim within the shorter limitation period for will or trust contests.

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§6A.28 D. Standing to Bring Prob C §21350 Proceeding

No language in Prob C §§21350-21356 specifies who has standing to commence an action to invalidate a transfer under the statute.

As a general matter, the standing rules that have developed in the context of will contests (see chap 17) would seem to apply. As in will contests, determining who is an "interested person" with the right to bring a Prob C §21350 proceeding must be determined on a case-by-case basis depending on the purpose and effect of the proceeding. In particular, counsel should consider the effect of Prob C §21353, providing that when a transfer fails under Prob C §21350, it is treated as if the disqualified person predeceased the transferor without spouse or issue. See §6A.8.

PRACTICE TIP: Prob C §21350 operates to invalidate transfers, not instruments. See Prob C §21353. A will leaving the entire estate to a disqualified person can, however, lead to complete intestacy if the will contains a revocation clause. A partial intestacy can also result if the will contains no residuary clause. A beneficiary of a prior will can attempt to avoid these results under the doctrine of dependent relative revocation. Under this doctrine, often applied when intestacy would otherwise result, the testator is presumed to have intended that the original instrument will stand to the extent that a latter instrument proves ineffective. See *Estate of Anderson* (1997) 56 CA4th 235, 245, 65 CR2d 307.

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§6A.29 E. Applicability of No-Contest Clause

A no-contest clause is unenforceable against a beneficiary who, with reasonable cause, brings an action to establish the invalidity of a transfer under Prob C §21350. Prob C §21306(a)(3) (operative before January 1, 2010). For this purpose, "reasonable cause" means possession of facts that would cause a reasonable person to believe that his or her allegations and factual contentions in the matter may be proven or, if specifically so identified, are likely to be proven after a reasonable opportunity for further investigation or discovery. Prob C §21306(b). The petitioner in an action to invalidate a transfer under Prob C §21350 cannot, however, obtain an advance declaratory ruling on whether Prob C §21306 applies in the particular case. Prob C §21320(d).

Declaratory relief should still be available, however, with respect to the issue of whether the express terms of the no-contest clause were clearly intended to encompass the Prob C §21350 proceeding. If the no-contest clause does not cover the §21350 proceeding, it will not matter whether the reasonableness standard under Prob C §21306(b) is met.

PRACTICE TIP: Because an action to invalidate a transfer under Prob C §21350 depends largely on objective facts, *i.e.*, the nature of the relationship between the transferor and the transferee, counsel should be particularly careful to conduct an adequate investigation before filing such an action if the client is at risk of being disinherited. Furthermore, counsel should proceed with great caution before voluntarily dismissing a §21350 proceeding absent a settlement agreement if this could expose the client to being disinherited.

Note that Prob C §21306 will be repealed effective January 1, 2010. For instruments that became irrevocable on or after January 1, 2001, §21306 will be superseded by new Prob C §21311, which states in pertinent part that a no-contest clause is enforceable against a Prob C §21350 challenge only if it is brought without probable cause. See Prob C §§21311(a)(1), 21310(b)(6).

"Probable cause" exists under the new law if at the time of filing, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery. Prob C §21311(b). This is a more demanding standard than the "reasonable cause" standard under existing Prob C §21306. See Cal L Rev'n Comm'n Comment to Prob C §21311. See also §5.12F.

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§6A.30 IV. LIABILITY FOR MAKING INVALID TRANSFERS

No person will be held liable for making any transfer to a disqualified person unless that person has received prior actual notice of the "possible invalidity of the transfer." Prob C §21352. For example, a trustee or other fiduciary without notice will not be subject to liability in a suit brought by another beneficiary for making a distribution to a disqualified person.

Certainly, if an interested person makes a Prob C §21350 objection to the transfer, that will constitute actual notice. Furthermore, if the fiduciary has notice of the *facts* that give rise to potential §21350 objection (*e.g.,* knowledge that the transferee is a drafter or care custodian), this will also constitute notice. However, nothing in the statute imposes any obligation on the fiduciary to make an independent inquiry about the relationship between the transferor and transferee.

On the other hand, a person with actual notice of the possible invalidity of a transfer will not be liable for *failing* to make a transfer unless the validity of the transfer has been conclusively determined by a court. Prob C §21352.

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§6A.31 V. WILL CONTEST AND GROUNDS FOR OPPOSITION TO PROBATE OF PURPORTED WILL

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number*]_ _
_ _[*E-mail address if available*]_ _

Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

_ _ _ _ _ _ Court, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *Judicial District*]_ _

In re the Estate of _ _[*name*]_ _ **Deceased**	)	**No. _ _ _ _ _ _**
_ _[*Name(s)*]_ _, **Contestant(s)**	)	**WILL CONTEST AND GROUNDS FOR OPPOSITION TO** _ _[*PROBATE OF PURPORTED WILL/ PURPORTED GIFT TO RESPONDENT UNDER PROBATE CODE §21350*]_ _
vs	)	
_ _[*Name(s)*]_ _, **Respondent(s)**	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
	)	**Trial date:** _ _[*if set*]_ _

Contestant _ _[*name*]_ _ **, alleges:**

1. On or about _ _[*date*]_ _, **decedent** _ _[*name*]_ _ **died in** _ _[*County and State*]_ _**.**

2. At the time of _ _[*his/her*]_ _ **death, decedent was a resident of** _ _[*County and State*]_ _**.**

3. On or about _ _[*date*]_ _, **respondent** _ _[*name*]_ _ **filed herein petition to Probate Last Will and Testament of** _ _[*decedent's name*]_ _, **dated** _ _[*date*]_ _**.**

4. Contestant is interested in the administration and distribution of decedent's estate and is entitled to contest the admission of the purported will because

[*Add one or both of the following*]

_ _[*he/she is a beneficiary under a prior will executed by the decedent*]_ _

_ _[*he/she has an intestate interest in decedent's estate*]_ _

[*Continue*]

and that interest would be impaired or defeated by the admission of the purported will for probate.

5. The names, ages, and residence addresses of the heirs, devisees, and legatees of decedent, so far as are

known to Contestant, are: _ _[*list*]_ _.

6. Probate of the purported will should be denied on the following grounds:

[*Add one or more of the following alternatives*]

[*Alternative 1*]

First Contest Ground

7. The provisions of the purported will that make a gift to Respondent, _ _[*name*]_ _, are invalid because Respondent drafted the purported will.

[*Alternative 2*]

_ _[*number*]_ _ Contest Ground

[7.] The provisions of the purported will that make a gift to Respondent, _ _[*name*]_ _, are invalid because Respondent is _ _[*related by blood or marriage to/a domestic partner of/a cohabitant with/an employee of*]_ _ the person who drafted the purported will.

[*Alternative 3*]

_ _[*number*]_ _ Contest Ground

[7.] The provisions of the purported will that make a gift to Respondent, _ _[*name*]_ _, are invalid because Respondent is a _ _[*partner/shareholder/employee*]_ _ of the law firm in which the person who drafted the purported will has an ownership interest.

[*Alternative 4*]

_ _[*number*]_ _ Contest Ground

[7.] The provisions of the purported will that make a gift to Respondent, _ _[*name*]_ _, are invalid because Respondent _ _[*transcribed the purported will/caused the purported will to be transcribed*]_ _ at a time when Respondent had a fiduciary relationship with the decedent.

[*Alternative 5*]

_ _[*number*]_ _ Contest Ground

[7.] The provisions of the purported will that make a gift to Respondent, _ _[*name*]_ _, are invalid because Respondent is _ _[*related by blood or marriage to/a domestic partner of/a cohabitant with/an employee of*]_ _ a person who _ _[*transcribed the purported will/caused the purported will to be transcribed*]_ _ at a time when that person had a fiduciary relationship with the decedent.

[*Alternative 6*]

_ _[*number*]_ _ Contest Ground

[7.] Those provisions of that purported will that make a gift to Respondent, _ _[*name*]_ _, are invalid because, at the time the purported will was executed, Respondent was a care custodian of the decedent as that term is defined under section 15610.17 of the California Welfare and Institutions Code, and the decedent would have been a dependent adult under the definition set forth in Welfare and Institutions Code section 15610.23 had _ _[*he/she*]_ _ been between the ages of 18 and 64.

[*Alternative 7*]

_ _[*number*]_ _ Contest Ground

[8.] The provisions of the purported will that make a gift to Respondent, _ _[*name*]_ _, are invalid because Respondent is _ _[*related by blood or marriage to/a domestic partner of/a cohabitant with/an employee of*]_ _ a person who was a care custodian of decedent who would have been a dependent adult under the definition set

forth in Welfare and Institutions Code section 15610.23 had _ _[*he/she*]_ _ been between the ages of 18 and 64.

WHEREFORE, contestant requests judgment as follows:

[*Alternative 1*]

1. That the purported will be denied probate;

[*Alternative 2*]

1. For an order, decree, and judgment invalidating those provisions of the subject will that purport to make a gift to Respondent;

2. For costs of suit, including attorney fees, to the extent allowed by law; and

3. For any other relief that the Court considers proper.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Comment: Each paper filed with the court, except for exhibits, must have a footer giving the title of the paper on each page below the page number. Cal Rules of Ct 2.110. For additional format rules, see Cal Rules of Ct 2.100-2.119, §§10.3-10.6.

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VI. REMOVAL OF SOLE TRUSTEE

§6A.32 A. Grounds for Removal

A sole trustee who is a person described in Prob C §21350(a) is subject to removal on petition or on the court's own motion, regardless of whether the trustee is the transferee of a donative transfer by the transferor. Prob C §15642(b)(6). This can cause problems when the client wishes to name his or her estate planning attorney as a trustee or successor trustee. This grounds for removal applies to instruments that became irrevocable on or after January 1, 1994, and cannot be waived. Prob C §15642(b)(6).

The court will not remove the trustee, however, if it finds based on any evidence of the settlor's intent and all other facts and circumstances, which shall be made known to the court, that the trustee's continued service is consistent with settlor's intent and that the appointment was not the product of fraud, menace, duress, or undue influence. Prob C §15642(b)(6). Unlike Prob C §21351(d), §15642(b)(6) does not shift the burden to the challenged trustee to disprove the lack of fraud, menace, duress, or undue influence; heighten the burden of proof to the "clear and convincing" standard; or preclude the court from basing its decision solely on the testimony of a person described in Prob C §21350(a). To the contrary, the statute requires that the court consider all competent evidence presented.

This grounds for removal does not apply if there are two or more cotrustees, at least one of whom does not fall within any of the Prob C §21350(a) categories. Prob C §15642(b)(6).

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§6A.33 B. Exceptions

Probate Code §15642(b)(6)(A)-(C) creates certain exceptions to the grounds for a trustee's removal under Prob C §15642(b)(6). See §§6A.34-6A.36. The exceptions track but differ slightly from the Prob C §21351 exceptions that apply to avoid invalidation of a gift, discussed in §§6A.17-6A.24.

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§6A.34 1. Spouse, Cohabitant, and Blood Relatives

A sole trustee cannot be removed under Prob C §15642(b)(6) if the settlor is related by blood or marriage to, or is a cohabitant with, the trustee, the person who drafted or transcribed the instrument, or the person who caused the instrument to be transcribed. Prob C §15642(b)(6)(B). See §6A.10 for definition of "drafter" and §6A.13 for definitions of "transcribe" and "causes the instrument to be transcribed." "Related by blood or marriage" in this context means persons within the seventh degree. Prob C §15642(f).

NOTE: Unlike Prob C §21351(a), Prob C §15642(b)(6) does not create an exception for a domestic partner.

On its face, this exception applies when neither the trustee nor the drafter are related to the settlor, provided that someone who transcribed the instrument or caused it to be transcribed is the settlor's relative or cohabitant. In this regard, this exception differs from the Prob C §21351 exceptions to the invalidity of gifts. In Prob C §21351, the fact that a transcriber or person who causes the instrument to be transcribed is related to the transferor will not save a gift made to one of the other categories of prohibited transferees, such as a care custodian of a dependent adult. It is not clear why the legislature would consider a familial or cohabitancy relationship between the settlor and a person who transcribes or causes an instrument to be transcribed (*e.g.,* a secretary) sufficient to protect against the possibility of overreaching by an unrelated drafter who names him or herself as sole trustee.

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§6A.35 2. Certificate of Independent Review

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The provision for removal under Prob C §15642(b)(6) will not apply if the trust instrument is reviewed by an independent attorney who counsels the settlor and signs and delivers to the settlor and trustee a certificate of independent review in substantially the following form prescribed in Prob C §15642(b)(6)(B):

CERTIFICATE OF INDEPENDENT REVIEW

I, _ _[*attorney's name*]_ _, have reviewed _ _[*name of instrument*]_ _ and have counseled my client, _ _[*name of client*]_ _, fully and privately on the nature and legal effect of the designation as trustee of _ _[*name of trustee*]_ _ contained in that instrument. I am so disassociated from the interest of the person named as trustee as to be in a position to advise my client impartially and confidentially as to the consequences of the designation. On the basis of this counsel, I conclude that the designation of a person who would otherwise be subject to removal under paragraph (6) of subdivision (b) Section 15642 of the Probate Code is clearly the settlor's intent and that intent is not the product of fraud, menace, duress, or undue influence.

__[*Name of Attorney*]__ __[*Date*]__

NOTE: Unlike Prob C 21351(b), Prob C §15642(b)(6)(B) does not explicitly require the attorney to attempt to discover whether the settlor's designation of the trustee is the product of fraud, menace, duress, or undue influence, although such a conclusion must be made in the certificate of independent review.

The independent attorney must sign the certificate and deliver it to the settlor and the designated trustee. The independent review and certification may occur either before or after the trust instrument's execution. Prob C §15642(b)(6)(B). See §6A.18 re meaning of "independent attorney."

PRACTICE TIP: When the settlor wants to name his or her estate planning attorney as a sole trustee, a Certificate of Independent Review is an alternative to referring preparation of the trust instrument to other counsel.

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§6A.36 3. Trust Instrument Created by Substituted Judgment

The trustee will not be removed under Prob C §15642(b)(6) if the instrument was approved, after full disclosure, by an order issued in substituted judgment proceedings under Prob C §§2580-2586. Prob C §15642(b)(6)(C).

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§6A.37 C. Applicability of No-Contest Clause

Notwithstanding anything to the contrary in an instrument, a petition to remove a fiduciary, including a petition to remove a sole trustee under Prob C §15642(b)(6) on the grounds that the trustee is a person described in Prob C §21350(a) does not violate a no-contest clause as a matter of public policy. Prob C §21305(b)(7).

This provision applies to instruments of decedents dying on or after January 1, 2001, and to documents that become irrevocable on or after that date. Prob C §21305(d). No-contest clauses in earlier documents will be construed and enforced in accordance with "common law." Prob C §21301. A no-contest clause that includes an attempt to remove a fiduciary as a contest is unenforceable as a matter of public policy unless the attempt is frivolous. *Estate of Ferber* (1998) 66 CA4th 244, 77 CR2d 774.

A new statutory scheme governing no-contest clauses will become operative on January 1, 2010, and will supersede Prob C §21305 for instruments that became irrevocable on or after January 1, 2001. Prob C §21315. For those instruments, a no-contest clause will be unenforceable against an attempt to remove a trustee for breach of trust. Prob C §21311. See §5.12B.

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§6A.38 D. Award of Attorney Fees

If the court finds that the designation of the trustee was not consistent with the settlor's intent or was the product of fraud, menace, duress, or undue influence, the removed trustee must bear all costs of the proceeding, including reasonable attorney fees. Prob C §15642(c). A trustee who successfully defends against a removal petition brought under Prob C §15642(b)(6) has no reciprocal entitlement to fees, but the court has discretion to order that the petitioner bear the trustee's fees and costs if it finds that the petition was filed in bad faith and that removal would be contrary to settlor's intent. Prob C §15642(d).

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Source: Estate Planning/California Trust and Probate Litigation/6A Statutorily Disqualified Donees and Trustees/§6A.39 E. Form: Petition for Removal of Trustee

§6A.39 E. Form: Petition for Removal of Trustee

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number*]_ _
_ _[*E-mail address if available*]_ _

Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

_ _ _ _ _ _ **Court, County of** _ _ _ _ _ _
_ _[_ _ _ _ _ _ *Judicial District*]_ _

IN THE MATTER OF _ _[*name of trust*]_ _ u/t/a/d _ _[*date*]_ _ _____ _ _[*Name(s)*]_ _, **Petitioner** **vs** _ _[*Name(s)*]_ _, **Respondent**	**No.** _ _ _ _ _ _ **PETITION FOR REMOVAL OF TRUSTEE** **Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

Petitioner, _ _[*name*]_ _**, alleges:**

1. Petitioner is _ _[*state interest in trust*]_ _.

2. _ _[*Name of trustee*]_ _ **is the sole trustee of the above-named Trust.**

3. The Trust _ _[*is revocable/became irrevocable on or after* _ _[*date after January 1, 1994*]_ _]_ _.

4. _ _[*Name of trustee*]_ _ **should be removed as trustee on each of the following grounds:** _ _[*List grounds separately, giving applicable details of relationship disqualifying trustee, e.g.:*

(a) _ _[*Name of trustee*]_ _ *drafted the trust instrument.*

(b) _ _[*Name of trustee*]_ _ *is* _ _[*related by blood to/a cohabitant with/an employee of*]_ _ _ _[*name of drafter*]_ _*, the person who drafted the trust instrument.*

(c) _ _[*Name of trustee*]_ _ *is an employee/partner/shareholder in* _ _[*name of drafter's law firm*]_ _*, a law partnership/corporation in which* _ _[*name of drafter*]_ _*, who drafted the trust instrument, has an ownership interest.*

(d) _ _[*Name of trustee*]_ _ *had a fiduciary relationship with* _ _[*name of settlor*]_ _ *as his/her* _ _[*nature of fiduciary relationship*]_ _ *and transcribed the trust instrument/caused the trust instrument to be transcribed.*

(e) _ _[*Name of trustee*]_ _ *is related to/a cohabitant with/an employee of* _ _[*name of person who transcribed or caused the trust instrument to be transcribed*]_ _ *and had a fiduciary relationship with* _ _[*name of settlor*]_ _ *as his/her* _ _[*nature of fiduciary relationship*]_ _.

(f) _ _[Name of trustee]_ _ was _ _[name of settlor]'s_ _ care custodian, and _ _[name of settlor]_ _ was a dependent adult at the time he/she designated _ _[name of trustee]_ _ as trustee]_ _.

[*Add if appropriate*]

5. _ _[*Name of trustee*]_ _ 's designation as trustee by _ _[*name of settlor*]_ _ was not consistent with _ _[*name of settlor*]_ _'s intent in that _ _[*allege facts establishing inconsistency or settlor's true intent*]_ _.

[*Add if appropriate*]

[6.] _ _[*Name of trustee*]_ _'s designation as trustee was the product of _ _[*fraud/menace/duress and or/ undue influence*]_ _ in that _ _[*allege facts establishing fraud, menace, duress and/or undue influence*]_ _.

[*Add if appropriate*]

[7.] _ _[*Allege facts showing beneficiary may suffer loss or injury from trustee's continued service pending a decision on the petition*]_ _.

WHEREFORE, petitioner requests that:

1. The court issue a citation directed to _ _[*name of trustee*]_ _ as trustee of the _ _[*name of Trust*]_ _ requiring _ _[*him/her*]_ _ to appear and show cause why _ _[*he/she*]_ _ should not be removed.

[*Add if appropriate*]

2. The court forthwith suspend the powers of _ _[*name of trustee*]_ _ as trustee of the _ _[*name of Trust*]_ _ and order _ _[*name of trustee*]_ _ to transfer all property in the trust to _ _[*name of receiver or temporary trustee*]_ _ pending a decision on this petition.

[2.] The court order _ _[*name of trustee*]_ _ to bear all attorney fees and costs incurred by petitioner herein.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Comment: Each paper filed with the court, except for exhibits, must have a footer giving the title of the paper on each page below the page number. Cal Rules of Ct 2.110. For additional format rules, see Cal Rules of Ct 2.100-2.119, §§10.3-10.6.

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§6A.40 VII. GROUNDS FOR ATTORNEY DISCIPLINE

A violation of Prob C §21350 is grounds for discipline of an attorney who "knew or should have known of the facts leading to the violation." Bus & P C §6103.6. This clearly applies to an attorney who participates in preparing an instrument that makes an invalid gift to him- or herself, a spouse, domestic partner, cohabitant, close relative, employee, or law partner. See Prob C §21350(a). On its face, it also applies when the instrument makes a gift to a prohibited transferee who is unrelated to the attorney, e.g., a care custodian, if the attorney knew or should have known of the relationship.

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7

Multiple Proceedings

Dominic J. Campisi

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I. TACTICAL CONSIDERATIONS

§7.1 A. Variety of Actions and Forums Available

Litigation of probate and trust matters offers a variety of forms of actions and courts. When the issue is ownership or control of assets, there may be several avenues of attack. Some situations merely present choices between different probate remedies, *e.g.,* between an heirship petition under Prob C §11700 and a property claim under Prob C §850. Other situations may permit filing of a civil claim in either superior court or federal court, with the possibility of a jury trial for some or all of the claims. Although the attorney normally should seek to minimize expense and delay by trying multiple issues in a single proceeding, that may not be possible because of an inability to obtain jurisdiction over the property in question or the persons involved. On jurisdictional issues generally, see §§9.1-9.6.

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Source: Estate Planning/California Trust and Probate Litigation/7 Multiple Proceedings/§7.2 B. Costs and Benefits of Multiple Proceedings and Attendant Delay

§7.2 B. Costs and Benefits of Multiple Proceedings and Attendant Delay

The attorney must assist the potential litigant in evaluating whether he or she is served by efficient consolidation of claims before a single judge or court or whether there are tactical advantages to proceeding in different courts or at different times.

Although some proceedings can be resolved quickly, others generally move with the slower pace of master calendars, bankruptcy court delays, or federal court dockets. The choice of an experienced probate judge who will only hear cases in segments on several afternoons may be rejected in favor of being put on the master calendar so that the proceeding can be concluded in a continuous setting, albeit with a judge whose contact with probate may be quite limited. Trying a case in half-day segments a month apart is demoralizing to both witnesses and counsel. The expense can also be enormous because counsel and witnesses must review and prepare for each segment.

The efficiency and convenience of trying all disputes before a single judge in a probate setting may not be in the client's interest, however, when, *e.g.*:

- The attorney can use an early action to force the opponent into tactical positions that can be exploited in a later action.
- The attorney foresees victory in early proceedings that may dishearten opponents from instigating later proceedings when the client's prospects may objectively be worse.
- The client is in a superior financial position and can wear the opposition down by the expense and delays of multiple proceedings.

NOTE: Because reliance on superior resources is not a strategy sanctioned by courts, the attorney must have other, more substantive justifications for the resulting consumption of judicial and legal resources.

- The parties' relative ages make delay advantageous because the client will be able to deal more effectively with the conservators or heirs of contentious older relatives who hold intractable views of their rights than with the older relatives themselves.
- The results of, *e.g.,* existing litigation involving the decedent or estate tax audits might be unfavorably affected by early resolution of questions of the ownership or valuation of assets.
- Delay will allow the grieving process to end, so that the parties can view their situations rationally, rather than confusing litigation with therapy. Often a case can be settled only after the parties have accepted their personal losses; six months is frequently the minimum.
- Litigation also allows transference of anger from the dead and their living allies to attorneys and the court process. Once the parties find common cause in frustration with the litigation process and its practitioners, they may consider settlement or mediation.

Delay is not without its risks. Clients often have a low tolerance for attorneys who utilize delaying tactics that result in fundamental changes in the client's position. If a client dies, becomes disabled, runs into financial reversals, or suffers a change in the governing law that cripples his or her case, the client (or the executor or conservator) may not treat the attorney gently for having embarked on that course. The attorney should counsel the client on the potential disadvantages of delay before undertaking that approach.

If the opposing attorney is part of a chummy probate bar in the county of venue, or the assigned judge or probate commissioner's views are inimical to the attorney, persons of the client's status, or the claims of right on which the case is being prosecuted, the attorney may want another judge. Although a challenge under CCP §170.6 is one available remedy, there may be more subtle ways to avoid a particular judge or commissioner. Bringing a civil action or packing a case with so many issues that it cannot be heard by the probate judge in the limited time available can result in the case being assigned to the master calendar without ever having to raise public questions about the bias of the probate judge or commissioner. Predicting at a status conference that a case will take weeks to try can get a case removed from a probate judge trial. On the other hand, the bench officer might conclude that the attorney is disingenuous or

hopelessly inefficient and retain the case, imposing draconian trial restrictions that weaken the attorney's presentation. The cost of success in switching to a master calendar may be substantial delay and the loss of the experience of the probate court personnel. Whether this is good or bad depends on the circumstances of the client and the case.

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Source: Estate Planning/California Trust and Probate Litigation/7 Multiple Proceedings/§7.3 C. Jury Issues

§7.3 C. Jury Issues

The desire for a jury trial for some segment of the overall dispute may dictate multiple proceedings. The possibility of a jury trial can be a major advantage if the client is in a position that elicits sympathy, the case has more empathetic appeal than law behind it, or the opposing parties (or their attorneys) fear their peers. Because many probate and trust litigators have had little jury trial experience, their insecurities can be used to advantage by an attorney who makes them aware of his or her successes with jury verdicts.

PRACTICE TIP: Although some judges are much more generous with damages (punitive and otherwise) than juries, it is often difficult to quantify the range of possible verdicts with a jury. Accordingly, the unpredictability of the size of a jury verdict can expand the range of settlement alternatives and thereby lead to a higher settlement.

As discussed in §10.42, probate matters are generally heard without a jury. Suits involving creditors' claims (see Prob C §§9000-9399, 19000-19403) and disputes over assets, however, can be heard under either the court's probate or civil jurisdiction and may permit jury trials when the gist of the action is one at law. See *Estate of Fincher* (1981) 119 CA3d 343, 351, 174 CR 18 (court may try equitable issues separately even when legal issues are tried to jury). Consequently, the action may proceed as a contract or fraud claim, or a claim of tortious interference with the right to inherit (see §7.8), entitling the parties to a jury trial rather than a probate or equitable action tried to the court.

The probate court has the full power of the superior court to reach parties and resolve disputes. See Prob C §17001 (trusts); *Estate of Baglione* (1966) 65 C2d 192, 197, 53 CR 139 (probate). Consequently, civil and probate matters may be joined in a single proceeding, as long as jurisdiction can be obtained over the respective parties or property. When property is in another state or country, the ability to obtain jurisdiction may be limited, unless jurisdiction can be asserted over an owner who has appeared in the probate or trust proceeding (as opposed to being joined only by notice in an in rem or quasi in rem proceeding). Similarly, it may be difficult to bring indispensable parties into the same court if, *e.g.,* trustees live in different states.

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§7.4 D. Equitable Issues Generally Tried First

Consolidation of civil jury issues with probate or trust proceedings, either in an initial pleading or by motion (see CCP §1048(a)), can raise problems of the order of trial when there are common issues of law and equity involved. The trial court has discretion to control the presentation of issues, but generally allows equitable issues to be decided first by the court, because this may eliminate the need for a jury trial on the common question. See *Raedeke v Gibraltar Sav. & Loan Ass'n* (1974) 10 C3d 665, 671, 111 CR 693; *Richard v Degen & Brody, Inc.* (1960) 181 CA2d 289, 295, 5 CR 263, disapproved on other grounds in 40 C3d at 498; 7 Witkin, California Procedure, *Trial* §149 (5th ed 2008).

PRACTICE TIP: Note that there is a substantial difference in federal practice in this regard. In federal court, as a general rule a jury question cannot be preempted by an equitable decision by the judge on a common issue unless imperative circumstances such as irreparable harm or inadequacy of legal remedies allow claims of equitable origins to be tried first. *Beacon Theatres, Inc. v Westover* (1959) 359 US 500, 3 L Ed 2d 988, 79 S Ct 948. Consequently, when there is diversity of citizenship or federal subject-matter jurisdiction, a party may elect to proceed in, or remove the action to, federal court to preserve the primacy of the jury's decision on key issues.

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II. TYPES OF ACTIONS

§7.5 A. Attack on Pour-Over Will, Inter Vivos Trust, or Both

The inter vivos trust coupled with a pour-over will is a common modern probate plan. Before deciding whether to attack the will, the trust, or both, the attorney must take care to ascertain whether the trust was fully funded. The attorney must also be aware that the standards of capacity to execute wills and trusts and to fund trusts may differ and pose more difficult evidentiary problems in the case of trusts, particularly those that are irrevocable, have third persons as trustees, or provide for transfers to others during the settlor's lifetime. See §6.4.

If the will and trust were executed at the same time, a judgment on the validity of one document can collaterally estop parties on the other. This may allow a single action on the more vulnerable document. Note, however, that an attack on a pour-over will may take so long that a subsequent attack on the trust may be time-barred. See *Morse v Crocker Nat'l Bank* (1983) 142 CA3d 228, 190 CR 839. Absent circumstances differentiating the validity of the trust from that of the will, it makes sense to try both in a consolidated probate action.

If the trust was funded at some time after the execution of the trust document, there may be significantly different evidentiary issues involved in proving whether lack of capacity or undue influence was involved at the time of the property transfer than in addressing execution of the document. With a failing settlor, for example, the transfer may take place without alert witnesses and at a time when the settlor lacked capacity. Similarly, when the trust in question deals with only a portion of the estate, the circumstances of funding may be critical in determining whether the nature and extent of the assets transferred were the subject of a reasoned and valid decision.

It may be important whether the pour-over will provides, in the event that the trust is held invalid, for republication of the terms of the trust. See *Hagen v Hickenbottom* (1995) 41 CA4th 168, 174, 48 CR2d 197. If it does not, a successful attack on the trust may lead to intestacy or a default provision in the will. In *Hagen*, the attack was made only on the inter vivos trust. The trustee and primary beneficiary sought and was granted summary judgment. On appeal, he argued that the existence of the pour-over will, which essentially republished the terms of the trust, mooted the attack on the trust. Apparently, there had been no probate of the will. The trustee thus sought the support of the pour-over will without submitting it for probate.

Instead of treating the defense as conjectural, the court of appeal stated (41 CA4th at 174):

> In our view the omission is obviously an oversight which the grandchildren undoubtedly would have sought to remedy had the point been timely raised in the trial court. Therefore we shall reject [trustee's] argument that the omission moots the attack upon the trust as such, and shall treat the grandchildren's theories as though addressed to both the trust and the pour-over will.

Whether the court in *Hagen* was dealing purely with a pleading issue or impliedly requiring a will contest in addition to the attack on the trust is not clear. Once one pleads that both the trust and pour-over will are infirm, he or she may be considered to have filed a will contest and be required to meet the service and other procedural requirements that accompany it. Conceptually, until the will is submitted for probate, it is simply a piece of paper. To invariably force a will contest when the inter vivos trust contains the entire estate seems a poor policy, although it obviously has advantages for the proponents, as the trustee in *Hagen* realized.

PRACTICE TIP: The attorney must also ascertain whether the trust was subsequently amended after execution of the will, and whether the pour-over will sought to pour into a specific trust or into one that, by subsequent amendments, existed at the time of death of the testator/settlor. The clients may be hurt or helped by the changes in the plan; if these are major changes, an attack on the trust may suffice because the will would pour into the unamended trust.

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§7.6 1. Defensive Considerations

Whether the trust is funded and contains directions for the trustee to expend funds to protect the trust, will, or both may be crucial. Modern practitioners with funded trusts often fail to probate the pour-over will because they may consider it to be a waste of time to conduct a "dry" probate.

When there is some question about the validity of the will and trust, however, it may be prudent to submit the will for probate, for at least the following reasons:

- Submission of the will for probate triggers a statute that forces potential adversaries into action within months rather than years.
- The pour-over will may require a lesser showing of capacity to withstand attack than the inter vivos trust that had consequences during the testator's remaining life. See §6.4. After the testator's death—and the will is published as of the time of death—prudence may be irrelevant.
- If the contestants allow the will to be admitted to probate, the executor can defend it with estate assets.

NOTE: The executor may have the right under the terms of the trust to apply to the trustees for funds for defense of the will whether admitted to probate or not.

Thus, trust proponents may choose to (a) take no action, and hope that laches or statutes of limitations will protect them, or (b) probate the pour-over will to flush out contestants or add a second trench to the defense when the trust is challenged. When a trust becomes irrevocable, a notice under Prob C §16061.7 and delivery of a copy of the trust may trigger the 120-day statute of limitations under Prob C §16061.8. An intermediate step is to give notice to creditors (see Prob C §§19000-19403) to start the clock running on claims (rather than relying on the statute of limitations in CCP §366.2, an approach that is not proving to be invariably successful), and thereby place the contestants on notice of the trust's existence.

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§7.7 2. Offensive Considerations

Like the proponents (see §7.6), the contestants have a variety of factors to consider. Because the probate court is a superior court with full powers, they may bring a will contest and an attack on the existence of the trust in probate, or they may file the trust attack as a civil complaint.

PRACTICE TIP: An attack on an unfunded inter vivos trust may leave the trustees without ready assets to defend the trust's validity. Consequently, such an attack on an empty trust can level the playing field with respect to resources to support the litigation.

Filing a will contest before the will's admission to probate can similarly deny immediate access to probate assets to the defenders for their costs. Separate actions can have a significant effect on the availability of funds for defense. If the attacks on the will and trust are consolidated, it will be more difficult to apply pressure to prevent use of trust assets to defend the consolidated actions.

Although the trust may be silent about defense costs, the trustee generally has a duty to defend the trust when it is reasonable to do so. See Prob C §16011; *Estate of Goulet* (1995) 10 C4th 1074, 1082, 43 CR2d 111; *Webb v St. Louis Nat'l Bank* (Mo App 1977) 551 SW2d 869; Restatement (Third) of Trusts §76, Comment d; §88, Comment d (2007). Consequently, the trustee generally can defend the trust from contestants seeking to invalidate it. Whether the contestants can disable or dissuade the trustee from using trust assets depends on the facts of the case. Both sides should be aware that an unreasonable or unsuccessful defense could result in the trustee being denied reimbursement of litigation costs. If the trustee is a beneficiary, the probate judge may be responsive to an attack based on use of trust funds to protect the trustee's personal interest. A petition to approve defense costs may be prudent for the trustee but may also offer the contestants a successful opportunity for attack early in the case.

When the trustee wishes to use trust funds for defense of the trust's validity or to subsidize the executor in the will's defense, the attorney must ensure that the trustee understands the risks of failure. At the same time, the attorney needs to build a record of the steps undertaken to determine that such a defense is reasonable. See*, e.g., Pillsbury v Karmgard* (1994) 22 CA4th 743, 27 CR2d 491.

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§7.8 3. Tortious Interference With Right to Inherit

One component of an attack on a trust can be a claim for tortious interference with the right to inherit. The common law provides a remedy when a person, by fraud, duress, or other tortious means, intentionally prevents another from receiving from a third person an inheritance or gift that he or she would otherwise have received. Restatement (Second) of Torts §774B (1965); Restatement of Restitution §184 (1937); Prosser & Keeton on the Law of Torts §130 (5th ed 1984). See *Hagen v Hickenbottom* (1995) 41 CA4th 168, 48 CR2d 197.

In *Estate of Silva* (1915) 169 C 116, 145 P 1015, the testator directed his wife to destroy his will, which left everything to her, after which his assets would be distributed in intestacy to other relatives. The wife instead destroyed an envelope that did not contain the will, but told the testator that it did. The intestate heirs filed a petition for revocation of the will in the probate proceedings, but had their claim rejected because the facts did not fall within the statutory grounds for revocation. They then sought relief from the wife, seeking a constructive trust in their favor, and prevailed on demurrer against her arguments that the admission of the will to probate barred their claim and that there was no legal remedy for the wrong alleged. *Brazil v Silva* (1919) 181 C 490, 185 P 174, disapproved on other grounds in 57 C2d at 133. For a summary of cases addressing whether an action for tortious interference with a bequest is precluded by the will contest remedy, see Anno, 18 ALR5th 211 (1994). For particular cases, see, *e.g., Huffey v Lea* (Iowa 1992) 491 NW2d 518 (action for tortious interference not barred by will contest remedy); *Estate of Hoover* (Ill App 1987) 513 NE2d 991 (action barred).

PRACTICE TIP: The tortious interference claim has the advantage of sounding in tort, although it generally is joined with constructive trust claims to obtain title to specific assets rather than simply obtaining damages. The tort remedy may be the only alternative if the alleged tortfeasor is not the recipient of the assets or if the assets have been dissipated by the innocent, but unduly enriched, beneficiary.

The wrongful conduct required for the tort remedy is also present in a will contest or trust attack based on undue influence, fraud, duress, or other improper conduct. Although a jury hears the tort claim, the legislature has ousted juries from hearing will contests, apparently because they tended to vote based on their own views of how testators should have disposed of the property rather than on the cold strictures of the law. See Prob C §8252(b); *Estate of Fritschi* (1963) 60 C2d 367, 373, 33 CR 264; *Estate of Gardner* (1991) 1 CA4th 995, 2 CR2d 664; Comment to Prob C §8252; 19 Cal L Rev'n Comm'n Reports 793 (1988). Thus, a tortious or negligent interference claim can lead to trying the matter before a jury, which can be a significant advantage. As the Law Revision Commission commented on the change to Prob C §8252, the availability of a jury trial enabled "contestants as a practical matter to force compromise settlements to which they would not otherwise be entitled." Comment to Prob C §8252.

The "equity first" doctrine may allow the defense to have the equitable claims, *e.g.,* for constructive trust, restitution, or cancellation, tried first to the court, thereby possibly preempting the jury in superior court. See §7.4. When there is diversity and no preexisting probate action, a federal action might be brought (see *Glickstein v Sun Bank/Miami, N.A.* (11th Cir 1991) 922 F2d 666; *Georges v Glick* (7th Cir 1988) 856 F2d 971), with a jury deciding the common issue. Facing a possible diversity case, the trustee or executor may choose to probate the pour-over will, seeking to prevent the matter from being heard in federal court.

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Source: Estate Planning/California Trust and Probate Litigation/7 Multiple Proceedings/§7.9 B. Alternative Claims

§7.9 B. Alternative Claims

There may be a variety of alternative claims that can be brought to obtain assets in a probate estate or trust. The surviving spouse, for example, may contest the will or validity of the trust and also seek to obtain all or a portion of the assets through community property claims or claims based on prenuptial or postnuptial agreements. See *Estate of Fincher* (1981) 119 CA3d 343, 174 CR 18 (claims brought by spouse based on agreements before marriage and community property interests arising during marriage). This could be done in probate through a property claim under Prob C §850 or an heirship petition under Prob C §11700. Alternatively, a quiet title action or civil suit might be brought to proceed outside of probate. On remedies under elder abuse provisions, see chap 8.

Quasi-contract (see §7.10) or palimony (see §7.11) claims may also be avenues for recovering assets, either when a will or trust contest is unfruitful or when one prefers multiple attacks.

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§7.10 1. Oral Agreement to Make Will

Different rules apply to the issue of whether an oral agreement to make a will (or not to revoke a will or to die intestate) is enforceable depending on when the promise was made.

For oral agreements made before January 1, 1985, it may be possible to impose a constructive trust when there are facts showing an enforceable promise to make a will. In general, a contract to make a particular testamentary disposition of property is valid and enforceable. As in every contract, there is an implied covenant of good faith and fair dealing that neither party will do anything that injures the rights of the other to receive the benefits of the agreement. When the parties contract to make a particular disposition of property by will, the agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed. Although the statute of frauds required an agreement to make a provision by will to be in writing, a party will be estopped from relying on the statute when fraud would result from refusal to enforce an oral contract. *Redke v Silvertrust* (1971) 6 C3d 94, 100, 98 CR 293. See former CC §1624 (pre-1985 wills; contract to make will invalid unless in writing and signed by party to be charged), Prob C §21700(c).

For agreements made on or after January 1, 1985, but before January 1, 2001, former Prob C §150 (post-1984 wills) requires at least one of the following:

- Provisions of a will stating material provisions of the contract;
- An express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or
- A writing signed by the decedent evidencing the contact.

In *Juran v Epstein* (1994) 23 CA4th 882, 28 CR2d 588, the court held that former Prob C §150 did not eliminate a court's ability to apply equitable principles, in particular equitable estoppel, in the area of contracts to make (or not to revoke) a will. There still must be proof of detrimental reliance to establish such a claim. Before equity will act to estop reliance on the statute of frauds, a substantial change of position must be proved. *Estate of Housley* (1997) 56 CA4th 342, 65 CR2d 628.

A promise made after January 1, 2001 can be established by a writing (as defined in former Prob C §150) or by clear and convincing evidence of an agreement or a promise between the decedent and the claimant, or between the decedent and another person for the benefit of the claimant, that is enforceable in equity. Prob C §21700. See also §5.22.

The statute of limitations for breach of an oral or written contract to make a will begins to run on the promisor's death. *Kennedy v Bank of America* (1965) 237 CA2d 637, 652, 47 CR 154; *Rooney v Sullivan* (1959) 169 CA2d 432, 434, 337 P2d 543. An action on an agreement to make a will or other testamentary device must be brought within one year after the date of death. CCP §366.3. In *Marriage of Edwards* (1995) 38 CA4th 456, 461, 45 CR2d 138, the court held that, absent allegations of bad faith inter vivos transfers for the purpose of defrauding the intended beneficiaries, a court lacked the ability during the promisor's lifetime to enforce an agreement in a divorce decree to leave money to the parties' children. When the promisor breaches the agreement or makes it impossible to perform, however, judicial intervention may be appropriate before his or her death.

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Source: Estate Planning/California Trust and Probate Litigation/7 Multiple Proceedings/§7.11 2. Palimony (Marvin) Claims

§7.11 2. Palimony (*Marvin*) Claims

A palimony claim of a nonmarital cohabitant was first recognized in *Marvin v Marvin* (1976) 18 C3d 660, 134 CR 815. Family Code property and support rights, on the other hand, are dependent on the existence of a valid marriage or putative spousal relationship. See *Marvin v Marvin, supra*; *Friedman v Friedman* (1993) 20 CA4th 876, 24 CR2d 892 (award of temporary spousal support to nonmarital cohabitant not available under Family Code).

Probate Code family protection provisions for a spouse are dependent on the existence of a valid marriage, although a putative spouse is entitled to his or her share of quasi-marital property. See Prob C §§6500-6615; *Estate of Hafner* (1986) 184 CA3d 1371, 229 CR 676.

Like any other parties, unmarried cohabitants may own property and enter into enforceable contracts, including contracts for property ownership and support. *Marvin v Marvin, supra*; *Byne v Laura* (1997) 52 CA4th 1054, 60 CR2d 908 (oral support and property agreements between unmarried cohabitants can be enforced against estate; equitable estoppel may be available to overcome statute of frauds issues). A number of remedies have been allowed for breach of such contracts:

- Express contract to hold or pool property or earnings;
- Implied contract based on the parties' conduct;
- Express or implied partnership or joint venture;
- Constructive trust, resulting trust, or equitable lien;
- Recovery in quantum meruit for fair market value of services rendered; and
- Additional equitable remedies that the court may fashion.

Cohabitation is usually necessary to prove consideration to support a claim of a contract for services. A cohabitation arrangement that is less than full time can be sufficient if the parties shared a stable, long-term relationship. *Cochran v Cochran* (2001) 89 CA4th 283, 106 CR2d 899. Rendition of sexual services, however, is not lawful consideration; rather, lawful consideration must be severable from sexual services. *Marvin v Marvin*, *supra*; *Bergen v Wood* (1993) 14 CA4th 854, 18 CR2d 75.

NOTE: An enforceable cohabitation agreement may be between partners of the same sex. See *Whorton v Dillingham* (1988) 202 CA3d 447, 248 CR 405.

As can be seen, there is a variety of distinct claims that might be brought in probate and civil actions, depending on the strategy desired. The attorney must be extremely careful in pleading such matters, particularly in probate procedures in which a verified petition is required. In an excess of zeal, the attorney may plead a variety of alleged facts without considering how they impact on other actions. The pleadings may, for example, allege valid agreements with the decedent during the same period that a will contest alleges incompetence.

The attorney should carefully research whether the client's legal rights and remedies are subject to the claims period raised by a probate or trust claims notice, or can be brought at a later time as a petition under Prob C §11700, community property claim, or civil suit. If deadlines are not imminent, time should be taken to discover facts and consider the potential consequences of allegations. Faced with deadlines, the unverified allegations of a civil suit may be preferable to having the client verify probate pleadings that might be drafted differently if there were more time.

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8

Remedies Under Elder Abuse Provisions

Irene L. Silverman

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I. INTRODUCTION

§8.1 A. Generally

This chapter is designed to be an overview of the interrelationship between the traditional trust and estate issues that result in litigation and elder abuse issues that often are present in the same litigation. When assessing a possible trust or will contest, the practitioner must be aware of facts that may also give rise to claims for elder abuse, including issues of incapacity, undue influence, mistake, fraud, duress, menace, wrongful taking of property, financial abuse, and bequests to disqualified persons under Prob C §21350.

The Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) (Welf & I C §§15600-15657.5) provides enhanced remedies for existing causes of action involving the abuse of elders or dependent adults. These include postmortem recovery for pain and suffering (see §8.8), attorney fees and costs (see §8.9), and conservator's costs (see §8.12). EADACPA also provides for concurrent probate and civil jurisdiction in certain situations (see §§8.14-8.16) and sets forth procedures for seeking temporary restraining and protective orders for elders or dependent adults in immediate danger of abuse (Welf & I C §15657.03).

"Elder abuse," for purposes of EADACPA's enhanced remedies, includes physical abuse (Welf & I C §15610.63), neglect (Welf & I C §15610.57), isolation (Welf & I C §15610.43), abduction (Welf & I C §15610.06), and financial abuse (Welf & I C §15610.30). This chapter will focus on financial abuse because it is the form of abuse most likely to be alleged in probate and trust litigation. See §8.5. See *Mack v Soung* (2000) 80 CA4th 966, 95 CR2d 830, for a case involving neglect. Note, however, that isolation very often may occur in situations in which undue influence, duress, or manipulation of an elder may be occurring, and would give rise to enhanced remedies for the resulting financial abuse.

For a detailed discussion of EADACPA issues generally, see California Elder Law Litigation: An Advocate's Guide, chap 6 (Cal CEB 2003). For discussion of elder abuse by nursing homes or residential care facilities, see Elder Law Litigation, chaps 2-5. For discussion of pleading and litigating the statutory tort of financial abuse of an elder or dependent adult, see Elder Law Litigation, chaps 6-6A. For jury instructions in cases of elder abuse, see CACI 3100-3116 (see also BAJI 7.40-7.48).

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§8.2 B. Nonexclusivity of Remedies Under EADACPA

The enhanced remedies available under EADACPA are "in addition to," and not in lieu of, "all other remedies otherwise provided by law" (Welf & I C §§15657, 15657.5) and compensatory damages in financial abuse cases (Welf & I C §15657.5). The enhanced remedies under EADACPA are not exclusive but supplement existing remedies for causes of action such as a prohibited bequest to a disqualified person; breach of fiduciary duties; tortious assault and battery; actual or constructive fraud; intentional or negligent infliction of emotional distress; conversion, embezzlement, or forgery; and violations of statutory or regulatory duties.

Thus, elderly victims of financial abuse are entitled to the general remedies available under Division 4 of the Civil Code. CC §§3274-3449. In addition, Prob C §859 authorizes double damages for bad faith wrongful taking, concealment, or disposal of property of the estate of the decedent, ward, or conservatee that is recovered in a proceeding under Prob C §§850-859.

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Source: Estate Planning/California Trust and Probate Litigation/8 Remedies Under Elder Abuse Provisions/§8.3 C. Statute of Limitations

§8.3 C. Statute of Limitations

An action for financial abuse under Welf & I C §§15657.5-15657.6 must be filed within 4 years after the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, the facts that constitute financial abuse. Welf & I C §15657.7.

Because the Welfare and Institutions Code is silent with regard to statutes of limitations for an action for physical abuse, the appropriate limitations period is governed by the underlying cause of action that involves elder abuse. Typically, physical abuse or neglect will cause personal injury or death, which fall within the 2-year statute of limitations of CCP §335.1 and may be subject to tolling for "insanity" under CCP §352. *Benun v Superior Court* (2004) 123 CA4th 113, 20 CR3d 26.

A survivor claim for personal injury to an elder pleads a different injury than a wrongful death cause of action, and, therefore, does not relate back to a timely filed wrongful death claim. *Quiroz v Seventh Ave. Ctr.* (2006) 140 CA4th 1256, 45 CR3d 222.

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D. Definitions

§8.4 1. Persons Protected by EADACPA

Under EADACPA, an "elder" is any person residing in California who is 65 years of age or older. Welf & I C §15610.27. A "dependent adult" is any person residing in California, between the ages of 18 and 64, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age. Welf & I C §15610.23(a). The term "dependent adult" also includes any person between the ages of 18 and 64 who is admitted as an in-patient to a 24-hour health care facility as defined in Health & S C §§1250. Welf & I C §15610.23(b). Under Prob C §21350(c), "dependent adult" is defined to have the meaning as set forth in Welf & I C §15610.23, and also includes those persons who (1) are older than age 64 and (2) would be dependent adults within the meaning of §15610.23 if they were between the ages of 18 and 64. This covers persons between the ages of 64 and 65.

References in this chapter to "elder" victims of abuse also apply to dependent adults, except where otherwise specified.

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Source: Estate Planning/California Trust and Probate Litigation/8 Remedies Under Elder Abuse Provisions/§8.5 2. Financial Abuse

§8.5 2. Financial Abuse

"Financial abuse" of an elder or dependent adult occurs when a person or entity does any of the following (Welf & I C §15610.30):

- Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with the intent to defraud, or both.
- Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
- Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in CC §1575.

A person or entity is deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult. Welf & I C §15610.30(b). The proscribed act occurs when the elder is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of the elder. Welf & I C §15610(c).

Under EADACPA, "financial abuse" is broadly defined. It may be committed by any person, including but not limited to one who is responsible for the care or custody of, or stands in a position of trust with respect to, an elder; it is not limited to individuals or entities who manage the affairs of an elder under the authority of a trust or similar legal document (such as power of attorney) or who have been judicially recognized as having fiduciary duties to the plaintiff. It does not require any proof of a preexisting trust or fiduciary relationship.

A professional fiduciary, such as an attorney or attorney-in-fact, conservator, accountant, financial advisor, or trustee may be liable for financial abuse as well as a spouse, domestic partner, child, other family member, friend, neighbor, or *anyone* else who takes, secretes, appropriates, obtains, or retains the elder or dependent adult's real or personal property for any wrongful use or with the intent to defraud (or both) or by undue influence. Welf & I C §15610.30(a)(1), (3). Any person or entity that assists in these acts also commits financial abuse. Welf & I C §15610.30(a)(2). Commercial fraud and unfair business practices against elders involving realtors, insurance agents, or investment or sales advisors also may constitute "financial" abuse. See California Elder Law Litigation: An Advocate's Guide, chap 6A (Cal CEB 2003).

PRACTICE TIP: The practitioner should review the fiduciary relationships between spouses in the context of applicable Family Code sections to determine whether facts exist to support not only a claim for elder abuse but also breach of the fiduciary duties of a spouse.

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Source: Estate Planning/California Trust and Probate Litigation/8 Remedies Under Elder Abuse Provisions/§8.5A 3. Elder or Dependent Adult Who Lacks Capacity

§8.5A 3. Elder or Dependent Adult Who Lacks Capacity

A person or entity that takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult who lacks capacity under Prob C §812 or is of unsound mind, but not entirely without understanding under CC §39, must return the property if demanded by the elder or dependent adult or a representative of the elder or dependent adult. Welf & I C §15657.6. If the person or entity does not return the property, the elder or dependent adult is entitled to financial abuse remedies under Welf & I C §15657.5, including attorney fees and costs. See §8.6.

Welfare & Institutions Code §15657.6 does not apply to an agreement entered into by an elder or dependent adult when he or she had capacity.

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§8.6 E. Threshold for Recovery Under EADACPA

A defendant is liable for reasonable attorney fees and costs, in addition to other remedies, if the plaintiff proves by a preponderance of the evidence that the defendant engaged in financial abuse as defined in Welf & I C §15610.30. Welf & I C §15657.5(a). To recover enhanced remedies under EADACPA for financial abuse, the plaintiff must establish by a "preponderance of the evidence" that the defendant is liable for financial abuse as defined in Welf & I C §15610.30, *and* by "clear and convincing evidence" that the defendant is guilty of "recklessness, oppression, fraud, or malice" in the commission of the abuse. Welf & I C §15657.5(b). If this is shown, the general limitations on the recovery of damages under CCP §377.34 on the decedent's causes of action do not apply. Thus, the plaintiff can recover for pain, suffering, or disfigurement.

For definitions of "oppression," "fraud," and "malice," see CC §3294(c); CACI 3115 (oppression), 3116 (fraud), 3114 (malice). For definitions of "recklessness," see CACI 3113 (see also BAJI 12.31, 12.77); Restatement (Second) of Torts §500, comment a (1965). Recklessness falls short of intentional misconduct but rises above negligence; it encompasses actions, or failures to act, that are undertaken with a deliberate or conscious disregard of the probable consequences.

Generally, under common law, a showing that the defendant is guilty of "recklessness" is not per se the equivalent of showing "oppression, fraud, or malice," which is required to recover punitive damages in a civil case under CC §3294(a). The question becomes more difficult, however, when you match the culpability standards (recklessness, malice, fraud, and oppression) with the substantive tort charged. Reckless financial abuse is not necessarily the equivalent of malice, because unlike physical abuse or neglect of an elder under EADACPA, financial abuse does not necessarily imply malice. The only difference between recklessness and malice is "despicable conduct." Recklessness is the "conscious disregard of the probability of injury," whereas malice is despicable conduct carried on in conscious disregard of the probability of injury. However, financial abuse is not necessarily despicable and can coexist with negligence in the handling of money/property, whereas reckless physical abuse or reckless neglect causing injury is probably always despicable. (Note, however, that even though a defendant may be shown to have acted with the requisite misconduct, punitive damages are not necessarily available. See California Tort Damages, chap 14 (2d ed Cal CEB 2002).)

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§8.7 F. Medical Negligence Causes of Action

The Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) specifies that actions for injury against a health care provider based on that provider's alleged professional negligence are governed by those laws that specifically apply to those professional negligence causes of action. Welf & I C §15657.2. These laws include the Medical Injury Compensation Reform Act of 1975 (MICRA), which places certain barriers to litigation against health care providers. See California Elder Law Litigation: An Advocate's Guide §§2.77-2.83, 3.41-3.42 (Cal CEB 2003).

The language of Welf & I C §15657.2 has raised questions about whether MICRA shall *solely* govern actions against health care providers, rendering the EADACPA remedies inapplicable to such actions, or whether MICRA shall *also* govern such actions. The supreme court has resolved this issue by noting that because an elder abuse claim stems from custodial neglect rather than from professional negligence, the law of professional negligence is inapplicable. *Covenant Care, Inc. v Superior Court* (2004) 32 C4th 771, 783, 11 CR3d 222; see also *Delaney v Baker* (1999) 20 C4th 23, 82 CR2d 610 (reckless neglect distinct from cause of action based on professional negligence); *Country Villa Claremont Healthcare Ctr. v Superior Court* (2004) 120 CA4th 426, 15 CR3d 315; *Mack v Soung* (2000) 80 CA4th 966, 95 CR2d 830 (fact that physician's conduct may also constitute professional negligence does not immunize physician from liability for elder abuse). Thus, when suing a health care provider for elder abuse, the claimant can seek punitive damages and is not subject to MICRA's procedural barrier set forth in CCP §425.13 (plaintiff must obtain court order to sue a licensed health care provider for punitive damages in an action arising from professional negligence). *Covenant Care, Inc. v Superior Court, supra*.

NOTE: By contrast, when suing a health care provider that also qualifies as a religious corporation, the claimant seeking punitive damages is subject to MICRA's similar, but distinct, procedural barrier set forth in CCP §425.14. See *Little Co. of Mary Hosp. v Superior Court* (2008) 162 CA4th 261, 75 CR3d 519 (plaintiff must obtain court order to sue religious corporation for punitive damages for elder abuse; unlike CCP §425.13, which expressly applies only to actions arising out of the professional negligence of a health care provider, CCP §425.14, applicable to religious corporations, provides greater protection because it contains no such limits).

Other courts have held that a MICRA provision does not apply to an elder abuse claim against a health care provider. *Smith v Ben Bennett, Inc.* (2005) 133 CA4th 1507, 35 CR3d 612 (MICRA tolling provision does not apply); *Benun v Superior Court* (2004) 123 CA4th 113, 20 CR3d 26 (MICRA statute of limitations does not apply). The courts have noted, however, that MICRA's inapplicability depended on the gravamen of the claim. *Smith v Ben Bennett, Inc.*, *supra,* stated that an elder abuse claim involves reckless neglect or intentional abuse by the custodian of an elder and thus is not encompassed within professional negligence. 133 CA4th at 1522. See also *Delaney v Baker* (1999) 20 C4th 23, 32, 82 CR2d 610 ("[A]cts proscribed [by EADACPA] do not include acts of simple professional negligence, but refer to forms of abuse or neglect performed with some state of culpability greater than mere negligence.").

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II. ENHANCED REMEDIES UNDER EADACPA

§8.8 A. Postmortem Damages for Pain and Suffering

When physical elder abuse is proven by clear and convincing evidence, EADACPA provides that a claim for damages for pain and suffering survives the victim's death. Welf & I C §15657(b) (limitation on recoverable damages under CCP §377.34 does not apply). When financial elder abuse is proven by a preponderance of the evidence, and it is proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in committing the abuse, postmortem pain and suffering damages are also available. Welf & I C §15657.5(b). Postmortem pain and suffering damages, however, may not exceed the damages permitted to be recovered under CC §3333.2 ($250,000.00 limitation on noneconomic damages in actions for injury against health care providers based on professional negligence). Welf & I C §§15657(b), 15657.5(b). For discussion of whether EADACPA's enhanced remedies apply to an action against a health care provider, see §8.7.

The right to postmortem recovery for pain and suffering does not apply retroactively to abuse occurring before January 1, 1992. *ARA Living Centers-Pacific, Inc. v Superior Court* (1993) 18 CA4th 1556, 23 CR2d 224.

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Source: Estate Planning/California Trust and Probate Litigation/8 Remedies Under Elder Abuse Provisions/§8.9 B. Mandatory Attorney Fees

§8.9 B. Mandatory Attorney Fees

Attorney fees and costs generally are not recoverable in traditional trust and estate litigation. Under EADACPA, however, the court *shall* (*i.e.*, must) award reasonable attorney fees and costs to a plaintiff who prevails in an elder abuse action when the defendant is guilty of financial abuse, physical abuse, neglect, or abduction. Welf & I C §§15657(a), 15657.5(a). To obtain an award of attorney fees for financial abuse, the plaintiff needs to prove liability only by a preponderance of the evidence (Welf & I C §15657.5(a)); physical abuse or neglect requires clear and convincing evidence (Welf & I C §§15657(a)).

The size of the attorney fee award is determined in accordance with Cal Rules of Prof Cond 4-200. Welf & I C §15657.1; *Conservatorship of Levitt* (2001) 93 CA4th 544, 113 CR2d 294. In addition, EADACPA provides that the measure of a reasonable attorney fee shall take into account (Welf & I C §15657.1):

- The value of the abuse-related litigation to the elder's quality of life and the results obtained;
- Whether the defendant took reasonable and timely steps to determine the likelihood and extent of liability; and
- The reasonableness and timeliness of any written offer in compromise.

NOTE: Although Welf & I C §15657.1 was not amended to add Welf & I C §15657.5 when financial abuse was removed from §15657, the factors in awarding attorney fees should still be relevant.

Costs include, but are not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under EADACPA. Welf & I C §§15657(a), 15657.5(a).

The provision of EADACPA relating to attorney fees applies retroactively to abuse occurring before January 1, 1992. *ARA Living Centers-Pacific, Inc. v Superior Court* (1993) 18 CA4th 1556, 23 CR2d 224.

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§8.10 1. Value of Attorney Services

Welfare and Institutions Code §15657.1(a) encourages attorney intervention even when substantial monetary damages are not involved by giving consideration to improvements in the elder's quality of life resulting from the litigation. Presumably, this factor is not relevant to the measure of attorney fees in postmortem litigation because it focuses on the improved quality of the elder's life as a result of litigation.

Because the legislature's express purpose in enacting EADACPA remedies was to "enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults" (Welf & I C §15600(j)), the quality-of-life factor should be interpreted as providing a basis for *enhancing* the plaintiff's attorney fees award and not, under any circumstances, to limit fees. But see *Conservatorship of Levitt* (2001) 93 CA4th 544, 113 CR2d 294 (trial court properly considered value of abused elder's estate when exercising its discretion in determining the amount of attorney fees and reducing fee request by 15 percent).

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§8.11 2. Defendant's Efforts to Determine Liability

A second factor in computing attorney fees under EADACPA is whether the defendant took reasonable and timely steps to determine the likelihood and extent of liability. Welf & I C §15657.1(b). Because the plaintiff must prove that the defendant is guilty of recklessness, oppression, fraud, or malice in the commission of the abuse to recover attorney fees, however, the defendant's efforts to determine liability are relevant not only to the computation of attorney fees but to the central issue of the defendant's liability for attorney fees or other enhanced remedies under EADACPA.

Thus, for example, if the plaintiff can demonstrate the elements of a financial abuse claim but cannot establish that the defendant is guilty of recklessness, oppression, fraud, or malice, the plaintiff is not entitled to any of the enhanced remedies under EADACPA, although he or she may recover other compensatory damages under the Civil Code. Conversely, if the plaintiff can demonstrate both abuse and the requisite level of intent, the existence of recklessness, oppression, fraud, or malice generally will preclude the defendant from reducing the size of the attorney fee award by claiming timely efforts to determine liability.

Welfare and Institutions Code §15657.1(b) plays a more significant role in determining employer liability, in respondeat superior, for attorney fees in EADACPA actions for physical abuse. For the employer to be liable for any damages or attorney fees because of the employee's acts of physical abuse, the employer's misconduct must meet the standards of CC §3294(b) for imposition of punitive damages. Welf & I C §15657(c). Thus, failure to take reasonable and timely steps to determine the likelihood and extent of misconduct may constitute a ratification within the meaning of CC §3294(b). However, in EADACPA actions for financial abuse, the employer liability standards of CC §3294(b) do not apply to the recovery of attorney fees or costs or compensatory damages but only to punitive damages. Welf & I C §15657.5(c).

NOTE: Because the court also considers the reasonableness of the defendant's actions in attempting to settle the dispute, including the timeliness of any written settlement offer, EADACPA appears to create an exception to the general rule of Evid C §1152 making settlement agreements inadmissible into evidence.

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§8.12 3. Written Offers in Compromise

A third consideration in determining an award of attorney fees under EADACPA is the reasonableness of the defendant's actions in determining liability and attempting to settle the dispute, including the timeliness of any written settlement offer. Welf & I C §15657.1. Thus, although settlement agreements are not normally admissible into evidence (Evid C §1152), EADACPA appears to create a limited exception for the purposes of evaluating the size of the attorney fee. Unlike the quality-of-life factor, written offers in compromise can serve not only to enhance the plaintiff's attorney fee award, but also to reduce it.

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§8.13 C. Conservator's Fees

Recoverable costs includes fees for the services of a conservator in pursuing elder abuse claims. Welf & I C §§15657, 15657.5. Although this section was designed to encourage conservators to bring or participate in actions to prevent abuse of their conservatees, it carries with it both the right and the obligation to pursue such claims and recover fees as additional damages. This remedy is arguably available to every fiduciary, including a trustee or a personal representative of the decedent's estate, if a reasonable suspicion of elder abuse exits. In fact, the failure to pursue elder abuse claims in trust and estate litigation, thereby failing to invoke the additional damages available, may very well expose the fiduciary to liability and potential surcharge claims, as well as malpractice claims by the beneficiary against the fiduciary's attorney.

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D. Jurisdiction

§8.14 1. Concurrent Probate and Civil Court Jurisdiction

The superior court department that has jurisdiction over probate conservatorships has concurrent jurisdiction over civil actions and proceedings involving elder abuse claims, if a conservator has been appointed for the plaintiff before the cause of action is initiated, unless the court decides that the matter should be determined in a civil action. Welf & I C §15657.3(a)-(b). If the court does make that decision, the matter should be transferred rather than dismissed. *Conservatorship of Kayle* (2005) 134 CA4th 1, 35 CR3d 671.

It appears that the probate court would also have jurisdiction over actions brought by a third party for losses suffered as a result of the defendant's abuse of the conservatee, because such a third party action would also involve a claim for relief arising out of the abuse of the elder. Presumably, such an action could be joined with the action on behalf of the conservatee.

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§8.15 a. Benefits of Concurrent Probate Court Jurisdiction

With the EADACPA grant of concurrent jurisdiction over civil actions for elder abuse, the probate court now has the authority to award the civil remedies of compensatory and punitive damages, *as well as* the enhanced EADACPA remedies. This extended jurisdiction over both civil action and *proceedings* presumably gives the probate court authority to grant injunctive relief, *e.g., a* temporary restraining order to prevent foreclosure of the elder's home.

There are also procedural and remedial advantages to probate court jurisdiction, such as double damages for property wrongfully taken in bad faith from a conservatee's estate (Prob C §859) and expedited discovery under Prob C §§2616-2619. For discussion of advantages of probate court jurisdiction, see California Elder Law Litigation: An Advocate's Guide §§6.5-6.8 (Cal CEB 2003).

Probate Code §825 provides that a jury trial is not available in "proceedings under the [Probate] Code," except as otherwise provided in the Probate Code. Although an action for elder abuse may seek enhanced remedies under EADACPA, it may not be a proceeding under the Probate Code. Because concurrent jurisdiction is conferred on the probate court when the elder is under a conservatorship, it has been suggested that the right to a jury trial may exist in the probate court when it is exercising concurrent jurisdiction over causes of action for elder abuse.

PRACTICE TIP: When concurrent jurisdiction is available, the plaintiff's choice of forum should be based on various factors, including local court practice and personnel (*e.g.,* whether judges and support staff hearing probate matters have had the opportunity to develop expertise in elder abuse matters, and perceptions of the judges handling probate matters on the one hand and general civil matters on the other); whether the case involves complex procedural, evidentiary, or damages issues that the general civil department might be more adept at handling; whether conservatorship procedures are needed to stop further abuse; and whether the probate court's expertise regarding incapacity issues is desirable. The speed with which cases are normally tried in the probate court varies, although generally cases will be heard faster than in the civil courts.

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Source: Estate Planning/California Trust and Probate Litigation/8 Remedies Under Elder Abuse Provisions/§8.16 b. Questions Concerning Concurrent Applicability of Conservatorship and Civil Action Procedures

§8.16 b. Questions Concerning Concurrent Applicability of Conservatorship and Civil Action Procedures

Under Welf & I C §15657.3(a), the probate court having jurisdiction over conservatorships is also given jurisdiction to hear and adjudicate a "civil action" alleging elder abuse brought by or on behalf of the conservatee. Procedural questions arise because it is unclear when Probate Code rules may apply concurrently with Rules of Civil Procedure, and how far the court will go in permitting all civil procedures to apply to the action. See California Elder Law Litigation: An Advocate's Guide §§6.5-6.21 (Cal CEB 2003). It is clear that the rules of discovery under the Code of Civil Procedure apply in probate court. Prob C §1000.

To the extent that procedural requirements remain ambiguous because of uncertainty regarding the interplay between rules under the Probate Code and under the Code of Civil Procedure, the practitioner may consider petitioning for instructions from the probate court under Prob C §2359 (instructions for conservator of person) or §2403 (instructions for conservator of estate).

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Source: Estate Planning/California Trust and Probate Litigation/8 Remedies Under Elder Abuse Provisions/§8.16A c. Contractual Arbitration

§8.16A c. Contractual Arbitration

It appears that an agent under a health care power of attorney has the power, unless restricted by the principal, to enter into an arbitration agreement that will be binding in an elder-abuse action. In *Garrison v Superior Court* (2005) 132 CA4th 253, 33 CR3d 350, the daughter of an elderly mother, acting as attorney-in-fact under a durable power of attorney for health care, signed two arbitration agreements on admission of her mother to a residential care facility. One agreement called for arbitration of medical malpractice claims, the other for arbitration of all other claims, including elder abuse claims. After the mother's death, the daughter brought civil actions for medical malpractice and elder abuse. The residential care facility petitioned to compel arbitration. The court held that the durable power of attorney was broad enough to authorize the daughter to enter into the arbitration agreements, and that the arbitration agreements were enforceable. See *Hogan v Country Villa Health Serv*s. (2007) 148 CA4th 259, 55 CR3d 450 (compelling arbitration under arbitration agreement signed by agent under health care power of attorney does not violate public policy); *Flores v Evergreen at San Diego, LLC* (2007) 148 CA4th 581, 587, 55 CR3d 823 (dicta, that *patient* or authorized *agent* who signs arbitration agreement at healthcare facility can bind relatives who present claims arising from patient's treatment).

NOTE: The spousal relationship alone does not give a spouse authority to agree to an arbitration provision in a nursing home admission contract. *Flores v Evergreen at San Diego, LLC* (2007) 148 CA4th 581, 587, 55 CR3d 823 (skilled nursing facility); *Warfield v Summerville Senior Living, Inc.* (2007) 158 CA4th 443, 69 CR3d 783 (residential care facility).

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Source: Estate Planning/California Trust and Probate Litigation/8 Remedies Under Elder Abuse Provisions/§8.17 2. Survivorship of Actions

§8.17 2. Survivorship of Actions

The death of the elder does not divest the court of jurisdiction over any claim for relief for elder abuse. Welf & I C §15657.3(c). When the decedent dies, the pending claim or right to bring a claim passes to the decedent's personal representative. Welf & I C §15657.3(d)(1). If there is no personal representative, the right to commence or maintain an action passes to any of the following, provided that the requirements of CCP §377.32 are met (Welf & I C §15657.3(d)(1)):

- An intestate heir affected by the action;
- The decedent's successor in interest as defined in CCP §377.11;
- An interested person, other than a creditor or a person who has a claim against the estate but is not an heir or beneficiary.

If the personal representative refuses to commence an action or if the personal representative's family is alleged to have committed the abuse, the aforementioned people have standing to commence the action. Welf & I C §15657.3(d)(2). If two or more people claim to have standing, the court may make an order concerning the parties that is appropriate to ensure the administration of justice. Welf & I C §15657.3(e). See also CCP §377.31. Section 15657.3(d) should be read together with CCP §§377.30-377.35, governing survival of actions. For discussion of survival of actions, see §§15.22-15.26. See also §8.22.

NOTE: EADACPA remedies apply to survival actions, but not to wrongful death actions. For a discussion of the distinctions between survival actions and wrongful death actions, see generally California Tort Damages, chaps 3-4 (2d ed Cal CEB 2002).

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III. ELDER ABUSE CLAIMS WITHIN TRUST AND ESTATE LITIGATION

§8.18 A. Client Information and Factual Analysis

In interviewing clients in trust and estate litigation when any abuse is suspected, it is important to obtain information sufficient to locate percipient witnesses such as physicians, neighbors, family members, and friends, as well as the location of physical evidence such as medical and financial records. Of equal importance is identifying individuals who had contact with the elderly person during his or her lifetime and may have knowledge of the elder's mental and physical condition. Often overlooked are individuals who, although not relatives or close friends, may have had significant contact with an otherwise isolated elder, such as employees of stores, restaurants, banks, and other institutions that the elder frequented. The local gas station attendant, market checker, bank teller, or even veterinarian often can provide significant and pertinent facts regarding potential abuse.

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§8.19 B. Cautions About Threats of Elder Abuse Litigation

Before fact-gathering is complete, it is important to instruct the client not to make allegations or threats of litigation to potential defendants, such as suspected abusers, attorneys who may have drafted documents that are being attacked, or bank employees, investment advisors, and other fiduciaries who may have assisted in the challenged transactions involving the elder's assets. Because elder abuse litigation may involve criminal as well as civil liability (Welf & I C §15656), threats might be construed as extortion (Pen C §519), and, as a practical matter, a threat of impending elder abuse litigation may alert a wrongdoer to alter or destroy records that would constitute evidence of abusive conduct.

This admonition applies to the practitioner as well. Extreme caution should be exercised when raising the possibility of elder abuse litigation in conjunction with other trust and estate litigation. See Cal Rules of Prof Cond 5-100(A) ("member shall not threaten to present criminal, administrative, or disciplinary charges to obtain advantage in a civil dispute").

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Source: Estate Planning/California Trust and Probate Litigation/8 Remedies Under Elder Abuse Provisions/§8.20 C. Setting Up Elder Abuse Case in Trust and Estate Litigation

§8.20 C. Setting Up Elder Abuse Case in Trust and Estate Litigation

In reviewing a matter for which the practitioner has been retained, such as the contest of a trust or will, he or she must always look to the facts to determine what will be alleged in the initiating complaint, contest, or petition to set aside the trust or will. First, the practitioner should determine whether or not the decedent, settlor, or beneficiary was represented by an attorney, and what role, if any, that attorney may have played in drafting the documents. The practitioner preparing to initiate the litigation must also determine what conflicts of interest may have existed for the attorney representing the decedent, the settlor, or the beneficiary of a trust. For example:

- Was the attorney who drafted the documents that the practitioner has been asked to set aside retained by, or otherwise representing the interests of, a beneficiary or a third party under the documents?
- Was the attorney for the decedent the successor trustee under the elder's inter vivos trust?
- Was the attorney acting in a fiduciary capacity, such as a successor trustee?
- Did that attorney know or should he or she have known that the elder may have lacked the requisite capacity to execute the documents or may have been influenced by some third party to execute the documents?

It is important to allege the facts that give rise to the various causes of action in the initiating pleadings, even though the action is not specifically one for elder abuse. If all of the elements of undue influence and lack of capacity are present and are coupled with a breach of trust and fiduciary duties, a subsequent action for elder abuse and resulting damages will be stronger.

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§8.21 D. Risk of Malicious Prosecution Charge

If the plaintiff does not prevail on a claim of elder abuse and lacked reasonable grounds to assert it, the plaintiff runs the risk of a suit for malicious prosecution. See, *e.g., Crowley v Katleman* (1994) 8 C4th 666, 34 CR2d 386. For this reason, substantial fact-gathering is essential before alleging elder abuse. The facts should bear on the issues of undue influence and establishment of a fiduciary relationship between the elder and the defendant.

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E. Potential Pitfalls to Avoid

§8.22 1. Standing to Bring Elder Abuse Claim

After the death of the elder, the right to maintain an action is transferred to the personal representative, or, if there is no personal representative, to one of the other persons identified by statute. See §8.17. Often, the identity of the person entitled to succeed to the estate is the very question at issue in trust or estate litigation. The legislature has addressed this by noting that when a nonrepresentative has standing because the personal representative has refused to act or has a family member accused of the elder abuse, the statute does not require the court to resolve the merits in order to determine whether the person who qualifies under the statute has standing to bring or maintain the action. Welf & I C §15657.3(d)(2). See also *Estate of Lowrie* (2004) 118 CA4th 220, 12 CR3d 828 (holding that uncertainty in contemporaneous estate litigation would not stop an elder-abuse claim as long as petitioner would end up with standing if successful; court ruled that petitioner had standing to bring elder-abuse action even though she would succeed to estate only if she managed to disinherit abuser-representative under Prob C §259).

A potential petitioner who lacks standing under Welf & I C §15657.3(d) and the rationale set forth in *Estate of Lowrie* should consider seeking the appointment of an independent special administrator and/or trustee ad litem for the limited purpose of evaluating and pursuing the potential elder-abuse claim. For further discussion of standing, see §§9.10-9.14.

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§8.23 2. Special Concerns in Trust and Estate Litigation

Issues may arise when there is a conflict between the fiduciary's duty to investigate an elder-abuse claim and the fiduciary's duty to defend the will or trust. In general, a fiduciary must take reasonable steps to enforce a claim that is part of the trust or estate being administered. Prob C §16010. However, it is well established that a fiduciary must also defend the instrument (both to uphold the settlor's desires and for the benefit of its beneficiaries). Prob C §16011; *Estate of Duffill* (1922) 188 C 536, 206 P 42.

A conflict may exist when the personal representative is the alleged abuser, because he or she is unlikely to pursue an elder-abuse claim in that case. Under these circumstances, a claimant may pursue an elder-abuse action if that claimant qualifies under Welf & I C §15657.3(d)(2). See §8.17. See also *Estate of Lowrie* (2004) 118 CA4th 220, 12 CR3d 828. However, even blameless personal representatives might hesitate to bring an elder-abuse action when they perceive it to conflict with their duty to protect the will, *i.e.,* a personal representative might have great difficulty defending the will while simultaneously arguing that it was executed during the commission of financial elder abuse.

NOTE: When the potential claimant lacks standing, notwithstanding Welf & I C §15657.3(d)(2), and the personal representative either cannot or will not bring the claim, the potential claimant can petition to have a special administrator appointed for the purpose of evaluating and maintaining a potential elder-abuse claim, along with a trustee ad litem if needed with regard to any trust issues.

If an inter vivos trust is being challenged during the lifetime of an incompetent settlor, the conservator is the proper party to initiate the proceedings to set aside the trust or to bring a petition under Prob C §17200 if mismanagement of the trust or breach of fiduciary duties is suspected. Again, the relationships of the incompetent and the fiduciary should be closely scrutinized, and, if the elements for elder abuse are present, they should be incorporated into the initial pleadings. Any no-contest clauses should also be carefully reviewed. For discussion of no-contest clauses, see chap 5.

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§8.24 3. Potential Liability for Surcharge

Although conservators are now given the incentive to proceed with elder abuse actions in defense of their conservatees, the provisions of the Welfare and Institutions Code also can create a dilemma for the conservator. If the conservator fails to take action, when elder abuse exists and action is appropriate, the conservator may be subject to surcharge for that failure and for not including the abuse allegations necessary to obtain attorney fees and damages for pain and suffering in other trust and estate litigation under the provisions of the Probate Code.

The same can be argued with respect to the duties and obligations of a personal representative for failure to bring an elder abuse action, especially in the situation of an ongoing will contest in which the ultimate beneficiaries of the decedent's estate have not yet been determined and the statute of limitations is about to run. At a minimum, a petition for instructions should be considered in this situation to protect the court-appointed fiduciary.

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§8.25 F. Examples of Fact Situations That Give Rise to Trust and Estate *and* Elder Abuse Claims

Example 1. A husband married to the same woman for more than 50 years, and with whom he had two children, remarries within 6 months after the death of his first spouse. The husband suffers from dementia. The new wife takes the husband to an attorney who drafts a family trust, making the husband and wife cotrustees and the wife successor trustee in the event of the husband's inability to act. All of the husband's separate property is placed into the family trust. The wife becomes the successor trustee, encumbers real property of the husband (now held in the family trust), withdraws substantial assets from the family trust, and gifts the property to her own children by her prior marriage. In addition, the wife now utilizes all income from the family trust, as well as principal, for her own benefit. She sells property of the trust and executes the deed under a power of attorney on behalf of the husband. No accountings are made to the husband or the remainder beneficiaries under the family trust. Not only should an action to compel an accounting be brought, but also actions to set aside the trust, to recover the property wrongfully transferred and conveyed, to set aside the sale, for breach of fiduciary duties, and for physical and financial elder abuse.

Example 2. The practitioner has been contacted by children of a decedent, who were the sole beneficiaries under the decedent's will and inter vivos trust. After the death of the decedent, the children learn that the decedent had been suffering from Alzheimer's Disease for some years before his death, had been living in squalid and unhealthy conditions, and that third parties (either under a power of attorney or without one) had been handling the decedent's financial affairs, purportedly caring for the decedent and providing food and the basic necessities of life for him before his death. The third parties assisted in preparation of amendments to the decedent's inter vivos trust and a new will, which made them and the decedent's attorney of many years beneficiaries of the trust and the decedent's estate. The bulk of the decedent's assets had been transferred to his inter vivos trust, and the decedent's attorney who drafted the original documents was named as the successor trustee. The children who have contacted the practitioner have been omitted from the later amendments to the trust and from the decedent's will, and have been specifically disinherited. The practitioner has been contacted to attack both the later will and the amendment to the decedent's intervivos trust.

A petition for probate of the later will has been filed by one of the third parties, and the third parties claim the decedent's entire estate under the later-drafted trust amendments.

A will and trust contest is instituted. The decedent lacked the capacity to handle his own affairs before his death, and thus the attorney named as the successor trustee should have stepped in to act as the successor trustee to manage and protect the assets of the trust. Although the attorney was aware that the decedent was unable to provide for his personal needs and handle his financial affairs and that the third parties were in fact handling all financial affairs of the decedent, including those assets in his trust, the attorney failed to take any steps to protect the trust assets or his client as the income beneficiary. Multiple causes of action arise from these facts, including actions for breach of trust, breach of fiduciary duties, attorney malpractice, and elder abuse, all of which should be alleged as additional causes of action in the underlying trust and will contests.

NOTE: Whether the children were aware of their father's illness is irrelevant to elder abuse allegations. The children are the intestate heirs and prior beneficiaries. The fact that they may have been somewhat estranged does not matter.

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IV. PLEADINGS IN COMPLAINT FOR RELIEF UNDER EADACPA

§8.26 A. Generally

The following form allegations set forth only the required elements for civil remedies under EADACPA. They are illustrative only. In addition, they will not necessarily appear in the order shown; rather, they will be interspersed among other factual allegations.

For other sample allegations of neglect or physical abuse, see California Elder Law Litigation: An Advocate's Guide §5.40 (Cal CEB 2003). For sample forms concerning the establishment of a conservatorship, see California Conservatorship Practice, chap 5 (Cal CEB 2005).

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Source: Estate Planning/California Trust and Probate Litigation/8 Remedies Under Elder Abuse Provisions/§8.27 B. Form: Allegations of Abuse Showing Applicability of EADACPA Remedies

§8.27 B. Form: Allegations of Abuse Showing Applicability of EADACPA Remedies

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8.27-1 Allegations of abuse showing applicability of EADACPA remedies

1. At all times relevant to this action, plaintiff, _ _[*name*]_ _, resided in California.

[*Add one of the following alternatives*]

[*Alternative 1: Plaintiff is age 65 or older*]

2. Plaintiff is _ _[*e.g., age 68*]_ _ and was age 65 or older at all times relevant to this action.

[*Alternative 2: Plaintiff is under age 65 and suffers from physical or mental impairments*]

2. Plaintiff suffers from the _ _[*physical/mental/physical and mental*]_ _ limitations specified below, which restrict plaintiff's ability to carry out normal activities or to protect plaintiff's rights.

[*Add if dependent adult is or was in 24-hour health facility*]

3. From _ _[*date*]_ _ _ _[*to the present time/date of discharge*]_ _, plaintiff _ _[*has been/was*]_ _ an inpatient at _ _[*name of facility*]_ _, a _ _[*e.g., skilled nursing facility*]_ _, which is a 24-hour health facility as defined in Health and Safety Code §_ _[*1250/1250.2/1250.3*]_ _.

[*Continue*]

[4.] Plaintiff suffers from _ _[*specify type(s) of physical or mental impairments or illnesses*]_ _.

[*Add if defendant was caretaker*]

[5.] At all time relevant to this action, defendant had the _ _[*care/custody/care and custody*]_ _ of plaintiff, in that _ _[*state facts showing nature of caretaker relationship*]_ _.

[*Add if defendant's conduct constituted physical abuse*]

[6.] Defendant's conduct, described in paragraphs _ _ through _ _ of this complaint, _ _[*also*]_ _ constituted physical abuse as defined in Welfare and Institutions Code §15610.63 in that _ _[*e.g., the psychotropic medication that defendant administered to plaintiff on a daily basis was used to maintain plaintiff in a docile and drugged state and not for any purpose consistent with that authorized by plaintiff's treating physician*]_ _.

[*Add if defendant's conduct constituted neglect*]

[7.] Defendant's conduct, described in paragraphs _ _ through _ _ of this complaint, _ _[*also*]_ _ constituted neglect as defined in Welfare and Institutions Code §15610.57 in that _ _[*e.g., by not providing adequate food for plaintiff and by allowing plaintiff to become malnourished*]_ _, defendant failed to exercise the degree of care that a reasonable person having the care and custody of plaintiff would exercise.

[*Add if defendant's conduct constituted financial abuse as defined in Welf & I C §15610.30(a)(1)*]

[8.] The _ _[*taking/secreting/misappropriation/obtaining/retention*]_ _ of plaintiff's _ _[*real/personal/real and personal*]_ _ property by defendant, as described in paragraphs _ _ through _ _ of this complaint, was _ _[*for a wrongful use and/or done with the intent to defraud*]_ _ in that _ _[*state facts*]_ _.

[*Add if defendant's conduct constituted financial abuse as defined in Welf & I C §15610.30(a)(2)*]

[9.] As described in paragraphs _ _ through _ _ of this complaint, defendant[s], _ _[*name[s]*]_ _, assisted in [*taking/secreting/misappropriating/obtaining/retaining*]_ _ **plaintiff's _ _[*real/personal/real and personal*]_ _ property, for a wrongful use _ _[*and/or*]_ _ with the intent to defraud in that _ _[*state facts*]_ _.**

[*Add if defendant's conduct constituted financial abuse as defined in Welf & I C §15610.30(a)(3)*]

[9.] The defendant _ _[*took/secreted/misappropriated/obtained/ retained*]**_ _ plaintiff's _ _**[*real/personal/real and personal*]**_ _ property by undue influence, as described in paragraphs _ _ through _ _ of this complaint, in that _ _**[*state facts*]**_ _.**

[*Continue*]

[10.] Defendant knew or should have known that the _ _[*taking/secreting/misappropriation/obtaining/retention*]**_ _ of plaintiff's property was likely to be harmful to plaintiff _ _**[*or his or her representative*]**_ _.**

[11.] Defendant's conduct constituted financial abuse under Welfare and Institutions Code §15657.5 as defined in Welfare and Institutions Code §15610.30.

[12.] Defendant was guilty of _ _[*recklessness/_ _*[*and*]**_ _** *oppression/_ _*[*and*]**_ _** *fraud/_ _*[*and*]**_ _** *malice*]**_ _ in the commission of the above-described abuse.**

[13.] Under Welfare and Institutions Code _ _[*§15657(a) and/or §15657.5(a)*]**_ _, defendant is liable to plaintiff for reasonable attorney fees and costs _ _**[*, including reasonable fees for the services of _ _*[*name*]**_ _** *, plaintiff's conservator, devoted to litigation of this claim*]**_ _.**

[14.] Under Civil Code §3294, defendant is liable for punitive damages.

[*Add if elder is deceased and postmortem recovery for pain and suffering is sought*]

[15.] Under Welfare and Institutions Code _ _[*§15657(b) and/or §15657.5(b)*]**_ _, defendant is liable to plaintiff for damages for the decedent's pain and suffering _ _**[*and disfigurement*]**_ _.**

Comment: For an action brought after an abused elder has died, the allegations should use the word "decedent" instead of "plaintiff." The complaint should specify the basis for the plaintiff's standing to sue, *e.g.*, as personal representative of or successor to the decedent's estate.

Although allegation 4, relating to physical or mental limitation, is required only when the plaintiff's basis for seeking EADACPA remedies is that he or she is a dependent adult or an elder who would be a dependent adult if he or she were between the ages of 18 and 64, it is always helpful to bring any of the plaintiff's physical or mental limitations, including diminished abilities because of age, to the court's attention.

If the defendant had the care or custody of the plaintiff, allegation 5 should be included regardless of the nature of the abuse at issue.

Allegation 13 may refer to other statutory provisions for attorney fees as well, depending on the particular causes of actions involved. See, *e.g.,* CC §1780(e) (attorney fees in action by consumer based on unfair commercial practices); Health & S C §1430(b) (attorney fees in action against nursing home for violation of patients' rights). These should be alleged *in addition to* EADACPA provision for mandatory attorney fees.

A prayer for relief for postmortem pain and suffering is appropriate only if the abused elder died before the action was initiated. If the elder is alive at the time the action is commenced, damages for pain and suffering will be alleged along with other compensatory damages.

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9

Procedural Issues

Stella Pantazis

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Source: Estate Planning/California Trust and Probate Litigation/9 Procedural Issues/§9.1 I. JURISDICTION

§9.1 I. JURISDICTION

The superior court has jurisdiction over proceedings under the Probate Code. See Cal Const art VI, §10. When a superior court exercises that jurisdiction, however, it is not, strictly speaking, a separate "probate court," even when it has a separate probate department. Rather, the probate department judge or other judge exercising jurisdiction under the Probate Code acts on behalf of the superior court sitting in probate. See *Estate of Tierney* (1944) 63 CA2d 295, 300, 146 P2d 700. The superior court sitting in probate is a court of general jurisdiction and has all the powers of the superior court. Prob C §§800, 17001. Thus, any jurisdictional conflicts affecting probate code proceedings within a single superior court are between the superior court sitting in probate and the superior court sitting in a separate civil action.

The Probate Code resolves these jurisdictional conflicts by specifying when the departments have concurrent jurisdiction and when the probate department has exclusive jurisdiction. See §§9.2-9.5. If a party brings litigation in the wrong department, the other party can demur to have the suit moved to its proper place. Failing to honor the rules of exclusive jurisdiction will make the resulting order defective but will not affect the court's fundamental jurisdiction or subject matter jurisdiction; thus, an order that has become final will stand even if the underlying litigation took place in the wrong department. See *Harnedy v Whitty* (2003) 110 CA4th 1333, 1342, 2 CR3d 798 (order not void for lack of subject matter jurisdiction even if underlying trust dispute should have been litigated in probate department).

Federal district courts may hear certain probate matters under diversity jurisdiction, but a probate exception to diversity jurisdiction bars federal courts from probating estates. See *Markham v Allen* (1946) 326 US 490, 494, 90 L Ed 256, 259, 66 S Ct 296; §9.6.

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A. Exclusive Jurisdiction

§9.2 1. Probate

A superior court sitting in probate has exclusive jurisdiction over certain matters. See Prob C §7050; Comment to Prob C §7050; *Howard v Bennett* (1942) 53 CA2d 546, 127 P2d 1012. These include:

- Probate of wills (Prob C §§8200-8272; *Reed v Hayward* (1943) 23 C2d 336, 144 P2d 561);
- Interpretation of instruments (Prob C §§21120-21122; *Howard v Bennett, supra*);
- Determination of entitlement to distribution of an estate (Prob C §§11700-11705; *Colden v Costello* (1942) 50 CA2d 363, 122 P2d 959);
- Creditor claims against an estate (Prob C §§9000-9399; *Estate of Vance* (1908) 152 C 760, 93 P 1010);
- Management of a decedent's estate (Prob C §§9600-10382; *deVall v Security-First Nat'l Bank* (1953) 121 CA2d 682, 263 P2d 910); and
- Distribution of an estate (Prob C §§11600-12007; *Howard v Bennett, supra*).

NOTE: It appears that a superior court sitting in probate also has exclusive jurisdiction over declaratory relief actions concerning wills and trusts. See CCP §1060 (expressly excludes wills and trusts from written instruments with respect to which interested parties may bring original declaratory relief actions); Prob C §17200; *Howard v Bennett, supra* (superior court sitting in probate has exclusive jurisdiction over declaratory relief action to construe terms of will in estate it is administering).

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§9.3 2. Trusts

A superior court sitting in probate that has jurisdiction over a trust has exclusive jurisdiction of proceedings concerning the internal affairs of the trust. Prob C §17000(a). By statute, such proceedings expressly include (among others), but are not limited to, proceedings to:

- Settle the accounts and pass on the acts of the trustee (Prob C §17200(b)(5));
- Instruct the trustee (Prob C §17200(b)(6));
- Compel the trustee to account to the beneficiary (Prob C §17200(b)(7));
- Determine or review the reasonableness of the trustee's compensation (Prob C §17200(b)(9));
- Appoint or remove a trustee (Prob C §17200(b)(10));
- Compel, by any available remedy, redress of a breach of the trust (Prob C §17200(b)(12)); and
- Modify or terminate a trust (Prob C §17200(b)(13)).

When the parties disagree on which court has jurisdiction to hear a trust matter, the issue of jurisdiction can become intertwined with the issue of venue. See §9.8. If a court has already properly assumed jurisdiction over the internal affairs of a trust, one can argue that that court is the exclusive forum under the doctrine of prior exclusive jurisdiction. This would not apply, however, if the jurisdiction of the initial court was only over a related probate estate or matters relating to a different trust. *David v Hermann* (2005) 129 CA4th 672, 682, 28 CR3d 622.

On jurisdiction over declaratory relief actions concerning wills and trusts, see §9.2.

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B. Concurrent Jurisdiction

§9.4 1. Probate

In some instances, *e.g.,* title controversies over assets claimed to belong to the decedent or another person (see Prob C §§850-859), the superior court sitting in probate has concurrent jurisdiction with the superior court sitting in general civil matters.

If a civil action and a pending probate matter involve a common question of law or fact, the court may order those actions consolidated for trial. CCP §1048(a).

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Source: Estate Planning/California Trust and Probate Litigation/9 Procedural Issues/§9.5 2. Trusts

§9.5 2. Trusts

The superior court sitting in probate has concurrent jurisdiction with the superior court sitting in general civil matters over proceedings to determine the existence of trusts (Prob C §17000(b)(1)), proceedings by or against creditors or debtors of trusts (Prob C §17000(b)(2)), and other proceedings involving trustees and third persons (Prob C §17000(b)(3)).

PRACTICE TIP: In most counties, it is more efficient to bring matters to the superior court sitting in probate than to the superior court sitting in general civil matters.

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§9.6 C. Federal Jurisdiction

A narrow probate exception to federal court jurisdiction reserves to state probate courts the probate or annulment of a will, the administration of the decedent's estate, and any other purely probate matter, but does not bar federal courts from adjudicating matters outside those confines. *Marshall v Marshall (In re Marshall)* (2006) 547 US 293, 164 L Ed 2d 480, 126 S Ct 1735 (probate exception did not apply to claim for tortious interference with a gift or inheritance filed in bankruptcy case). The probate exception does not bar federal courts from entertaining suits in favor of creditors, legatees, heirs, and other claimants against a decedent's estate to establish their claims, as long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the state court's custody. *Markham v Allen* (1946) 326 US 490, 494, 90 L Ed 256, 259, 66 S Ct 296. The *Marshall* court interpreted the "interfere with" language in *Markham* "as essentially a reiteration of the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*." 547 US at 311, 164 L Ed 2d at 498.

Even when a federal court has jurisdiction, however, matters of comity may restrict its assertion of jurisdiction when a state court has assumed jurisdiction. See, *e.g., Bassler v Arrowood* (8th Cir 1974) 500 F2d 138 (although diversity jurisdiction lay, federal court should have abstained to avoid needless interference with pending state proceedings).

The federal circuits are split as to the extent to which the probate exception applies to claims involving trust administration in diversity. When no state court has assumed jurisdiction over the administration of the trust in question, many circuits have approved jurisdiction over trust disputes when there is diversity. See, *e.g., Golden v Golden* (3rd Cir 2004) 382 F3d 348 (rejecting a per se rule that probate exception applies to trusts; if estate res is distributed by trust instead of will, exception applies; however, if the action is in personam and could have been brought by the parties in a state court of general jurisdiction (here: slander and tortious interference with inheritance), federal diversity jurisdiction also lies). See also *Sianis v Jensen* (8th Cir 2002) 294 F3d 994; *Georges v Glick* (7th Cir 1988) 856 F2d 971, 974. But see *Weingarten v Warren* (SD NY 1990) 753 F Supp 491, 494 (probate exception to diversity jurisdiction does not apply to trusts).

PRACTICE TIP: When an attorney expects that the opposition might attempt to bring an action in federal court, he or she may wish to begin an accounting or other procedure in the appropriate superior court sitting in probate in order to form the basis for abating or dismissing the federal action. See, *e.g., Matter of Trust Created by Hill* (D Minn 1990) 728 F Supp 564 (trustee's motion to remand granted after trustee filed petition in state court requesting instructions and beneficiary removed petition to federal court).

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II. VENUE

§9.7 A. Probate

If the decedent was domiciled in California at the time of death, the proper county for probate proceedings is the county in which he or she was domiciled. Prob C §7051. If the decedent was not domiciled in California at the time of death, the proper county is the county in which he or she died if property of the decedent is located there. Prob C §7052(a). If no property of the nondomiciliary decedent is located in the county in which he or she died, or if he or she did not die in California, the proper county is any county in which property of the decedent is located. If such property is located in more than one county, the proper county is that in which a petition for ancillary administration is first filed. Prob C §7052(b).

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§9.8 B. Trusts

The proper county for commencement of a trust proceeding is determined by the type of trust or action.

For living trusts, venue is proper in the county where the trust's principal place of administration is located. Prob C §17005(a)(1). For living trusts with no trustee, the proper county in which to file a petition to appoint a trustee is the county where the trust property, or some portion of it, is located. Prob C §17005(b).

For testamentary trusts, venue is proper either in the county where the decedent's estate is administered or the county where the trust's principal place of administration is located. Prob C §17005(a)(2). If a testamentary trust is under continuing court jurisdiction, the proper county is that in which the decedent's estate was administered, and the court retains jurisdiction over the trust for any of the purposes enumerated in Prob C §17200. Prob C §17301.

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Source: Estate Planning/California Trust and Probate Litigation/9 Procedural Issues/§9.9 C. Motion for Change of Venue in Trust Proceedings

§9.9 C. Motion for Change of Venue in Trust Proceedings

A testamentary trust under the continuing supervision of the court may be transferred to a different California county under Prob C §17304. If, after the hearing, it appears to the court that the transfer will be in the estate's best interests or that economical and convenient administration of the trust will be facilitated by the transfer, the court must order the transfer. Prob C §17304(c). A petition may also be filed to transfer the place of administration of a trust, or some or all of the trust property, to another state. Prob C §§17400-17405. A court may also make an order accepting the transfer of place of administration of a trust to California or the transfer of some or all of the trust property in another jurisdiction to a trustee in California. Prob C §§17450-17457.

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III. STANDING

§9.10 A. Interested Persons Generally

A will contest (see Prob C §§8004(b), 8250-8254) may be brought by any interested person. A petition for revocation of a will admitted to probate may be filed by any interested person other than a party to a will contest or a person who had actual notice of a will contest in time to have joined in the contest. Prob C §8270. An "interested person" is defined as an heir, devisee, child, spouse, creditor, beneficiary, or any other person having a property right in or claim against a trust estate or decedent's estate that may be affected by the proceeding, any person having priority for appointment as personal representative, or a fiduciary representing an interested person. Prob C §48(a). The meaning of "interested person" as it relates to particular persons may vary, however, and must be determined according to the particular purposes of, and matter involved in, any proceeding. Prob C §48(b). An interested person with respect to a will contest, for example, is one who has a pecuniary interest in the estate that may be impaired or defeated by the probate of the will or benefited by having the will set aside. *Estate of O'Brien* (1966) 246 CA2d 788, 55 CR 343. Other examples include the following:

- A testamentary trustee is not an interested person for purposes of contesting a subsequent testamentary document that does not impair a beneficiary's pecuniary interest (*Estate of Getty* (1978) 85 CA3d 755, 149 CR 656);
- An executor's interest only in serving and receiving fees does not make him or her an interested person for purposes of challenging a codicil unless the testator's object and intent would be thwarted by the provisions of the challenged document (*Jay v Superior Court* (1970) 10 CA3d 754, 89 CR 466);
- A pretermitted child is not an interested person for purposes of a will contest because he or she will take by statute notwithstanding the will (*Stevens v Torregano* (1961) 192 CA2d 105, 13 CR 604);
- A beneficiary under a later will is an interested person for purposes of contesting an earlier will (*Estate of Powers* (1979) 91 CA3d 715, 154 CR 366);
- Intestate heirs, whose pecuniary interests are invaded by any will, are interested persons for purposes of a will contest (*Estate of Robinson* (1963) 211 CA2d 556, 27 CR 441); and
- The daughter of a deceased named trustee of a charitable trust is not an interested person for purposes of petitioning for appointment of a successor trustee. The Attorney General is the only party with standing to represent the trust's intended beneficiaries (*Arman v Bank of America* (1999) 74 CA4th 697, 705, 88 CR2d 410).

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§9.11 B. Heirs and Devisees

An heir is any person entitled to take property of the decedent by intestate succession. Prob C §44. A devisee is a person designated in a will to receive property of the decedent. Prob C §§32, 34. As interested persons (Prob C §48), heirs and devisees generally have standing to contest a will. Heirs or devisees may, by themselves or together with the personal representative, file an action for possession of property or to quiet title to property against any person except the personal representative. Prob C §9654. On this basis, heirs and devisees generally have standing to contest the validity of an inter vivos trust. *Olson v Toy* (1996) 46 CA4th 818, 823, 54 CR2d 29.

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§9.12 C. Personal Representatives

The personal representative is generally a proper party to file an action on behalf of the estate. Personal representatives may begin actions against third parties for the recovery of real or personal property, breach of contract, enforcement of a trust, or wrongful death. However, a personal representative who is not licensed to practice law cannot appear in propria persona on behalf of the estate in matters outside of probate proceedings. *Hansen v Hansen* (2003) 114 CA4th 618, 7 CR3d 688 (trial court should have stricken complaint without prejudice when nonlawyer brought civil action as representative of estate).

A successor personal representative is entitled to sue on behalf of the estate and can bring any action that the former personal representative could have maintained. Prob C §8524; *Borissoff v Taylor & Faust* (2004) 33 C4th 523, 530, 15 CR3d 735.

In *Estate of Davis* (1990) 219 CA3d 663, 268 CR 384, a personal representative's surety was permitted to participate as an "interested person" under Prob C §48 in opposition to a petition to surcharge the personal representative because the surety would be required to pay on the bond if the personal representative were found liable.

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Source: Estate Planning/California Trust and Probate Litigation/9 Procedural Issues/§9.13 D. Trustees

§9.13 D. Trustees

A trustee may petition the court concerning the internal affairs of a trust or to determine the existence of a trust. Prob C §17200(a). The trustee is under a duty to the beneficiaries to take reasonable steps to realize on claims that he or she holds in trust. Restatement (Third) of Trusts §76, Comment d (2007). Beneficiaries also have standing when the trustee fails to protect the beneficiaries' interests. *Triplett v Williams* (1969) 269 CA2d 135, 74 CR 594. The beneficiary must establish that the trustee's failure to act was negligent, wrongful, or otherwise improper. *Pillsbury v Karmgard* (1994) 22 CA4th 743, 27 CR2d 491. See Restatement (Second) of Trusts §282 (1959). See also *Saks v Damon Raike & Co.* (1992) 7 CA4th 419, 427, 8 CR2d 869:

> [W]here a trustee cannot or will not enforce a valid cause of action that the trustee ought to bring against a third person, a trust beneficiary may seek judicial compulsion against the trustee. In order to prevent loss of or prejudice to a claim, the beneficiary may bring an action in equity joining the third person and the trustee.

Beneficiaries, including remainderpersons, have standing to object to a trust accounting under Prob C §17200. An application for the appointment of a guardian ad litem may be required if minors are involved.

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Source: Estate Planning/California Trust and Probate Litigation/9 Procedural Issues/§9.14 E. Creditors

§9.14 E. Creditors

A creditor may be considered an "interested person" for the purposes of filing a will contest. See Prob C §48.

A judgment lien creditor of an heir has standing when the heir would inherit real property if the will were set aside (*Estate of Harootenian* (1951) 38 C2d 242, 238 P2d 992), but a creditor of the decedent does not (*Estate of Seaman* (1921) 51 CA 409, 196 P 928).

A creditor must file a claim under Prob C §§9000-9399 before filing suit against a decedent or the estate. If the creditor's claim is not filed, it is barred. Prob C §9002.

In order to continue an action or proceeding pending against the decedent at the time of death (Prob C §9370):

- A claim must be filed;
- The claim must be rejected, in whole or in part; and
- Provided that notice of the deadline is given in the notice of rejection, the plaintiff must apply, within 3 months after the notice of rejection is given, to the court in which the action or proceeding is pending for an order to substitute the personal representative in the action or proceeding.

An exception to the claim-filing requirement exists when an action is commenced to establish the decedent's liability for which the decedent was protected by insurance. See Prob C §9390.

For full discussion of creditors' claims, see California Decedent Estate Practice, chap 14 (2d ed Cal CEB 2009).

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§9.15 IV. LOCAL COURT RULES AND NOTICE REQUIREMENTS

Before proceeding on any matter under the Probate Code, counsel should be thoroughly familiar with the local rules governing the particular county. Probate local rules memorialize the county's policies and procedures. Not paying close attention to local rules can result in continuances and matters being taken off the calendar.

PRACTICE TIP: Counsel should also consult local rules regarding whether the use of the court's own forms are required and whether there are special rules for the presentation of documents to be filed or for the submission of proposed orders. Counties also differ in their filing and notice procedures and in their requirements for appearances.

The court may require notice beyond that otherwise required by law. Prob C §1202. The San Francisco rules, for example, provide that:

- Additional notice will ordinarily be required when it appears that the interest of any person may be adversely affected by determination of the issues raised by the pleadings, *e.g.,* status of property (San Francisco Ct R 14.25(A));
- The court may also require a copy of the petition to be served with the notice (San Francisco Ct R 14.25(A));
- When notice of hearing is required, whether by personal service, mailing, publication, or posting, the burden is on the petitioner to cause such notice to be given and to file the necessary proof of service (San Francisco Ct R 14.26); and
- The court clerk will post the notice as required, if provided with two copies, but will not mail, furnish proof of mailing, or arrange for publication (San Francisco Ct R 14.26).

The Los Angeles Superior Court rules provide that:

- Additional notice will ordinarily be required when it appears that the interest of any person may be adversely affected by determination of the issues raised by the pleadings, *e.g.,* status of property or request for substantial extra fees (Los Angeles Ct R 10.26(a)); and
- In such cases the court will require notice to include not only the time and place of hearing but also a summary of the matters to be determined or service of a copy of the petition with the notice (Los Angeles Ct R 10.26(a)).

PRACTICE TIP: Generally, a petition should always state the relief being sought with specificity, *e.g.,* a petition for independent administration, a request for extraordinary fees, a request for a proration of estate taxes, or a petition for the removal of a trustee or a personal representative.

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Source: Estate Planning/California Trust and Probate Litigation/9 Procedural Issues/§9.16 V. PETITION FOR INSTRUCTIONS

§9.16 V. PETITION FOR INSTRUCTIONS

When no other procedure is provided by statute, a personal representative may file what is generally termed a "petition for instructions." In fact, the personal representative may petition for authorization and instruction, or for approval and confirmation of his or her acts as personal representative. Prob C §9611. A petition for the court to direct the personal representative to act or not act concerning the estate may be filed by any interested person and may be granted on a showing that the estate will suffer great or irreparable injury if the petition is not granted. Prob C §9613.

PRACTICE TIP: Petitions for instructions are misused if they disguise a request for which another procedure is provided by statute.

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VI. NOTICE AND SERVICE

A. By Mail

§9.17 1. Probate Proceedings

Notices and citations in proceedings under the Probate Code are governed by Prob C §§1200-1265. Notice by mail is generally governed by Prob C §1215. The notice must be sent by first class mail if the address is within the United States, sent by airmail if the address is not within the United States, and be deposited in the United States mail, in a sealed envelope, with postage paid, addressed to the person to whom it is mailed, at that person's place of business or place of residence. Prob C §1215(b)-(d). Once the notice is deposited in the mail, the mailing is complete and the notice period may not be extended. Prob C §1215(e).

Notices of hearing must be mailed at least 15 days before the time set for the hearing unless a statute or court specifies otherwise. Prob C §§1220(a)(1), 1221. Additional time is not added for service by mail. The Probate Code controls over CCP §1013a, which provides that the time period for notice is extended by 5 to 20 days, depending on destination and place of mailing, when service is by mail.

Notice must be mailed individually and directly to the person entitled to notice at the person's residence or place of business. Prob C §1220(a)(3); Cal Rules of Ct 7.51(a)(1). Notice to a minor must be sent directly to the minor, with a separate copy of the notice to the minor's legal custodian, unless the minor is under the age of 12 and the court determines that Prob C §1460.1 requirements have been fulfilled. Cal Rules of Ct 7.51(d).

NOTE: Notices sent to more than one person in a household must be mailed separately. Cal Rules of Ct 7.51(a)(3).

Notice may not be mailed in care of another person unless the person entitled to notice is an adult who has, in writing, directed the party giving notice to send notice in care of another person. Cal Rules of Ct 7.51(a)(2). If a person is represented by an attorney of record, notice must also be sent to the attorney, unless, in the case of a special notice, the notice specifies otherwise. Prob C §1214; Cal Rules of Ct 7.51(b). If a guardian or conservatee has been appointed for the person entitled to notice, notice must be sent to the guardian or conservator; it must also be sent to the ward or conservatee, unless the court dispenses with this notice or the notice is personally served on a California-resident guardian or conservator of the estate under Prob C §1210 in a decedent's estate proceeding. Cal Rules of Ct 7.51(c).

If a beneficiary in a decedent's estate has died, notice must be sent to his or her personal representative (if beneficiary died after decedent) or to the substitute beneficiaries in the decedent's will (if beneficiary died before decedent). Cal Rules of Ct 7.51(e).

When the recipient's address is unknown, the petitioner must submit a declaration of diligent search. See Cal Rules of Ct 7.52 for declaration requirements.

NOTE: Certain probate petitions require 30 days' notice, *e.g.,* a petition filed under Prob C §850 (see Prob C §851) and a petition for the proration of estate taxes (see Prob C §§20120-20122).

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Source: Estate Planning/California Trust and Probate Litigation/9 Procedural Issues/§9.18 2. Trust Proceedings

§9.18 2. Trust Proceedings

Notice for proceedings concerning trusts must be mailed at least 30 days before the time set for hearing on the petition to all trustees, all beneficiaries, and, if the petition relates to a charitable trust, the Attorney General. Prob C §17203(a). Further, at least 30 days before the hearing, notice of the hearing and a copy of the petition must be served in the manner provided by CCP §§413.10-417.40 (service of summons) on any other person whose right, title, or interest would be affected by the petition. Prob C §17203(b). The court may not shorten the time for giving such notice. Prob C §17203(b).

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§9.19 B. Personal Delivery

When notice is required to be mailed, it may be personally delivered to the person to be served, in which event delivery is complete when the notice is personally delivered to the person who is to receive it. Prob C §1216.

The person personally delivering notice may make a proof of notice by affidavit (see §9.21), showing the time and place of delivery and the name of the person to whom delivery was made. Prob C §1264.

Contrast personal delivery on an attorney or party under the Probate Code with personal delivery of notices under CCP §1011, which provides that such service may be effected, respectively, by leaving the notice at the attorney's office, or at the party's residence with any person who is at least 18 years old.

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Source: Estate Planning/California Trust and Probate Litigation/9 Procedural Issues/§9.20 C. Citations

§9.20 C. Citations

Citations under the Probate Code are governed by Prob C §§1240-1242. When a citation is authorized or required by statute, it may be issued by the court clerk on the application of any party, without a court order, except when an order is expressly required by law. Prob C §1240.

The citation must be directed to the person to be cited, signed by the court clerk, and issued under the court's seal. It must contain the title of the proceeding, a brief statement of the nature of the proceeding, and a direction that the person cited appear at a specified time and place. Prob C §1241.

The citation must be served on the person cited in the manner provided by CCP §§413.10-417.40 (service of summons). But see, *e.g.,* Sacramento Ct R 15.17 (when applicable provision of Probate Code or local probate rules requires personal service, substituted service (see CCP §§415.10-415.50) may be used only with court's prior approval). Except as otherwise provided by statute, the citation must be served at least 5 days before its return day. Prob C §1242.

A court order that a citation issue is required:

- For a petition under Prob C §2616 for a person to answer interrogatories or appear before the court and be examined under oath, or both, concerning assets of a ward or conservatee (Prob C §2616(b));
- For a petition by a personal representative under Prob C §8870 for a person to answer interrogatories or appear before the court and be examined under oath, or both, concerning the decedent's property or a lost will (Prob C §8870(a)) (see §10.31);
- For a petition by a personal representative under Prob C §8873 for a person who has possession or control of property in the decedent's estate to appear before the court and make an account under oath of the property and the person's actions with respect to the property (see forms in §§10.34-10.36);
- To compel, under Prob C §11051, a personal representative who does not file a required account to appear and show cause why he or she should not be punished for contempt (on compelling accounts, see chap 13); and
- For a petition under Prob C §8500 for removal of a personal representative (see forms in §§14.43-14.45).

For an example of local court rules regarding citations, see San Francisco Ct R 14.17(D), which provides that:

- An endorsed filed copy of the petition setting forth the relief requested, with the hearing date affixed, must be submitted together with a separate ex parte petition requesting a court order allowing the issuance of a citation; and
- A separate order, which may be submitted ex parte with no appearance required, must be submitted directing the clerk's office to issue a citation.

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§9.21 VII. AFFIDAVITS AND DECLARATIONS

An affidavit is defined as a written declaration under oath, made without notice to the adverse party. CCP §2003. An affidavit is typically made before a notary public. Whenever an affidavit is appropriate, a declaration under penalty of perjury may likewise be used. CCP §2015.5. In practice, affidavits and declarations are used interchangeably. See, *e.g.,* Prob C §1022 (either affidavit or verified petition will be received as evidence when offered in uncontested proceeding).

PRACTICE TIP: Some courts, *e.g.,* San Francisco, now accept faxed signatures on petitions, affidavits, and declarations for filing in the clerk's office.

NOTE: Affidavits of trustees and personal representatives must be executed by the trustee or personal representative, not the attorney.

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Source: Estate Planning/California Trust and Probate Litigation/9 Procedural Issues/§9.22 VIII. VERIFICATION OF PLEADINGS

§9.22 VIII. VERIFICATION OF PLEADINGS

All pleadings filed under the Probate Code must be verified. Cal Rules of Ct 7.103. An attorney may sign or verify a pleading if a person is absent from the county where his or her attorney's office is located, or for some other cause is unable to sign or verify it, unless the person is the appointed fiduciary in the proceeding or is seeking to become one. Prob C §1023; Cal Rules of Ct 7.103(c).

Some local rules provide that all accounts, petitions, and other pleadings made by an executor, administrator, trustee, guardian, or conservator in his or her official capacity (except an account filed by the attorney for a deceased or absconding fiduciary) must be personally signed and verified. The code provision allowing attorneys to verify certain pleadings in civil matters does not apply to probate proceedings when the personal representative is acting in his or her official capacity. Monterey Ct R 4.11; San Francisco Ct R 14.22. See Prob C §1023. For a form of verification of pleadings, see §17.61.

In San Francisco, a petitioner can prove an unverified petition by filing a supplemental declaration before the hearing. San Francisco Ct R 14.22(B). Failure to verify pleadings, when required by statute, will result in the matter being continued, going off calendar, or being placed on the appearance calendar, depending on the circumstances. San Francisco Ct R 14.22(C).

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10

Litigation Tools: An Overview

Michael G. Desmarais

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.1 I. INTRODUCTION

§10.1 I. INTRODUCTION

With few exceptions, the fundamental rules of civil procedure and evidence apply in probate matters just as they do in general civil litigation. See Prob C §1000. Unless the Probate Code provides a special rule, *e.g.,* limiting new trial motions in decedent estate proceedings (Prob C §7220; see §10.89), the Code of Civil Procedure applies. Although estate litigation differs in some ways from ordinary civil litigation (*e.g.,* most trust and probate cases are tried to the bench, not to a jury), trust and probate cases generally follow the same basic pattern as other civil cases.

This chapter briefly summarizes the basic tools of litigation practice, with special emphasis on trust and probate litigation, and provides references to additional sources counsel may consult for in-depth treatment.

For appellate practice, consult Handling Civil Appeals (Cal CEB Action Guide June 2008) or California Civil Appellate Practice (3d ed Cal CEB 1996).

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§10.2 II. BEGINNING LITIGATION

Trust or probate litigation can commence with the filing of different types of pleadings, *e.g.,* an objection to a petition for probate (Prob C §8250) or a petition to determine persons entitled to distribution (Prob C §11700). In such litigation, it can sometimes be difficult to determine who would be "plaintiff" or "defendant" in ordinary civil litigation terms. This chapter uses "plaintiff" to include object or and petitioner and "defendant" to include respondent. See Prob C §1044.

Counsel drafting the initial pleading or the answer or other response should ensure that it states a cause of action and can withstand attacks such as a demurrer or motion for judgment on the pleadings.

When considering how to respond to an initial pleading, counsel should consider whether to demur or make a motion before, after, or in addition to filing an answer or other response. See Prob C §8251(a) (setting time for proponent of will to answer or demur to objection). The question of whether to demur can also arise when the *initiator* of the litigation is faced with the opponent's answer or other response. See CCP §430.20 (grounds for demurring to answer).

In evaluating the types of pleadings available, counsel on either side should take into account the greater flexibility available in probate matters with respect to the manner of pleading, and the resulting ability to be more persuasive. For example, the types of pleadings available are not limited to an affirmative "petition" and a response. There is frequent use of "supplemental" pleadings and surrebuttals, and responses are not always mandatory. In addition, there is heavy use in probate matters of declarations and memorandums to determine substantive matters, completely apart from "law and motion" practice. See §13.55.

On drafting complaints in civil litigation, see California Civil Procedure Before Trial, chap 15 (4th ed Cal CEB 2004). On preparing answers in civil litigation, see Civ Proc Before Trial, chap 25.

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III. LAW AND MOTION PRACTICE

§10.3 A. Type of Pleading

The main goal of a demurrer or early motion (*e.g.,* for judgment on the pleadings) is to dispose of the case quickly. The main goal of motions made later in the case (*e.g.,* for summary judgment or summary adjudication) is to avoid trial or limit the issues for trial.

Before demurring or filing a motion, counsel should evaluate the possibility of success: whether winning will cut the length and cost of the litigation and whether the possible advantages of the demurrer or motion outweigh the cost and the risk of educating opposing counsel.

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§10.4 1. Drafting Motion Papers

The form of papers presented for filing is governed by Cal Rules of Ct 2.100-2.119 (made applicable generally to all cases in the superior court by Cal Rules of Ct 2.2). This rule requires the use of recycled paper, and regulates the paper size, pagination, type style, line spacing and numbering, page numbering, hole punching, format of first page, and footers.

Rules for discovery in probate proceedings are governed generally by Cal Rules of Ct 3.1100-3.1370 (law and motion rules; see in particular Cal Rules of Ct 3.1345-3.1348), as well as Cal Rules of Ct 3.1000-3.1010 (discovery rules). It appears, however, that Cal Rules of Ct 3.1100-3.1370 (law and motion) do not apply to other law and motion matters in probate cases. See Cal Rules of Ct 3.1100, 3.1103(a)(1). Practitioners should review applicable local rules in addition to the following rules of court.

The motion papers to be served and filed include a "notice" of motion, a "motion," and a "memorandum." Cal Rules of Ct 3.1112(a). Other papers may be filed in support of the motion, including declarations, appendixes, and other documents or pleadings. Cal Rules of Ct 3.1112(b). The papers filed under Rules 3.1112(a)-(b) may be filed as separate documents or combined in one or more documents. If items are combined, they must be listed separately in the caption, *e.g.*, "Notice of Motion and Motion for Change of Venue." Cal Rules of Ct 3.1112(c). Certain motions may require additional papers. See, *e.g.,* CCP §437c(b) (summary judgment or summary adjudication motions).

Each paper filed with the court, except for exhibits, must have a footer giving the title of the paper on each page below the page number. Cal Rules of Ct 2.110. For additional format rules, see Cal Rules of Ct 2.100-2.119. See also California Civil Procedure Before Trial, chaps 11-12 (4th ed Cal CEB 2004).

The pages of each document and exhibit must be attached at the top in a way that allows the pages to be turned easily and the entire page to be read. Cal Rules of Ct 3.1110(e).

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§10.5 2. Caption

As part of the caption, the first page of the motion paper must state the name, address, telephone number, and state bar number of the moving party's attorney, the title of the court, the title and number of the case, the nature of the paper, and, if applicable, that it is a limited civil case. Cal Rules of Ct 2.111. Each pleading and each proposed order must clearly and completely identify the nature of the relief sought or granted in its title. Cal Rules of Ct 7.102. The caption may also include the attorney's fax number and email address. This is, however, optional and their inclusion shall not be considered consent to service by fax or email unless otherwise provided by law. Cal Rules of Ct 2.111(1).

On motion papers, it is sufficient to provide the short title of the case, stating the name of the first party on each side, with appropriate indication of other parties and, if applicable, that a cross-action or cross-actions are involved (*e.g*., "and Related Cross-Action"). Cal Rules of Ct 2.111(4).

Below the case number, the caption should include a statement of the nature of the paper, *i.e.,* a brief description of the nature of the order sought, *e.g.,* "Notice of Motion for Summary Judgment." Cal Rules of Ct 2.111(6). Below the character of the action or proceeding, the caption should state whether the amount demanded exceeds $10,000. Cal Rules of Ct 2.111(9). When other papers, *e.g.,* a memorandum in support of the motion or declarations, are attached to the notice of motion, these papers should be similarly named in the caption of the top sheet. Cal Rules of Ct 3.1110(b)(2).

The line "Telephone Appearance" should be added by a moving party who wishes to "attend" the hearing by telephone. See CCP §367.5 for telephone appearance in specified types of cases and matters.

Below the identification of the document, the caption should show the date, time, and location (if ascertainable) of any scheduled hearing, the name of the hearing judge (if ascertainable), the date of filing of the action, and the trial date, if one is set. Cal Rules of Ct 3.1110(b).

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.6 3. Form: Sample Caption

§10.6 3. Form: Sample Caption

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_ _[*Name of attorney*; *State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number*]_ _
_ _[*E-mail address if available*]_ _

Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

_ _ _ _ _ _ **Court, County of** _ _ _ _ _ _
_ _[_ _ _ _ _ _ *Judicial District*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**Notice of Motion and Motion for Change of Venue**
	)	**Hearing:** _ _[*date*; *time*]_ _
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
	)	**Trial date:** _ _[*if set*]_ _
	)	
_____	)	

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§10.7 B. Where Is Law and Motion Heard?

The department where probate law and motion matters are heard varies among counties. Before filing a law and motion matter, counsel should determine where law and motion is heard in the county in order to avoid the motion being taken off calendar, a continuance to another department for hearing, or renoticing motions. Some courts consider relevant law and motion matters in the probate department. See, *e.g.,* San Francisco Ct R 14.11 (law and motion matters heard in probate department except discovery motions, see §10.19); Sacramento Ct R 15.00. Others hear some or all types of law and motion matters in the law and motion department. See, *e.g.,* Sierra Ct R 2.1.

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§10.8 C. Tentative Ruling Phone Numbers

Many courts maintain a tentative ruling phone line that enables attorneys to determine the status of a calendared matter before the hearing. For example, in San Francisco, the probate examiners place the court's tentative ruling on the designated phone line on completion of their review. Counsel may telephone the rulings line up to three days before the hearing to ascertain whether a matter has been approved, continued, or placed on the appearance calendar. The automated system prompts the caller to proceed.

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.9 D. Demurrer

§10.9 D. Demurrer

When responding to a pleading, counsel should consider filing a demurrer under CCP §§430.10-430.30. See also Prob C §8251(a)-(b) (demurrer available in will contest). A demurrer tests the legal sufficiency of the pleading based on an objection that appears on its face (or on judicial notice). See CCP §§430.10-430.90, 589, 591. See also *Banerian v O'Malley* (1974) 42 CA3d 604, 611, 116 CR 919; *James v Superior Court* (1968) 261 CA2d 415, 67 CR 783.

Common grounds for demurrer in trust and probate litigation include (see CCP §430.10):

- Lack of subject matter jurisdiction, *e.g.,* the action was commenced in the civil department when the probate department has exclusive jurisdiction over the acts of a guardian, conservator, personal representative, or trustee (see, *e.g.,* Orange Ct R 601.01 (all matters relevant to probate proceedings to be filed in probate department); but see CCP §396 (mandating transfer rather than dismissal of matter filed in wrong court));
- Lack of legal capacity to sue (on "interested persons," see §§9.10-9.14);
- Failure to state a cause of action, *e.g.,* the action is barred by the statute of limitations; and
- Uncertainty, *e.g.,* the allegations do not specifically allege undue influence.

PRACTICE TIP: Courts rarely sustain a demurrer, especially without leave to amend. A demurrer consumes time and money, and, although it narrows the issues, it may also educate opposing counsel about the case or deficiencies in the pleading. Sometimes a successful demurrer can be dispositive, however. See, *e.g., Bank of America v Superior Court* (1986) 181 CA3d 705, 717, 226 CR 685 (order settling guardianship accounting barred civil action against fiduciary because plaintiff could not allege extrinsic fraud or material misrepresentations).

Generally, when the court overrules a demurrer and no answer has been filed, the court must permit an answer to be filed on such terms as are just. CCP 472a. If the court overrules the demurrer in a will contest, counsel must answer the objection to probate of the will within 15 days. Prob C §8251(b).

On demurrer requirements and how to demur, see California Civil Procedure Before Trial, chap 23 (4th ed Cal CEB 2004).

For a discussion of a demurrer to a will contest, including a form, see §§17.64-17.70.

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§10.10 E. Motion to Strike

If the objection is not a permissible ground for demurrer (*e.g.,* the pleading contains false or irrelevant information), counsel may make a motion to strike under CCP §§435-437. A motion to strike can also eliminate part of a cause of action (*e.g.,* a claim for punitive damages) even though the rest of the cause of action would stand against a general demurrer. See CCP §435(b)(1). An objection that constitutes proper grounds for demurrer is usually not a proper ground for a motion to strike. See *Warren v Atchison, Topeka & Santa Fe Ry. Co.* (1971) 19 CA3d 24, 41, 96 CR 317.

As is true of a demurrer, the grounds for a motion to strike must appear on the face of the pleading or from matter of which the court must take judicial notice. CCP §437.

Counsel should use a motion to strike to eliminate (CCP §436):

- Any irrelevant, false, or improper matter inserted in any pleading;
- All or any part of any pleading not drawn or filed in conformity with the laws of California, a court rule, or an order of the court.

For example, a motion to strike can be used to strike allegations in an amended pleading that were the subject of a prior successful demurrer without leave to amend. For further information on motions to strike, see California Civil Procedure Before Trial, chap 24 (4th ed Cal CEB 2004).

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.11 F. Motion for Judgment on Pleadings

§10.11 F. Motion for Judgment on Pleadings

When the time to file a demurrer or motion to strike has expired, and after an answer has been filed, a party may still file a motion for judgment on the pleadings under CCP §438(f), but *not* without court permission if a pretrial conference order has been entered under CCP §575, or within 30 days after the initial trial date, whichever is later. CCP §438(e). The grounds for the motion are the same as for a demurrer. See *Smiley v Citibank* (1995) 11 C4th 138, 145, 44 CR2d 441.

PRACTICE TIP: As with a demurrer, the court will often allow leave to amend even if it does grant the motion. Because this is so, many counsel will answer the defective pleading and move for judgment on the pleadings later, after some discovery has been completed and the opposing party has had the chance to commit itself to a certain position, perhaps making it more difficult to cure defects in the pleading.

For more information on motions for judgment on the pleadings, see California Civil Procedure Before Trial, chap 27 (4th ed Cal CEB 2004).

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.12 G. Motion to Dismiss for Failure to Serve Summons or to Bring Case to Trial

§10.12 G. Motion to Dismiss for Failure to Serve Summons or to Bring Case to Trial

A plaintiff must comply with state statutes requiring reasonable diligence in the prosecution of civil actions; an action is subject to dismissal if plaintiff fails to meet the deadlines in these statutes. Both mandatory and discretionary grounds for dismissal exist, including, *e.g.*:

- **Failure to serve summons**. Under CCP §§583.210-583.250, the court *must* dismiss an action if the summons is not served within 3 years after the action is commenced. Under CCP §583.420(a)(1), the court *may* dismiss the action if service is not made within 2 years after commencement.
- **Failure to bring to trial.** Under CCP §§583.310 and 583.360, the court *must* dismiss an action if it is not brought to trial within 5 years after it is commenced. Under CCP §§583.410 and 583.420(a)(2), the court *may* dismiss an action if it is not brought to trial within 3 years after commencement. Under Cal Rules of Ct 3.1340 (adopted by authority of CCP §§583.410(b) and 583.420(a)(2)(B)) the court *may* dismiss the action if it is neither brought to trial nor conditionally settled within *2 years* after commencement.

Any person interested in the action (whether a party or not), or the court on its own motion, can move for mandatory dismissal for failure to timely serve a summons. CCP §583.250(a)(2). Only the defendant (or cross-defendant), or the court on its own motion, can move for mandatory dismissal for failure to bring an action to trial. CCP §583.360(a). If the dismissal sought is discretionary, the court can dismiss the action either on its own motion or on the motion of the defendant or cross-defendant. CCP §583.410(a). See Cal Rules of Ct 3.1342.

For further information on involuntary dismissals, see California Civil Procedure Before Trial, chap 39 (4th ed Cal CEB 2004).

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§10.13 H. Motion for Summary Judgment or Summary Adjudication

Unlike motions based on the face of the pleadings (*e.g.,* demurrers and motions to strike), motions for summary judgment and summary adjudication under CCP §437c must be supported and opposed by admissible evidence. Both motions are subject to Cal Rules of Ct 3.1350 (stating requirements, including supporting documents, separate statement of undisputed material facts, documents in opposition, and documentary evidence).

A motion for summary judgment may be made by either party in any action or proceeding on the grounds that the action has no merit or that there is no defense to it. CCP §437c(a). The court will deny summary judgment, however, if any issue of material fact must be decided in order to render judgment. CCP §437c(c); *Salazar v Southern Cal. Gas Co.* (1997) 54 CA4th 1370, 1376, 63 CR2d 522. Therefore, motions for summary judgment are primarily used to resolve cases in which there is no triable issue of fact or the issue is one of law. *Exxon Corp. v. Superior Court* (1997) 51 CA4th 1672, 1679, 60 CR2d 195.

A motion for summary judgment must be supported and opposed by affidavits and declarations that are made on personal knowledge and based on admissible evidence CCP §437c(b), (d). The motion may also be supported by admissions, answers to interrogatories, depositions, and matters subject to judicial notice. CCP §437c(b). Evidentiary objections may be made by both the moving and responding parties. See CCP §437c(b)-(d).

Motions for summary judgment can be particularly useful in estate litigation, *e.g.,* to resolve disputes over the meaning of a testamentary instrument. Although the opposing party may argue for the admission of extrinsic evidence to prove the instrument's meaning, this type of evidence often fails to raise a material issue of fact and the moving party can defeat the argument. See, *e.g., Wagner v Glendale Adventist Dental Ctr.* (1989) 216 CA3d 1379, 265 CR 412.

A motion for summary adjudication (regarding one or more causes of action within an action) may be made by itself or as an alternative to a motion for summary judgment. However, a party may not move for summary judgment based on issues asserted in a prior motion for summary adjudication that was denied by the court, unless that party establishes to the satisfaction of the court newly discovered evidence or circumstances or change of law supporting the issues reasserted in the summary judgment motion. CCP §437c(f)(2).

On how to make and defend a motion for summary judgment or summary adjudication, see California Civil Procedure Before Trial, chap 36 (4th ed Cal CEB 2004). See also Making and Opposing a Summary Judgment Motion (Cal CEB Action Guide October 2005).

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§10.14 IV. CONDUCTING DISCOVERY

California statutory civil discovery procedures apply in estate litigation proceedings. Prob C §1000. In view of the unusual circumstances that may precipitate certain types of estate litigation, such as will contests, counsel should thoroughly investigate the relevant facts effectively to prepare and present the case at trial.

Investigative tools include both informal discovery (see §§10.15-10.17) and formal discovery devices as set forth in the Code of Civil Procedure (see §§10.18-10.29). However, a party who has not yet filed a pleading may in some circumstances be barred from initiating formal discovery. Compare *Forthmann v Boyer* (2002) 97 CA4th 977, 985, 118 CR2d 715 (beneficiary who has not filed written objections to account has no right to formal discovery in connection with trustee's account), with *Mota v Superior Court* (2007) 156 CA4th 351, 67 CR3d 303 (error to deny petition to compel discovery after party had filed formal objection to trustee account).

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§10.15 A. Informal Discovery

Informal discovery is often the most effective, economical, and expeditious way of accomplishing the following principal objectives of discovery:

- Gaining information;
- Preserving and marshaling evidence;
- Establishing the truth of matters so as to reduce the need to introduce evidence at trial;
- Identifying the contentions of opposing parties;
- Learning what evidence the opposing parties have acquired; and
- Forming impressions on the likely effectiveness of evidence.

On conducting informal discovery, see Creating Your Discovery Plan, step 19 (Cal CEB Action Guide February 2007). On conducting discovery in general, see California Civil Discovery Practice (4th ed Cal CEB 2006).

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§10.16 1. Inspecting Records

Heirs, devisees, and beneficiaries have the right to inspect the records relating to their estates or trusts without engaging in formal discovery. See, *e.g., Strauss v Superior Court* (1950) 36 C2d 396, 224 P2d 726; *Lasky, Haas, Cohler & Munter v Superior Court* (1985) 172 CA3d 264, 218 CR 205. The fiduciary who denies them access to those records risks removal and surcharge. See Prob C §§16400, 16420(a) (breach of trust).

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§10.17 2. Retaining Expert Witnesses

Counsel may retain an expert either to consult in preparation and trial of the case (consulting expert) or to testify at the trial itself (testifying expert).

Counsel should consider retaining consulting experts on a wide variety of issues, including taxation, standard of care, and economic loss. In general, the work product rule shields from discovery the identity, as well as the reports, opinions, and knowledge, of experts who will not testify at trial, but who are retained solely for assistance and advice. See, *e.g., South Tahoe Pub. Util. Dist. v Superior Court* (1979) 90 CA3d 135, 154 CR 1; *Brokopp v Ford Motor Co.* (1977) 71 CA3d 841, 857, 139 CR 888. But see *Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 151 CR 399 (disagreeing with *Brokopp* and holding that work product privilege is applicable at trial).

PRACTICE TIP: In estate litigation involving claims of breach of fiduciary duty, *testifying* experts are especially valuable to help establish the standard of care and whether it was breached.

On exchange of expert witness information, see §10.27.

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B. Formal Discovery

§10.18 1. Order of Discovery

The most commonly used statutory discovery methods in civil actions and a typical order of their use are the following:

- Demand for production of documents (CCP §§2031.010-2031.510; see §10.21);
- Depositions of the most important witnesses (see CCP §§2025.010-2028.080, 2029.100-2029.900 (operative January 1, 2010); see also §10.24);
- Service of interrogatories to elicit the opposing party's contentions (CCP §§2030.010-2030.410; see §10.25);
- Requests for admission to obtain agreement on, *e.g.,* the validity of the main documents in the case (CCP §§2033.010-2033.420; see §10.26); and
- Exchange of witness information (CCP §§2034.010-2034.730; see §10.27).

Physical and mental examinations (CCP §§2032.010-2032.650) are used less often.

In addition to these procedures used in civil actions, the Probate Code provides special discovery procedures for use when third persons are withholding estate property or have knowledge of it. These procedures are discussed in §§10.30-10.37.

On exhuming the body in a will contest, see §10.29.

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§10.19 2. Where Is Discovery Heard?

Local probate court rules may specify where discovery pertaining to pending probate proceedings is heard; the location varies among counties. In some counties, they may be heard in the civil law and motion department (see, *e.g.,* Contra Costa Ct R 6(D) (probate matters set in Probate Department, except discovery, summary judgment, and summary adjudication of issues motions)); in others, they may be heard in the probate department (see, *e.g.,* San Diego Ct R 4.23.4). In other counties, probate discovery matters are heard in the discovery department. See, *e.g.,* San Francisco Ct R 14.11 (all motions and other matters concerning discovery in probate proceedings must be noticed for hearing before court commissioner in discovery department unless probate judge directs otherwise).

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§10.20 3. Judge or Commissioner

Commissioners are on staff in many superior courts, and they sit as judges pro tem over probate matters at hearings as well as in ex parte matters. A stipulation on the record gives the commissioner, sitting as a judge pro tem, the authority of a superior court judge sitting in probate. CCP §259. See Cal Const art VI, §21. There can even be an implied stipulation as, *e.g.,* when all parties participate in the hearing without objecting to the commissioner's authority to render a binding order. *Gridley v Gridley* (2008) 166 CA4th 1562, 1579, 83 CR3d 715. If a party refuses to have the matter heard by a commissioner, a judge must preside at the hearing and rule on the matter. *In re Frye* (1983) 150 CA3d 407, 197 CR 755; *Gridley v Gridley, supra* (judge must hear and rule on trust matter when prior stipulation to temporary judge involved estate matter and had terminated with close of probate). The refusal does not constitute a peremptory challenge under CCP §170.6. As discussed in §10.19, many probate courts refer all discovery motions to the court's discovery department for determination by a commissioner sitting as a judge pro tem.

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4. Civil Discovery Devices

§10.21 a. Production Demands; Subpoena Duces Tecum

Estate litigation counsel must know the key documents in the case, including those under the opposing party's control. A production demand under CCP §§2031.010-2031.320 is the method for inspecting and copying these documents, including electronically stored information. The production of documents from nonparties is compelled by a subpoena duces tecum. See CCP §§1985-1997.

In a will contest, the drafter of the will, and quite often a proponent, may have relevant documents such as drafts of the will, the estate planning file, letters, notes, memoranda, diary entries, and even tapes that will shed considerable light on the case. The attorney-client privilege regarding communications between a deceased client and his or her attorney does not prevent counsel for the contestant from inspecting these documents. Evid C §961. See §10.76.

On the showing necessary for production and the sufficiency of the contestant's affidavit, see *Adams v Superior Court* (1957) 49 C2d 427, 317 P2d 983; *Coberly v Superior Court* (1965) 231 CA2d 685, 42 CR 64. Local rules should also be consulted.

PRACTICE TIP: Counsel should serve demands for production of documents and subpoenas duces tecum in time to receive responses before taking depositions.

A CCP §2031.010 production demand also entitles a party to inspect (1) tangible things, (2) land or other property, and (3) electronically stored information (as defined in CCP §2016.020(d)-(e)) in the possession, custody, or control of any other party.

When subpoenaing a consumer's personal records, or an employee's employment records, counsel must comply with certain special requirements. See CCP §§1985.3, 1985.6. Unlike the demand for production (see CCP §2031.040), a subpoena duces tecum must be personally served. CCP §1987.

The responding party may do the following:

- Move for a protective order to preclude or limit the discovery (CCP §2031.060); or
- Respond separately to each item or category of item to the inspection demand by a written (CCP §§2031.210-2031.240):
- Statement that the party will produce the documents demanded by the date set for inspection;
- Representation that the responding party lacks the ability comply with the demand; or
- Objection to the particular demand.

The responding party's response must be verified. CCP §2031.250.

The propounding party may move to compel responses or further responses, and the court may impose sanctions against either the propounding party or the responding party. CCP §§2031.300-2031.320.

For sample request for production in will contest proceeding, see §10.105. On production demands and subpoenas, see California Civil Discovery Practice, chap 8 (4th ed Cal CEB 2006).

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§10.22 (1) Decedent's Medical History

In a will contest, information indicating and records showing specific instances of the testator's mental incapacity, such as delusions, are extremely significant. The doctor-patient privilege and the psychotherapist-patient privilege usually do not prevent discovery of such material in will contests. See Evid C §§1002, 1019. See also §10.75.

The decedent's complete medical history should be obtained from all physicians, hospitals, and nursing homes that rendered him or her care. Every condition or treatment should be analyzed and understood as far as it might have affected the decedent's vulnerability to fraud and undue influence or affected his or her competency. The decedent's progress notes, nurses' notes, consultation notes, histories, and reports of laboratory examinations should all be obtained and evaluated in depth. They will frequently provide the most objective and authoritative source of evidence available.

In a will contest, it is not sufficient to allege that the decedent was known to be under the influence of medication. Counsel should be prepared to demonstrate by the medical records that the decedent actually had a specific quantity of a narcotic drug on the day he or she executed the contested will and to present medical testimony on the effects of such a drug. Counsel should learn the direct and side effects of each drug that the decedent was taking.

Hospital records also may be helpful in identifying potential witnesses. Frequently, nurses' notes will indicate the patient's condition, at what times the patient had visitors, and who was there, as well as when physicians saw the patient.

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§10.23 (2) Business Records

In addition to the medical evidence, counsel on both sides of a will contest should review the decedent's business transactions, contracts, and signed documents, if any, executed on or about the time he or she signed the will. For example, a man who entered into an important business contract with the decedent on the same day the decedent signed his will and who has since been receiving benefits under that contract would be a reliable witness regarding the decedent's competency on that date. See *Huyck v Rennie* (1907) 151 C 411, 90 P 929.

The contestant's counsel should not go to trial without examining the decedent's papers, *e.g.,* checkbooks, bill files, investment portfolio, legal papers, diary entries, and travel documents. They may shed light on the issues of competency, fraud, and undue influence. As far as possible, inspection should include every piece of paper traceable to the decedent or to his or her agents, representatives, or attorneys for any relevant period. This procedure will at least avoid surprise at trial.

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§10.24 b. Depositions

In probate or trust litigation, important witnesses are often elderly or in ill health and the only effective means of preserving their testimony for use at trial is to take their deposition for introduction into evidence if they are unavailable.

In a will contest, it is common to depose not only the opposing party, but also the decedent's treating physician, the drafting attorney, and the parties' retained expert witnesses. The attorney defending a will contest may wish to obtain the contestant's deposition as soon as possible to ascertain the specific claims and the facts that may support the contest. Particular attention should be paid to the identification and location of witnesses and documents that the contestant claims support his or her view. By obtaining an early deposition, the attorney may be able to circumscribe the contestant's opposition. As the case develops, the contestant is likely to learn some of the weaknesses in the proponent's case, including those points of fact that the proponents do not recall or would be unable to contradict. In those areas, a contestant's memory may "expand" if he or she has not been inhibited by what other people know or can prove.

Much of the evidence of a typical will contest consists of conversation and subjective conduct. What did the proponent say and do to achieve undue influence or to perpetrate the fraud? What was the decedent's physical and mental condition, how did he or she look and act, and what did the decedent say to suggest that he or she was incompetent, defrauded, or subject to undue influence? The longer the case goes on before a party's story is pinned down, the more damaging is the imaginative witness who learns the kind of evidence that may be useful.

Code of Civil Procedure §§2025.010-2025.620, governing the manner of taking depositions, establishes procedures for the taking of a deposition by audio or video technology (see CCP §2025.220; CCP §§2025.330-2025.340). It also permits the court to provide for a telephone deposition of a nonparty witness if there is good cause and no prejudice to any party. CCP §2025.310. A copy of the transcript or of an audio or video recording of testimony taken at deposition may be obtained under CCP §2025.570.

The oral deposition of a party under CCP §§2025.010-2025.620 requires only the service of a deposition notice (CCP §2025.220), whereas the deposition of a nonparty witness requires the personal service of a subpoena as well (CCP §§2020.010-2020.030; see CCP §1987(a)). The deponent may be compelled to produce documents or other evidence at the deposition. CCP §§2025.220-2025.240. Production of documents by a nonparty witness requires service of a subpoena duces tecum. CCP §§1987(a), 2020.010, 2025.280(b). Because in many cases it is desirable to obtain the records of a nonparty witness before the day of the deposition, the subpoena duces tecum should be served well in advance.

Objections to the deposition of a party can be made by a written response or a motion for a protective order. CCP §§2025.410-2025.420. Objections to the deposition of a nonparty witness must be raised by motion to quash or modify the subpoena or by motion for a protective order. CCP §§1987.1, 2025.420. A motion for a protective order under CCP §2025.420 requires that the moving party made a good faith attempt at informal resolution.

The propounding party may make a motion to compel the deposition or answers to questions propounded at the deposition, and the court may impose sanctions against either the propounding party or the deponent. CCP §§2025.430-2025.450, 2025.480.

The propounding party also may record the deposition by audio or video technology. CCP §§2025.330-2025.340. Copies of the audio or video recording may be obtained by any party. CCP §2025.510.

Depositions may be taken by written questions. CCP §§2028.010-2028.080. This procedure is often not practical, however, unless the information to be obtained is limited and defined.

On preparing for and taking depositions, see California Civil Discovery Practice, chaps 5-6 (4th ed Cal CEB 2006).

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§10.25 c. Interrogatories

Interrogatories propounded to the opposing party under CCP §§2030.010-2030.410, like production demands under CCP §§2031.010-2031.320, are a good method of discovering information in the hands of opposing counsel. They are also the best method of determining the opposing party's legal contentions. See CCP §2030.010(b); *Burke v Superior Court* (1969) 71 C2d 276, 78 CR 481; *Estate of Luke* (1987) 194 CA3d 1006, 1021, 240 CR 84 (in action by heirs of wife, answers to interrogatories appropriately used to eliminate opposing parties' contention that surviving husband derived property from noncommunity sources).

PRACTICE TIP: Counsel should be aware that interrogatories may disclose to the opposing party what counsel knows and his or her approach to the case. Interrogatories can also spur the responding party to develop his or her own case.

A party may propound 35 specially prepared interrogatories in addition to any number of form interrogatories and, with a declaration for additional discovery, an increased number of specially prepared interrogatories as well. CCP §§2030.030-2030.050.

The responding party must respond in writing under oath separately to each interrogatory by an answer or by an objection. The responding party also has the option to produce writings in response to an interrogatory. CCP §2030.210(a). In addition, subject to the requirement of a good faith attempt at informal resolution, the responding party may move for a protective order, and the court may impose sanctions. CCP §2030.090.

The propounding party may move to compel answers or further answers to the interrogatories, and the court may impose sanctions on either the propounding or the responding party. CCP §§2030.290-2030.300.

For an example of interrogatories used in particular estate litigation proceedings, see §10.103.

On special interrogatories used for discovery from persons withholding or concealing estate property, see §§10.31-10.32.

On propounding and responding to interrogatories, see California Civil Discovery Practice, chap 7 (4th ed Cal CEB 2006).

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.26 d. Requests for Admission

§10.26 d. Requests for Admission

Requests for admission (CCP §§2033.010-2033.420) seek to eliminate or narrow issues, thus saving time and expense. They are particularly useful to will proponents because they can eliminate the necessity of calling witnesses to prove due execution of the will.

PRACTICE TIP: Because requests for admission cannot require the responding party to state the facts on which it bases its admission or denial, counsel should use interrogatories, not requests for admission, to ascertain the facts on which a party bases its contentions. In fraud actions, counsel should consider using Judicial Council Form DISC-001 (Form Interrogatories-General). See CCP §2033.710-2033.740.

A party may serve a written request that any other party to the action admit the genuineness of specified documents or the truth of specified matters of fact, opinion relating to fact, or application of law to fact, provided, however, that the request for admission relates to a matter that is in controversy between the parties under CCP §2033.010. The propounding party may serve at least 35 requests for admissions. By also serving a declaration for additional discovery, the propounding party may serve additional requests. CCP §§2033.030-2033.050. The responding party must respond in writing under oath separately to each request or must object to the particular request. CCP §§2033.210-2033.240.

The responding party also may move for a protective order. CCP §2033.080. In response, the propounding party may move for an order compelling responses or further responses to the requests or for an order that the genuineness of any documents and the truth of any matters specified in the requests be considered admitted. CCP §§2033.280-2033.290. The court may impose sanctions in connection with a motion for a protective order, a motion to compel responses, or a motion to compel further responses. CCP §§2033.080, 2033.280-2033.290.

Any matter admitted in response to a request for admission is conclusively established against the party making the admission in a pending action unless the court permits withdrawal or amendment of the admission. CCP §2033.410. If the responding party fails to admit the genuineness of any document or the truth of any matter and the propounding party proves the genuineness of that document or the truth of that matter, the propounding party may move the court for an order requiring the responding party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. CCP §2033.420.

For an example of requests for admission used in particular estate litigation proceedings, see §10.104.

On making and responding to requests for admission, see California Civil Discovery Practice, chap 9 (4th ed Cal CEB 2006).

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§10.27 e. Exchange of Expert Information

Because estate litigation is generally tried without a jury, and expert witness testimony is admitted more liberally in bench than in jury trials, it is essential to discover the experts whom the opposing party may call and to depose them sufficiently to refute their testimony at trial.

After the setting of the initial trial date (see §§10.38-10.41), any party may serve a written demand that all parties simultaneously exchange information concerning each other's expert trial witnesses under CCP §§2034.010-2034.730, including the name and address of the expert witness and the production of all discoverable reports and writings made by the expert in the course of preparing an opinion. All parties must then exchange information concerning their expert witnesses in writing. CCP §2034.260.

If an expert has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action, the designation must contain a brief narrative statement of both the qualifications of the expert and the general substance of his or her expected testimony. CCP §2034.260(c).

After the exchange, the parties may serve supplemental expert witness information. CCP §2034.280. A party may move for a protective order in connection with an untimely or otherwise improper demand. CCP §2034.250. A party also may move to augment his or her expert witness designation or submit tardy expert witness information. CCP §§2034.610-2034.730. Failure to exchange expert witness information can lead to the exclusion of the expert's testimony. CCP §2034.300. The court may impose sanctions in connection with any motion for protective order, a motion to set the expert witness's fee, or a motion to augment or submit a tardy expert witness designation. CCP §§2034.250, 2034.470, 2034.630, 2034.730.

On expert opinion testimony, see §§10.65-10.67. On the exchange of expert information, see California Civil Discovery Practice, chap 11 (4th ed Cal CEB 2006).

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.28 f. Discovery Before or After Action

§10.28 f. Discovery Before or After Action

Certain Code of Civil Procedure provisions permit discovery before the action commences (see CCP §§2035.010-2035.060) and pending an appeal (see CCP §§2036.010-2036.050). These procedures are useful to perpetuate testimony or preserve information in the event of further proceedings. On the other hand, proceedings under CCP §§2035.010-2035.060 cannot be used to determine the possible existence of a cause of action or of a defense to it. CCP §2035.010(b).

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§10.29 g. Exhuming Body in Will Contest

A trial court in a will contest does not have the authority to order the exhumation and autopsy of a deceased testator's body for the purpose of discovery. See *Holm v Superior Court* (1986) 187 CA3d 1241, 232 CR 432, in which the contestants alleged that the decedent may have had Alzheimer's disease, which could have affected testamentary capacity.

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.30 5. Discovery Procedures Unique to Probate Proceedings

§10.30 5. Discovery Procedures Unique to Probate Proceedings

The Probate Code provides special discovery procedures for use when a person has wrongfully taken, concealed, or disposed of the decedent's property, or has knowledge or possession of the decedent's assets or of a lost will. See Prob C §8870. These procedures are available when a third party has embezzled, concealed, smuggled, or fraudulently disposed of estate property or may be hiding a will. In such situations, the Probate Code provides three avenues of relief. The court, on petition by an interested party, may issue a citation compelling the third person to:

- Answer interrogatories (Prob C §8870; see §10.31);
- Appear and be examined (Prob C §8870; see §10.33); or
- Appear and make an account of estate property (Prob C §8873; see §10.34).

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.31 a. Citation to Answer Interrogatories or Appear for Examination

§10.31 a. Citation to Answer Interrogatories or Appear for Examination

When it appears that a third party is withholding or concealing estate assets or knowledge of estate assets, the personal representative or other interested party may petition the court to issue a citation compelling the person to answer interrogatories or appear for examination on the matter. Specifically, the interrogatories or examination may ask whether the person (Prob C §8870(a)):

- Has wrongfully taken, concealed, or disposed of estate property; or
- Has knowledge or possession of:
- A deed, contract, or other writing that contains evidence of the decedent's right, title, interest, or claim to property;
- A claim of the decedent; or
- A lost will.

If the person does not live in the county where the estate is being administered, either the superior court where the person resides or the court administering the estate may issue the citation. Prob C §8870(b). Refusal to answer or appear in response to the citation is punishable by contempt. Prob C §8870(c).

The personal representative must receive notice of these discovery proceedings, as must persons who have filed requests for special notice. Prob C §8870(c). See Prob C §§1220 (notice to personal representative), 1250 (request for special notice), 1252 (notice to person requesting special notice).

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.32 b. Propounding and Answering Interrogatories

§10.32 b. Propounding and Answering Interrogatories

Interrogatories propounded to a third person who is withholding or concealing estate property under the special Probate Code discovery procedures must be in writing. Prob C §8871. The answers must be signed under penalty of perjury. Both the interrogatories and the answers must be filed with the court. Prob C §8871.

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§10.33 c. Conduct of Examination

When a person who is withholding or concealing estate property is cited to appear and be examined, either side may produce and examine witnesses at the hearing. Prob C §8872(a). If, after the examination, it appears that the allegations against the person are true, the court may order him or her to disclose relevant information to the personal representative. Prob C §8872(b). On the other hand, if examination reveals the allegations are untrue, the court may order the person's expenses and attorney's fees to be paid by the estate or the petitioner. Prob C §8872(c). To charge expenses, the court must make an express finding of innocence. *Estate of Downing* (1980) 106 CA3d 159, 164 CR 787.

Examinations under Prob C §§8870 and 8872 are relatively rare. An attorney considering use of the procedure should consult local court staff regarding scheduling, location, and court reporter arrangements. If the examination is likely to be lengthy, the court may require that the bulk of the examination take place without the judge present, in a manner similar to a judgment-debtor examination. See Debt Collection Practice in California §§8.15-8.19 (2d ed Cal CEB 1999).

The special discovery procedure of Prob C §8872 is available only to discover assets of the estate; it may not be used to try title to property. *Estate of Schachtman* (1955) 45 C2d 50, 286 P2d 345.

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§10.34 d. Appearance to Account for Estate Property

On petition by the personal representative, the court may issue a citation to a person who has possession or control of estate property to appear before the court and make an account under oath of the property and the person's actions concerning the property. Prob C §8873(a). See forms in §§10.35-10.36. Refusal to appear in response to the citation is punishable by contempt. Prob C §8873(b).

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.35 (1) Form: Petition for Issuance of Citation Requiring Citee to Appear and Account for Estate Property

§10.35 (1) Form: Petition for Issuance of Citation Requiring Citee to Appear and Account for Estate Property

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[*Title of court*]

In re _ _[*name*]_ _ Trust, Established _ _[*date*]_ _	)	**No. _ _ _ _ _ _**
	)	
	)	**PETITION FOR ISSUANCE OF CITATION REQUIRING CITEE TO APPEAR AND ACCOUNT FOR ESTATE PROPERTY; POINTS AND AUTHORITIES; DECLARATION OF _ _[*NAME*]_ _ (PROBATE CODE §8873(a))**
	)	
	)	
	)	
	)	
	)	
_____	)	

Petitioner, _ _[*name*]_ _, alleges:

[*Add one of the following alternatives*]

[*Alternative 1*]

1. Petitioner was appointed trustee of the _ _[*name*]_ _ Trust under the will of _ _[*name*]_ _ by order of court dated _ _[*date*]_ _ and has been trustee since that date.

[*Alternative 2*]

1. Petitioner accepted trusteeship of the _ _[*name*]_ _ Trust created by the trust agreement dated _ _[*date*]_ _, and has been trustee since that date.

[*Continue*]

2. Petitioner hereby applies for an order directing that a citation be issued to _ _[*name*]_ _ under Probate Code §8873(a).

3. The petition is made on the grounds that this person has possession and control of _ _[*description of property*]_ _ in the decedent's estate and should appear before the court and make an account under oath of the property and _ _[*his/her*]_ _ actions with respect to the property.

4. The petition is based on the attached Declaration of _ _[*name*]_ _, the Points and Authorities set forth below, and the complete files and records of this action.

5. The names and last known post office addresses of the beneficiaries of the trust, as far as known to petitioner, are: _ _[*List names and addresses*]_ _.

[*Add one of the following alternatives*]

[*Alternative 1*]

6. No one has filed a request for special notice in this proceeding.

[*Alternative 2*]

6. The following have filed request(s) for special notice in this proceeding: _ _[*name(s)*]_ _.

[*Continue*]

WHEREFORE, petitioner requests that the court issue a citation directed to _ _[*name of citee*]_ _ requiring _ _[*him/her*]_ _ to appear before the court and make an account under oath relating to _ _[*description of property*]_ _, including _ _[*his/her*]_ _ knowledge and actions with respect to the property.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Trustee(s) _ _[*Name(s)*]_ _

POINTS AND AUTHORITIES

Probate Code §8873(a) provides that:

> **ON PETITION BY THE PERSONAL REPRESENTATIVE, THE COURT MAY ISSUE A CITATION TO A PERSON WHO HAS POSSESSION OR CONTROL OF PROPERTY IN THE DECEDENT'S ESTATE TO APPEAR BEFORE THE COURT AND MAKE AN ACCOUNT UNDER OATH OF THE PROPERTY AND THE PERSON'S ACTIONS WITH RESPECT TO THE PROPERTY.**

As shown in the accompanying Declaration of _ _[*name*]_ _, _ _[*name of citee*]_ _ has possession or control of _ _[*description of property*]_ _ property in the decedent's estate.

Accordingly, the Probate Court has the authority to order the issuance of a citation requiring _ _[*name*]_ _ to appear before the court and make an account under oath of the property and _ _[*his/her*]_ _ knowledge and actions with respect to the property under Probate Code §8873(a).

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Petitioner

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Petitioner

VERIFICATION

I, the undersigned trustee of the _ _[*name*]_ _ Trust, declare that:

I have read the foregoing petition for issuance of citation requiring citee to appear and account for estate property and know its contents. It is true of my own knowledge except as to matters that are stated in it on information and belief, and as to those matters I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Let citation issue.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge/Court Commissioner

Copies: Original for filing; service copies; office copies; copy for probate department.

Comment: The petition should be accompanied by Judicial Council Form DE-122 (Citation-Probate), which includes proof of service.

The original citation with proof of service attached should be filed with the clerk in advance of the hearing.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

On citation procedure in probate proceedings, see chap 9.

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.36 (2) Form: Declaration Supporting Petition for Issuance of Citation

§10.36 (2) Form: Declaration Supporting Petition for Issuance of Citation

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[*Title of court*]

In re _ _[*name*]_ _ **Trust,**	)	**No.** _ _ _ _ _ _
Established _ _[*date*]_ _	)	
	)	**DECLARATION OF**
	)	_ _[*NAME*]_ _ **SUPPORTING**
	)	**PETITION FOR ISSUANCE OF**
	)	**CITATION (PROBATE CODE**
_____)		**§8873(a))**

_ _[*Name*]_ _ **declares:**

1. I am an attorney at law duly admitted to practice before all the courts of the State of California and am the attorney of record for petitioner. I have personal knowledge of the facts set forth below and, if called as a witness in this matter, would and could competently testify to the following.

2. Attached to this declaration is a true and correct copy of a petition requesting the court to issue a citation requiring _ _[*name*]_ _ **to appear and account for estate property and** _ _[*his/her*]_ _ **action with respect to it that I caused to be filed today.**

3. As set forth in these pleadings, _ _[*describe grounds giving rise to the petition*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Petitioner(s) _ _[*Name(s)*]_ _

Copies: Original (attach to and file with petition for issuance of citation); office copies; copy for probate department.

Comment: For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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§10.37 e. Exclusivity of Probate Discovery Procedures

Although some attorneys claim that the procedures set forth in Prob C §§8870-8873 are an exclusive means of conducting discovery, it is the author's opinion that these probate discovery procedures may be used in addition to the discovery procedures set forth in the Code of Civil Procedure. The better argument appears to be that these probate discovery procedures may be employed even before the initiation of a contested proceeding, notwithstanding the requirements of CCP §§2035.010-2035.060 (providing for discovery before commencement of action in civil proceedings).

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V. TRIAL SETTING

§10.38 A. Probate Department Trial Date

Where and when probate matters are set for trial differs by county. A probate judge who retains contested probate proceedings for trial might set a trial date during one of a series of court-ordered status conferences, or the judge might refer the matter to a referee for trial.

Many probate departments do not have the capability to conduct lengthy trials due to various calendars that must be heard. In some counties, the probate judge refers the matter over to the civil calendar if, at the time of the initially noticed hearing, the parties estimate the trial will take longer than half a day or a day. See, *e.g.,* Santa Clara Ct R 1(G) (contested matter that exceeds 1 day may be assigned to master trial calendar by probate judge); San Francisco Ct R 14.4 (hearings requiring more than 2 court afternoons are normally referred to presiding judge).

Many matters may be heard in this period of time if counsel have adequately prepared and defined the issues. Probate policy manuals are attempting to require attorney compliance in this regard. Parties are expected to prepare their cases thoroughly in advance and to have completed deposition, discovery, and settlement negotiations.

On setting the case for trial, see California Civil Procedure Before Trial, chaps 40-41 (4th ed Cal CEB 2004).

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§10.39 B. Trial Without Evidentiary Hearing

Local probate rules do not say as much, but short matters on probate calendars often are heard without oral testimony. The "evidence" consists of the verified pleadings and any additional affidavits or declarations under penalty of perjury filed with the court. Despite the fact that Prob C §1022 allows the use of affidavits and petitions as evidence only in uncontested proceedings, the procedure is valid in the absence of objections. As stated in *Evangelho v Presoto* (1998) 67 CA4th 615, 79 CR2d 146, quoting *Estate of Nicholas* (1986) 177 CA3d 1071, 1088, 223 CR 410:

> [W]here the parties do not object to the use of affidavits in evidence, and where both parties adopt that means of supporting their positions, the parties cannot question the propriety of the procedure on appeal.

In *Evangelho,* the beneficiaries of a revocable living trust sought an accounting from the trustee. Both parties submitted trust documents and some canceled checks to the trial court, but no witnesses gave testimony and no documents were formally introduced into evidence. Neither party objected to any of the factual statements presented by the other, proffered oral testimony, or suggested formal introduction of exhibits. The court of appeals found that the documents submitted to the trial court constituted sufficient factual basis for the trial court's orders and were proper "evidence."

In view of the widespread acceptance of holding short-matter probate hearings without oral testimony or formal evidence, it is extremely important that counsel make every effort to have necessary petitions and affidavits on file in advance. If counsel intends to demand a full evidentiary hearing, he or she should consult local probate rules and court personnel regarding the procedure for requesting a hearing time, and as a matter of courtesy give the court and opposing counsel advance notice of the fact that the request will be made.

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§10.39A C. Right to Evidentiary Hearing

Although it is common practice for parties to allow matters to be heard using verified pleadings and declarations as evidence, any party to a contested proceeding may demand an evidentiary hearing at which "issues of fact… shall be tried in conformity with the rules of practice in civil actions." Prob C §1000. *Estate of Bennett* (2008) 163 CA4th 1303, 78 CR3d 435 (right to evidentiary hearing applies even when contested matter is a Probate Code motion, because CCP §2009, which generally permits use of affidavits in hearings on motions in civil litigation, is trumped by Prob C §1022, which limits use of affidavits in probate matters to "uncontested" proceedings); *Estate of Lensch* (2009) 177 CA4th 667, 99 CR3d 246 (right to evidentiary hearing on contested entitlement petition not waived by failure to give 3 court days' advance notice under Cal Rules of Ct 3.1306(b) because that rule does not apply to probate matters, except for discovery proceedings in probate (see Cal Rules of Ct 3.1100)).

However, note that Prob C §11704(a) provides that "[t]he court shall consider as evidence in the [Prob C §11700] proceeding any statement made in a petition filed under Section 11700 and any statement of interest filed under Section 11702." See *Estate of Shellenbarger* (2008) 169 CA4th 894, 86 CR3d 862, in which the trial court did not allow an evidentiary hearing, and the court of appeal affirmed, without reference to *Bennett, supra*. In *Shellenbarger* the demand for an evidentiary hearing involved evidence that might have made no difference as a matter of law.

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.40 D. Case Management Rules in Civil Department

§10.40 D. Case Management Rules in Civil Department

Although probate, guardianship, and conservatorship proceedings are exempt from the Trial Court Delay Reduction Act (Govt C §§68600-68620; see Cal Rules of Ct 3.712(a), 1.6(4)), contested estate proceedings filed in or assigned to the civil department may be subject to the rules that govern civil cases in general. Counsel should consult local practice.

Some counties set an initial case management conference at the time or shortly after the complaint is filed. Other conferences then follow, including a court-ordered trial setting conference at which the trial date is ultimately set. See, *e.g.,* Alameda Ct R 3.135. See also Contra Costa Ct R 5(K), concerning a mandatory "Issue Conference."

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§10.41 E. Trial Date Motions

Consider moving for statutory trial preference under CCP §36 if, *e.g.,* the client has a substantial interest in the action as a whole, is over age 70, and is in ill health. See California Civil Procedure Before Trial §§42.4, 42.6 (4th ed Cal CEB 2004).

Motions to advance, specially set, or reset trial are governed by Cal Rules of Ct 3.1335. On these types of motions, see Civ Proc Before Trial, chap 42.

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§10.42 F. Jury Trial Demand

As a general rule, there is no right to a jury trial in proceedings under the Probate Code. Prob C §§825, 8252(b); *Estate of Beach* (1975) 15 C3d 623, 642, 125 CR 570.

In some estate litigation, however, the plaintiff may be entitled to a jury trial if the court determines that the substance of the action is legal as opposed to equitable. *Walton v Walton* (1995) 31 CA4th 277, 291, 36 CR2d 901 (if plaintiff seeks breach of contract damages, gist of action is legal with right to jury; if plaintiff seeks quasi-specific performance, action is equitable with no right to jury); *Getty v Getty* (1986) 187 CA3d 1159, 232 CR 603; *Hartman v Burford* (1966) 242 CA2d 268, 51 CR 309 (plaintiff not entitled to jury trial for specific performance or imposition of constructive trust for breach of oral contract to make will). See Cal Const art I, §16; CCP §592; *People v One 1941 Chevrolet Coup* (1951) 37 C2d 283, 231 P2d 832.

To demand a jury trial when it is not a matter of right, counsel must move under CCP §631(d)(4) either:

- When the action is first set for trial, if the trial date is set on motion or stipulation; or
- Within 5 days after notice of setting, if the trial date is set without notice or stipulation.

To contest a setting for jury trial, within 5 days after receiving notice from the clerk that the case was set for a jury, opposing counsel should file a motion to vacate and reset the case for trial by court. See CCP §631(d)(4).

For what constitutes waiver of a right to jury trial, see CCP §631(d).

On making a jury trial demand, see California Civil Procedure Before Trial, chap 41 (4th ed Cal CEB 2004).

On consolidation of legal and equitable issues for trial, see §7.4. On motions to consolidate, see §10.53.

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§10.43 G. Disqualifying Judge

In counties in which the probate judge is likely to try the case, counsel should make any challenge to the judge *before* the initially noticed hearing date on the petition or objection. On proceedings to disqualify judges, see CCP §§170-170.9.

In general, counsel should seek to disqualify the judge at the earliest possible opportunity, *e.g.,* in the case of a challenge for cause, as soon as possible after discovering facts constituting ground for disqualification or, in the case of a peremptory challenge, as soon as counsel knows the identity of the judge. A later-appearing party in a probate proceeding may not move to disqualify the judge under CCP §170.6 if the judge has already decided a contested issue of fact on the merits. *Stephens v Superior Court* (2002) 96 CA4th 54, 116 CR2d 616.

See California Trial Practice: Civil Procedure During Trial, §§6.26-6.78 (3d ed Cal CEB 1995).

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VI. PRETRIAL PRACTICE

A. Settlement

§10.44 1. Mandatory Settlement Conference

Most courts require a settlement conference at some point in the litigation, preceded by the submission of settlement conference statements 5 days before the initial date set for the conference. Cal Rules of Ct 3.1380(c). Local rules usually set requirements for attendance of trial counsel, parties, and persons with authority to settle the case. See Cal Rules of Ct 3.1380(b). See California Civil Procedure Before Trial §§40.71-40.87 (4th ed Cal CEB 2004).

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§10.45 2. CCP §998 Settlement Offer

Under CCP §998, a party may make a written settlement offer and recover certain costs and fees if the opposing party refuses the offer but obtains a less favorable judgment. See also CCP §§1031-1032.

A §998 offer of compromise is an effective means of recovering the costs for the services of an expert witness. CCP §998(c)-(d), (h).

On §998 offers, see California Civil Procedure Before Trial, chap 47 (4th ed Cal CEB 2004).

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§10.46 3. If Case Settles

If the case settles, the parties may want to enter into a consent judgment (CCP §664.6) so that they can enforce the settlement agreement as a judgment. Normally, the court will enter judgment on the basis of the filing of a written stipulation that sets forth the terms of the settlement to which the parties have agreed in writing, orally before the court, or both. A nod of the head in court is insufficient to show assent to the settlement and to warrant enforcement of the settlement under CCP §664.6. *Conservatorship of McElroy* (2002) 104 CA4th 536, 128 CR2d 485. See California Civil Procedure Before Trial, chap 48 (4th ed Cal CEB 2004).

NOTE: Confidential settlement agreements in civil actions under the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) (Welf & I C §§15600-15657.3) are disfavored and require a special showing for the confidentiality agreement to be recognized or enforced by the court, *e.g.,* that the information is privileged under existing law. CCP §§2017.310-2017.320. On privileges, see §§10.75-10.76.

If probate proceedings have been consolidated with civil proceedings involving the same subject matter, counsel should also obtain probate court approval of the settlement; this is a simple matter when the judge presiding over the consolidated cases also presided over the probate proceedings. The probate court generally is recognized as having the authority to approve settlements as part of its inherent powers. See §§12.11-12.20. See also Prob C §§9611, 9613, 9830-9838. On negotiating and drafting a settlement, see chap 11A. On consolidation, see §§7.2, 7.5, 10.53.

PRACTICE TIP: If fewer than all the litigants settle and there is a possibility of joint tortfeasor liability, a fiduciary should consider obtaining, or challenging an application for, a good faith settlement determination under CCP §877.6, which bars any further claims against the settling tortfeasor for equitable contribution or indemnification. See *Gackstetter v Frawley* (2006) 135 CA4th 1257, 38 CR3d 333 (after trust beneficiaries had settled separate actions against trustee and trustee's attorney and attorney had secured good faith settlement determination, trustee's later action against attorney was disguised indemnification claim barred by CCP §877.6).

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§10.47 B. Trial Preparation

The key to effective trial preparation is organization. One simple system is to set up separate folders for, *e.g.*:

- Trial briefs, motions, and memoranda;
- Each individual witness, including copies of the documents and other evidence that counsel intends to introduce through that witness;
- A summary checklist of all of the exhibits counsel intends to introduce and the originals of those exhibits;
- Outline of counsel's opening statement;
- Outline of counsel's closing argument; and
- Jury instructions and verdict forms in jury trial cases.

On organizing materials for trial, see California Trial Practice: Civil Procedure During Trial, chap 3 (3d ed Cal CEB 1995).

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§10.48 1. Witnesses

Counsel must know who will testify and what each witness will say. If there is no witness who can testify about a necessary element of the case, then counsel must obtain that evidence from another source.

In preparing to cross-examine opposing witnesses, counsel should read the witnesses' deposition transcripts carefully. A copy of each witness's deposition transcript should be included in that witness's folder, whether the witness is to examined on direct or cross.

PRACTICE TIP: Because counsel must lodge the deposition transcript with the court before the witness takes the stand, it is good practice to lodge such transcripts *before trial*; some local court rules *require* lodging before trial. See, *e.g.,* Los Angeles Ct R 8.71.

On using depositions at trial, see California Trial Practice: Civil Procedure During Trial, §§12.14, 12.32-12.97 (3d ed Cal CEB 1995).

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§10.49 a. Compelling Attendance and Production

Counsel may compel witnesses to attend and to testify at trial by personal service on them of a subpoena, and, if the production of documents or other specified evidence is also desired, by personal service of a subpoena duces tecum. CCP §§1985, 1987. Counsel may compel a party to attend and to testify by serving the other party's counsel, by mail, with a written notice to appear and produce documents or other evidence. CCP §1987(b)-(c).

On compelling attendance and production of evidence at trial, see California Trial Practice: Civil Procedure During Trial, chap 4 (3d ed Cal CEB 1995).

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§10.50 b. Preparing Witnesses for Trial

In preparing witnesses for trial, counsel should instruct them to:

- Tell the truth;
- Listen carefully to questions and think before answering;
- Give complete, responsive answers, but not volunteer information;
- Admit mistakes;
- Speak distinctly and loudly;
- Look at the trier of fact;
- Answer from personal knowledge; and
- Avoid hostility.

Counsel should also prepare a witness for cross-examination by alerting the witness to how opposing counsel is likely to structure his or her questions. For example, opposing counsel may ask leading or even hostile questions, such as "Didn't you take decedent's will and tear it up after she died?"

On preparing witnesses for trial, see California Trial Practice: Civil Procedure During Trial, chap 5 (3d ed Cal CEB 1995).

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§10.51 2. Documents

To the extent possible, counsel should obtain either the originals or satisfactory substitutes of the documents to be introduced into evidence. Because evidentiary rules often require counsel to establish a foundation for a document before introducing it into evidence, counsel should keep a copy of each document in the witness folder for the particular witness who will lay that foundation. See generally Laying a Foundation to Introduce Evidence (Preparing and Using Evidence at Trial) (Cal CEB Action Guide April 2008).

If copies can be introduced into evidence under Evid C §§260, 1521, and 1552-1553 (see §§10.68-10.70), make sure that they are legible and have no extraneous writings on them.

Courts frequently require counsel to premark their documentary evidence before trial. Exhibits customarily are marked numerically by plaintiffs and alphabetically by defendants.

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§10.52 3. Other Exhibits

Even in bench trials, demonstrative evidence such as timelines or excerpts from medical records can be effective and may be presented by the use of enlargements or overhead projectors. Videotapes can sometimes present technical and complicated analyses effectively.

Before trial, counsel should arrange with the court or court clerk for the use of any necessary technical equipment.

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4. Pretrial Motions

§10.53 a. Motions to Consolidate, Sever, and Change Order of Trial

Counsel may move to consolidate two or more actions involving common questions of law or fact so that they are jointly heard or tried. CCP §1048(a). See, *e.g., Estate of Baker* (1982) 131 CA3d 471, 485, 182 CR 550 (affirming consolidation when court had jurisdiction of both will contest and action to set aside deed). Similarly, the court may sever issues or causes of action so that they are tried separately in the furtherance of justice or to avoid prejudice or when separate trials will be conducive to expedition and economy. CCP §1048(b).

The court also may first try special defenses not involving the merits of a claim, *e.g.,* statutes of limitation, res judicata, other action pending, settlement and compromise, and capacity to sue. CCP §§597, 597.5. In addition, the court may bifurcate any issue or part of an issue and try it early. CCP §598. The trial judge has discretion to regulate the order of proof "except as otherwise provided by law." Evid C §320.

While bifurcation of issues in estate litigation proceedings is common, issues such as capacity and undue influence usually are tried together.

On motions to consolidate or sever, see California Civil Procedure Before Trial, chap 43 (4th ed Cal CEB 2004).

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§10.54 b. Motions in Limine

A motion in limine is a motion made either before any evidence is received, or before the evidence that is the subject of the motion is admitted. The term "in limine" is Latin for "at the very start." Although not expressly authorized by statute, the motion is well recognized in case law. See, *e.g., Akins v County of Sonoma* (1967) 67 C2d 185, 197, 60 CR 499; *Clemens v American Warranty Co.* (1987) 193 CA3d 444, 451, 238 CR 339. The motion commonly is used to seek exclusion of particular items of evidence on the ground that the evidence is legally inadmissible. A motion in limine also may be used for the converse purpose of seeking to admit particular items of evidence on the ground that the evidence is legally admissible.

Motions in limine are common in jury trials. Although motions in limine may be made in court trials, they are far less important than in jury trials because the judge who hears the motion in a court trial is the same person who will try the issues of fact, and he or she will know what evidence would have been introduced. Thus, judges in court trials frequently deny motions in limine without prejudice and allow counsel to object to the introduction of the evidence at the appropriate time.

Motions in limine generally are made in writing at the beginning of the trial. When counsel anticipates a motion in limine, it is often conducive to prepare a written opposition to the anticipated motion, or later objections, to present to the court when the matter is raised.

On motions in limine, see California Trial Practice: Civil Procedure During Trial, chap 7 (3d ed Cal CEB 1995).

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§10.55 5. Trial Briefs and Trial Memorandums

The trial brief is counsel's first and best opportunity to educate and persuade the judge of the merits of a party's position. Although the trial brief is not evidence, the judge may subconsciously read it as such. It can also put the judge in a frame of mind conducive to receiving, considering, and retaining a party's evidence.

Counsel should present a trial brief at the beginning of the trial and another at the end, if the court invites posttrial briefs. Counsel should prepare memoranda on issues that might arise during trial but that are not included in the trial brief, *e.g.,* issues that opposing counsel might or might not raise.

PRACTICE TIP: Although trial briefs and memorandums are useful in jury trials, they are absolutely essential in court trials because the judge is also the trier of fact.

The elements of the trial brief are:

- An introduction that catches the court's attention;
- A factual summary that reads like a story and compels a conclusion in favor of counsel's client;
- A legal analysis that assures the court that it is authorized and even required to rule in favor of counsel's client;
- A conclusion that specifically sets forth what counsel wants the court to include in the judgment.

The trial brief should be short. The judge will appreciate (and perhaps be more persuaded by) counsel who recognize that theirs is not the only case the court must hear. It is critical that the evidence support the trial brief's factual summary and that the legal authorities support the trial brief's legal conclusions.

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VII. TRIAL

§10.56 A. Chambers Conference

On the first day of trial, the judge normally will invite counsel into chambers to consider any motions in limine or other "housekeeping" matters. In jury trials especially, the court also may make further attempts to settle the case.

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§10.57 B. Courtroom Attendance

The court may exclude from the courtroom any witnesses not under examination at that time to prevent them from hearing the other witnesses' testimony. Evid C §777(a). Parties cannot be excluded from the courtroom. Evid C §777(b)-(c).

PRACTICE TIP: Although excluding witnesses might render opposing witnesses less effective, counsel's own witnesses may be less effective because they, too, will have missed the previous testimony.

Although the parties and the public may assert the right to a public trial (CCP §124), the trial judge can impose reasonable limitations on public access to a trial or issue protective orders, *e.g.,* "gag orders." See, *e.g., Richmond Newspapers, Inc. v Virginia* (1980) 448 US 555, 65 L Ed 2d 973, 100 S Ct 2814; *Younger v Smith* (1973) 30 CA3d 138, 106 CR 225. See California Trial Practice: Civil Procedure During Trial §§2.36-2.60 (3d ed Cal CEB 1995). Counsel should always consider asking the trial judge for reasonable limitations on public access to trials involving intensely personal issues such as conservatorships.

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§10.58 C. Jury Selection

Most estate litigation cases are not tried to a jury, regardless of the department in which they are filed. See Prob C §§825, 8252(b); *Estate of Beach* (1975) 15 C3d 623, 642, 125 CR 570; *Getty v Getty* (1986) 187 CA3d 1159, 232 CR 603.

If the case is tried to a jury, counsel must become familiar with the principles of jury selection and the rules governing jury trial. Jury selection is a very involved process for which vital skills include experience in jury background checks, juror voir dire, and the use of challenges for cause and preemptory challenges. In cases justifying the cost, juror consultants are now frequently used to assist counsel in selecting jurors.

For guidance on jury selection, see California Trial Practice: Civil Procedure During Trial, chap 8 (3d ed Cal CEB 1995). On jury management, see Civ Proc During Trial, chap 17.

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.59 D. Opening Statement

§10.59 D. Opening Statement

In the opening statement, counsel presents the client's case and outlines what the evidence will prove. Although the court in bench trials often asks counsel to waive opening statements in the interest of time, it is good practice to give an opening statement if the court permits it. The opening statement is an important opportunity for counsel to respond to the opposing party's trial brief and to re-emphasize favorable points. Opening statements may also prompt the court to ask questions of counsel that tip counsel as to how the judge sees the case.

PRACTICE TIP: Counsel should not overreach. In closing argument, opposing counsel is certain to point out the differences between the proof promised in the opening statement and what was actually proved during trial.

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§10.60 E. Order of Proof

The usual order of proof in a civil case, which also applies in a probate case, is (CCP §§607, 631.7):

- Plaintiff produces evidence on plaintiff's part;
- Defendant produces evidence on defendant's part;
- Plaintiff may then offer rebuttal evidence; and
- Defendant may then offer surrebuttal evidence.

In estate litigation, it is sometimes difficult to tell who is the "plaintiff" and who is the "defendant" because the plaintiff may be, *e.g.,* the "petitioner" or the "objector." See §10.2. The court has discretion to regulate the order of proof (Evid C §320) and usually resolves this dilemma by determining who has the burden of producing evidence and who has the burden of proof as to a particular fact. See Evid C §§110, 115, 500-555.

On the order of proof and burden of persuasion in a will contest, see §§17.25-17.34.

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§10.61 F. Phases of Examination

The examination of witness includes (Evid C §772(a)):

- **Direct examination:** On direct examination, the witness testifies to the facts of the party's claims or defenses. Direct examination testimony should present the party's case logically and efficiently and should open and close on strong points. Counsel should anticipate evidentiary objections and prepare for them to reduce interference with the flow of testimony.
- **Cross-examination**: Cross-examination has two essential purposes: to elicit additional favorable facts not established by prior direct testimony and to elicit facts tending to discredit the witness by showing that his or her testimony was untrue, biased, or based on faulty memory or perception.

On how to conduct direct and cross-examination, see Effective Direct & Cross-Examination (Cal CEB 1986).

Cross-examination is limited in scope to the witness's direct examination, unless the cross-examination is directed at impeachment. Evid C §§761, 773, 780, 785. If the witness on direct examination testifies to only part of an act, declaration, conversation, or writing, on cross-examination, counsel may inquire into the whole. Evid C §356.

PRACTICE TIP: In a breach of fiduciary duty case, plaintiff's counsel might want to call the defendant fiduciary as part of plaintiff's case in chief, to establish by cross-examination what the fiduciary did or did not do. Adverse parties can be examined in this fashion under Evid C §776.

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§10.62 G. Introducing Evidence

Evidence is testimony, writings, objects, or other things offered to prove the existence or nonexistence of a fact. Evid C §140.

Only relevant evidence is admissible (Evid C §350), and all relevant evidence is admissible, unless a statute provides that it is not (Evid C §351). Relevant evidence has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." Evid C §210. Relevant evidence is of two types: that which is probative of a witness's credibility and that which is probative of a disputed material fact.

The court has discretion to exclude relevant evidence under Evid C §352 if its probative value is substantially outweighed by the probability that its admission will:

- Take too much time; or
- Create a substantial danger of
- Undue prejudice;
- Confusing the issues; or
- Misleading the jury.

For an overview of evidence, see California Trial Practice: Civil Procedure During Trial, chap 10 (3d ed Cal CEB 1995).

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§10.63 1. Witness Testimony

A person who is not competent, *i.e.*, who is unable to comprehend and relate events, is unqualified to be a witness. Evid C §701(a). Competency to testify generally requires both (Evid C §§700-702):

- The capability to express oneself so as to be understood and to understand the duty to tell the truth; and
- Personal knowledge of the matter.

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2. Opinion Testimony

§10.64 a. Lay Witnesses

A witness not testifying as an expert is permitted to given an opinion as permitted by law, including but not limited to an opinion that is (Evid C §800):

- Rationally based on the perception of the witness; and
- Helpful to a clear understanding of the witness's testimony.

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§10.65 b. Expert Witnesses

Expert opinion testimony can be used at trial only if it:

- Involves a subject beyond the experience of ordinary witnesses (Evid C §801(a));
- Will help the trier of fact (Evid C §801(a));
- Is given by a person with special knowledge, skill, experience, training, or education necessary to qualify as an expert on that topic (Evid C §720(a)); and
- Is based on matter perceived by or personally known or made known to the expert that is considered reliable (including inadmissible evidence, such as hearsay), if it is of a type that reasonably may be relied on by an expert in forming an opinion on the subject of his or her testimony (Evid C §801(b)).

An expert may testify on ultimate issues that are to be decided by the trier of fact, (Evid C §805), but may not give legal conclusions (*Schauf v Southern Cal. Edison Co.* (1966) 243 CA2d 450, 456, 52 CR 518).

The expert's testimony should include:

- His or her qualifications;
- Information that the expert considered in forming an opinion;
- How the expert formulated the opinion; and
- The opinion itself.

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§10.66 (1) Qualifying Expert

Counsel may stipulate to the qualifications of an expert. Nevertheless, and especially if counsel's expert's qualifications are more extensive than those of the opponent's, it is wise for counsel to place the expert's qualifications into evidence.

Before counsel begins direct examination of an expert witness at trial, opposing counsel may interrupt to "voir dire" the expert on his or her qualifications. After questioning the expert on voir dire, opposing counsel either accepts the expert as qualified or objects that the witness is unqualified to state an expert opinion. If opposing counsel fails to object to qualifying the expert, however, any error in this regard may be considered to have been waived. *McGuire v Baird* (1937) 9 C2d 353, 357, 70 P2d 915. See California Expert Witness Guide (2d ed Cal CEB 1991).

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§10.67 (2) Examining Expert

No matter how qualified the expert, the value of the expert's opinion testimony is no greater than the value of the information on which it is based. Counsel thus must give the expert both the favorable and unfavorable evidence on the issues about which the expert opinion is sought. Failure to do so will result in the expert's opinion testimony being impeached or even rendered valueless.

Counsel must be sure that the expert's opinions track the specific legal requirements of the issue on which testimony is sought. An expert's testimony that establishes every element *but one* that counsel must prove is useless unless counsel can obtain evidence of that element from another source.

PRACTICE TIP: Be sure the trier of fact understands the expert's testimony and analysis. Especially in bench trials, the judge may be put off by an analysis that he or she cannot understand and may regard it as an attempt to mislead the court.

Counsel may elicit the expert's opinion by the use of hypothetical questions. See Evid C §801(b). Expert testimony is usually more persuasive if elicited by open-ended questions.

The traditional method of attacking opposing experts is cross-examination, and opposing counsel should not hesitate to employ this method. The key to successful cross-examination is preparation. Cross-examining counsel should be at least as familiar with the subject matter of the expert's testimony as the expert. Cross-examination has developed into an art form, and some of the fundamental "rules" of the art include the following:

- Know the answer to the question asked;
- Ask leading questions; and
- Know when to stop.

Perhaps the most fundamental tool in assisting counsel in cross-examination is the witness's deposition testimony. A deposition is often the principle basis for establishing facts that are favorable to the client and impeaching the testimony of the adverse party's witnesses as well.

Some other useful methods for attacking opposing experts include bringing motions in limine, challenging the expert's qualifications on voir dire, and using objections and motions to strike during direct examination.

On examining witnesses, see California Trial Practice: Civil Procedure During Trial, chap 11 (3d ed Cal CEB 1995).

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3. Documentary Evidence

§10.68 a. Uses

Documentary evidence consists of any form of writing, including handwriting, typewriting, printing, photostatting, photographing, photocopying, transmitting by electronic mail or facsimile, and any other means of recording any form of communication or representation on any tangible thing, and any record thereby created regardless of how it is stored. Evid C §250. Like testimony, documentary evidence is used to prove or disprove one of the factual contentions of the case. It is often more effective than testimony, however, when it is used:

- To refresh a witness's recollection (Evid C §771);
- As a past recollection recorded when the witness is unable to recall certain events (Evid C §1237);
- To impeach a witness (see Evid C §§721, 780, 785, 788, 1202, 1220-1227, 1235, 1300); or
- To rehabilitate a witness (Evid C §§791, 1236).

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§10.69 b. Authentication and Proof

Counsel must authenticate any writing before the writing or secondary evidence of its contents can be admitted into evidence. Evid C §1401(a)-(b). Authentication is proof, by evidence or other means (*e.g.,* stipulation), that the writing is what the proponent claims it to be. Evid C §1400. Authentication is not required when introducing into evidence the portion of a writing used by a witness to refresh his or her recollection (see Evid C §771) or when a party reads a writing into evidence as a past recollection recorded (see Evid C §1237).

Whether a writing has been properly authenticated is a preliminary fact issue that the judge determines. Evid C §403(a). For the different methods of authentication, see Evid C §§1410-1421.

Some types of writing are considered self-authenticating and presumed to be authentic. See Evid C §§1450-1454, 1550-1567.

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§10.70 c. Secondary Evidence

The original of a writing is admissible to prove the content of the writing. Evid C §1520. If made in the regular course of business, a nonerasable optical image reproduction of the writing may be introduced as proof of the writing, provided that additions, deletions, or changes to the original document are not permitted by that technology. Evid C §1550. Further, under California's secondary evidence rule, a duplicate is admissible to the same extent as an original *unless* (Evid C §1521):

- A genuine dispute exists concerning material terms of the writing and justice requires its exclusion; or
- It would be unfair to admit the duplicate in lieu of the original.

Oral testimony is inadmissible to prove the content of a writing (Evid C §1523(a)) except when the proponent does not have possession or control of any copies of the writing, and the original is lost or has been destroyed with no fraudulent intent on the proponent's part (Evid C §1523(b)).

These provisions in Evid C §§1520-1523 concerning proof of the contents of a writing were enacted effective January 1, 1999, but they apply in any action or proceeding commenced before, on, or after that date. Stats 1998, ch 100, §9(b).

Copies of certain official writings are prima facie evidence of their existence and content and the best evidence rule does not exclude them. See Evid C §1530-1532, 1600-1605.

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§10.71 4. Material Objects and Other Things

Like documentary evidence, a foundation must be laid for the introduction of material objects and other things. Both the rules governing authentication and proscribing secondary evidence, and the exceptions to it, govern the admissibility of material objects and other things. On authentication, see §10.69. On secondary evidence, see §10.70.

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§10.72 5. Judicial Notice

The court may take judicial notice of a matter of fact or law listed in Evid C §§451-453. When the court does so, the matter is considered established in the case, and no further proof of the truth or existence of the matter is thereafter required. *Post v Prati* (1979) 90 CA3d 626, 633, 153 CR 511.

The court *must* judicially notice certain matters of law or fact under Evid C §451. The court has discretion to take judicial notice of the matters listed in Evid C §452.

Counsel need not formally request judicial notice under Evid C §451. Judicial notice of the matters set forth under Evid C §452 becomes mandatory if a party makes the request properly and gives the other party sufficient advance notice to enable it to prepare to meet the request. See Evid C §453.

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.73 6. Hearsay

§10.73 6. Hearsay

Estate and trust litigation often concerns statements made by a now-deceased person that demonstrate his or her intent or state of mind at the time the documents at issue were drafted or executed. As a result, the hearsay rule and its exceptions may dictate what type of evidence can be admitted.

Hearsay is evidence of a statement (a) made other than by a witness while testifying at the hearing, *and* (b) offered to prove the truth of the matter stated. Evid C §1200(a). For example, affidavits, declarations, and verified petitions are classic examples of hearsay evidence that is not admissible in contested proceedings. See Prob C §1022. Hearsay evidence is inadmissible unless one of the many statutory exceptions applies. See Evid C §1200(b). Exceptions to the hearsay rule include:

- Admissions or statements attributed to a party (Evid C §§1220-1225, 1227);
- Declarations against interest of a declarant who is unavailable as a witness (Evid C §1230);
- A witness's prior consistent and inconsistent statements, past recollection recorded, prior identifications, and prior testimony (Evid C §§770, 791, 1235-1238, 1290-1292);
- Spontaneous declarations, contemporaneous statements, and dying declarations (Evid C §§1240-1242);
- Statements of mental or physical state (Evid C §§1250-1252);
- Business records (Evid C §§1270-1272);
- Official records (Evid C §§1280-1284);
- Judgments (Evid C §§1300-1302);
- Family history (Evid C §§1310-1316);
- Reputation and statements concerning community history, property interests, and character (Evid C §§1320-1324);
- Dispositive instruments and ancient writings, including:
- Evidence of a statement in a deed of conveyance or will or other writing purporting to affect an interest in real or personal property if the matter stated was relevant to the purpose of the writing, would be relevant to an issue as to an interest in the property, and the dealings with the property since the statement was made have not been inconsistent with the truth of the statement (Evid C §1330);
- Evidence of a statement in a writing more than 30 years old and the statement has been since generally acted on as true by persons having an interest in the matter (Evid C §1331);
- Material in commercial, scientific, and similar publications (Evid C §§1340-1341).

In addition to the above exceptions, there are significant exceptions to the hearsay rule that relate specifically to wills, including:

- Evidence of a statement made by a declarant who is unavailable as a witness that the declarant has or has not made a will or has or has not revoked a will, or that identifies his or her will, unless the circumstances are such as to indicate its lack of trustworthiness (Evid C §1260);
- Evidence of a statement made on the personal knowledge of the declarant at a time when he or she has recently perceived the matter and while his or her recollection was clear, unless the statement is made under circumstances such as to indicate its lack of trustworthiness (Evid C §1261).

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§10.74 7. Evidence Excluded by Extrinsic Policies

Certain types of evidence are inadmissible at trial for public policy reasons. This evidence includes:

- Settlement negotiations (Evid C §1152);
- Evidence of liability insurance (Evid C §1155);
- Statements of sympathy made to an accident's victim or his or her family (Evid C §1160); and
- Character evidence unless the evidence is offered to attack a witness's credibility and only then to the extent that the evidence involves the witness's character traits of honesty or veracity or their opposites (Evid C §§780, 785-786, 790, 1100).

Evidence of prior acts may be admissible to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than the witness's disposition to commit such an act. Evid C §1101. Evidence of specific prior acts may not be used to prove the witness's character, nor for the sole purpose of attacking or supporting a witness's credibility. Evid C §787.

If character evidence is offered to show that the person acted in a particular way on a particular date because his or her character traits were consistent with that conduct, the evidence will likely be excluded. Evid C §§1101(a), 1104.

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§10.75 8. Privileges

Evidence of a statement, writing, or other communication is inadmissible if it is privileged and no exception to the privilege applies. Evid C §919.

There is no doctor-patient privilege for a communication relevant to an issue between parties, all of whom claim through a deceased patient. Evid C §1000. Similarly, there is no psychotherapist-patient privilege under such circumstances. Evid C §1019. Therefore, *e.g.,* in a will contest, usually neither of these privileges will prevent discovery of the testator's medical or treatment records. See §10.22. But see *Rittenhouse v Superior Court* (1991) 235 CA3d 1584, 1 CR2d 595 (in proceeding to probate holographic will executed by decedent's mother, discovery of decedent's medical records was quashed).

These privileges and other commonly invoked privileges and their exceptions are set forth in Evid C §§970-1063.

Estate tax returns are privileged from compelled disclosure during discovery under some circumstances. See *Deary v Superior Court* (2001) 87 CA4th 1072, 105 CR2d 132 (estate tax returns not discoverable by third party claimant unable to demonstrate public policy basis for disclosure). *Deary* notes that the estate tax return privilege is an "implied" privilege that has been "judicially expanded" from an express statutory provision prohibiting the state controller from disclosing information and records filed with the controller (Rev & T C §14251). This implied privilege is not absolute and may be lost when, for example, it is intentionally relinquished, the basis of the underlying action is inconsistent with assertion of the privilege, or a public policy greater than confidentiality of tax returns is involved. 87 CA4th at 1080. Left undecided by *Deary* are issues such as under what circumstances, if any, the privilege may be asserted against a beneficiary, as well as whether a fiduciary loses the privilege by putting the return at issue when the fiduciary provides to a beneficiary, or files with the court, a report or account of administration. Beneficiaries have needs and interests distinct from those of a third party claimant, such as ascertaining whether the fiduciary has filed a timely and accurate estate tax return, whether estate tax liabilities have been satisfied, whether estate tax obligations have been properly prorated to the beneficiary's share of the estate, whether property distributable on a non-prorata basis has been properly valued for distribution purposes, and the amount of the stepped-up tax basis for property distributed to the beneficiary. Beneficiaries also enjoy common law and statutory rights to information (see, *e.g.*, Prob C §16060 concerning the right to be "reasonably informed" and §16061 concerning the right to information "relevant to the beneficiary's interest").

Personal income tax returns are privileged from compelled disclosure under certain circumstances, particularly when they are the returns of an individual litigant rather than the decedent. See, *e.g., Fortunato v Superior Court* (2003) 114 CA4th 475, 8 CR3d 82 (in will contest, respondent's tax returns were protected by Cal Const art I, §1, right of privacy and the implied privilege set forth in Rev & T C §19282).

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.76 9. Attorney-Client Privilege

§10.76 9. Attorney-Client Privilege

In general, confidential information transmitted between a client and his or her lawyer in the course of the attorney-client relationship is privileged from disclosure. Evid C §§952, 954. In the context of estate and trust litigation, there are several potential exceptions to the general rule of nondisclosure. They involve two types of confidential communications: (1) lifetime communications between the decedent and his or her attorney, and (2) communications between a fiduciary and the fiduciary's attorney.

Decedent's Attorney-Client Communications: There are three principal exceptions that may lead to disclosure of a decedent's lifetime attorney-client communications.

First, after a client's death, the personal representative becomes the holder of the privilege (Evid C §953(c)) and has the power to assert or waive it (Evid C §§912, 954). As holder of the privilege, the personal representative has the authority to require disclosure of the confidential communications to himself or herself, and to permit disclosure to others by waiving the privilege. This power extends to all the decedent's attorney-client communications on any subject.

Second, after a client's death, the privilege no longer exists for communications relevant to:

- An issue between parties, all of whom claim through the client, regardless of whether the claims are by testate or intestate succession, nonprobate transfer, or inter vivos transaction (Evid C §957);
- An issue concerning the client's intention with respect to, or concerning the validity of, a deed, will, or other writing executed by the client that purports to affect an interest in property (Evid C §§960-961); or
- An issue concerning the intention or competence of a client executing an attested document of which the lawyer is an attesting witness, or concerning the execution or attestation of the document. Evid C §959. This exception applies to "the type of communication about which an attesting witness would testify" (Comment to Evid C §959) and applies even while the client is alive.

Third, spouses often develop estate plans together, consulting the same attorney in a joint-client representation. Neither client nor either client's successor in interest may claim the attorney-client privilege as to a communication made in the course of that representation and offered in a civil proceeding between the clients (or their successors in interest). Evid C §962.

Fiduciary's Attorney-Client Communications: There is one principal exception that may lead to disclosure of a fiduciary's confidential attorney-client communications. A successor trustee is generally entitled to discover confidential communications between the predecessor and the predecessor's attorney "that occurred when the predecessor, in its fiduciary capacity, sought the attorney's advice for guidance in administering the trust." *Moeller v Superior Court* (1997) 16 C4th 1124, 1134, 69 CR2d 317. Trust beneficiaries generally have no right to obtain disclosure of trustee attorney-client communications, however, regardless of the subject matter. *Wells Fargo Bank v Superior Court* (2000) 22 C4th 201, 91 CR2d 716. Consequently, in most situations, beneficiaries who want to compel disclosure of a trustee's confidential attorney-client communications must seek removal or resignation of the trustee, appointment of a successor, and voluntary waiver of the privilege by the successor. See §21.50A.

A successor personal representative becomes the holder of the attorney-client privilege for those confidential communications that occurred when the predecessor, in his or her fiduciary capacity, sought the attorney's advice for guidance in routine estate administration. See *Borissoff v Taylor & Faust* (2004) 33 C4th 523, 529, 15 CR3d 735, citing *Moeller v Superior Court* (1997) 16 C4th 1124, 1133, 69 CR2d 317.

Conversely, "defensive communications" may be protected. A successor fiduciary does not become the holder of the attorney-client privilege for confidential communications that occur when a predecessor fiduciary hires a separate attorney in his or her personal capacity. *Borissoff v Taylor & Faust, supra; Moeller v Superior Court, supra*.

PRACTICE TIP: When defending a fiduciary in litigation over breach of fiduciary duty, the attorney may want to consider keeping separate files for the litigation and opening a separate billing file. Keeping administration and litigation files separate will make reporting to the court and beneficiaries easier and create a stronger argument that the information in the segregated litigation file is privileged.

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§10.76A 10. Attorney Work Product Privilege

A writing that reflects an attorney's impressions, conclusions, opinions, or legal research is not discoverable under any circumstances. CCP §2018.030(c). The work product of an attorney (other than a writing described in the preceding sentence) is not discoverable unless the court determines that denial of discovery will unfairly prejudice the parties seeking discovery in preparing that party's claim or defense or will result in an injustice. CCP §2018.030(b).

If an inadvertent disclosure of work product occurs, counsel may not read the documents more closely than needed to determine that they are privileged and must immediately notify opposing counsel to resolve the situation. See *Rico v Mitsubishi Motors Corp.* (2007) 42 C4th 807, 68 CR3d 758 (disqualification of plaintiffs' attorneys and experts was proper after attorney used defense counsel's notes to impeach defense expert, resulting in irreversible damage).

The attorney work product privilege can be waived. Without reaching the apparent conflict posed by the statutory work product privilege and the client's right to his or her file, the court in *Eddy v Fields* (2004) 121 CA4th 1543, 18 CR3d 487, applied the principle established in *Moeller v Superior Court* (1997) 16 C4th 1124, 1134, 69 CR2d 317, to hold that a successor trustee has the same rights as a predecessor trustee with respect to a waiver of the attorney work product privilege. See *Eddy v Fields* (2004) 121 CA4th 1543, 18 CR3d 487 (when the predecessor trustees' attorney waived the work product privilege with respect to his own clients, he waived with regard to the successor trustee as well). See §10.76.

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.77 11. Objecting to Evidence

§10.77 11. Objecting to Evidence

Counsel must object to evidence in a timely manner and must clearly state the specific ground of the objection. Evid C §353(a). Failure to make a timely, specific objection usually constitutes waiver of a party's right to complain of the earlier submission of the evidence on appeal. See *Russell v Geis* (1967) 251 CA2d 560, 59 CR 569.

In addition to the grounds for objection discussed in §§10.62-10.76, counsel should keep in mind the various standard objections:

- Unduly time-consuming, prejudicial, confusing, or misleading (Evid C §352);
- Ambiguous or unintelligible (Evid C §765(a));
- Argumentative (Evid C §765(a));
- Assumes facts in dispute or not in evidence (Evid C §§210, 765(a));
- Calls for a narrative answer (Evid C §765(a));
- Calls for speculation (Evid C §§702, 800-801);
- Compound (Evid C §765(a));
- Asked and answered (Evid C §765(a));
- Leading (Evid C §§764-765(a));
- Misquotes the witness (Evid C §765(a)); and
- Too general (Evid C §765(a)).

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H. Motions During Trial

§10.78 1. Motion for Judgment

In bench trials, any party can move for a judgment at the conclusion of the opposing party's case. Bringing the motion does not waive the right to present a defense or rebuttal evidence if the motion is denied. On hearing the motion, the court weighs the evidence and may render a judgment in favor of the moving party. CCP §631.8(a).

A motion for judgment, unlike a motion for nonsuit in a jury trial (see §10.79), is on the merits and requires the weighing of evidence.

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§10.79 2. Motion for Nonsuit

In a jury trial, a defendant may move for a nonsuit order dismissing the plaintiff's action. The motion may be made only after the opening statement or after the presentation of evidence on the grounds that the plaintiff has failed to establish a prima facie case. CCP §581c.

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§10.80 3. Motion for Directed Verdict

In a jury trial, either the plaintiff or the defendant may move for a directed verdict asking the court to instruct the jury to return a verdict against the nonmoving party at the close of the other party's evidence. CCP §630. A party does not waive the right to a jury trial by making a motion for directed verdict. CCP §630(a).

After the motion is made, the trial court's function is to determine whether there is sufficient evidence to support a verdict for the nonmoving party. If the only reasonable conclusion is that the evidence is insufficient, the court should grant the motion. *Dailey v Los Angeles Unified Sch. Dist.* (1970) 2 C3d 741, 745, 87 CR 376.

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§10.81 4. Motion for Continuance

A party may move for a continuance before or during the trial. Cal Rules of Ct 3.1332. Judges, however, strongly disfavor motions for continuance. See Cal Rules of Ct 3.1332(c). The motion must be made as soon as reasonably practicable once the need for a continuance is discovered. Cal Rules of Ct 3.1332(b).

If the court continues a matter to allow a written objection or response and it is not timely filed and served, the court may deem it waived. Cal Rules of Ct 7.801.

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§10.82 5. Motion to Reopen Case

A plaintiff or defendant after its case in chief can move the court for permission to offer evidence concerning the original case on a showing of good cause. CCP §607(6). See Evid C §320. After a bench trial, the court can also reopen the case instead of granting a new trial for the introduction of additional evidence. CCP §662.

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§10.83 6. Motion for Mistrial

A motion for mistrial requires the court to end the trial before its conclusion for error or irregularity too substantial to correct. Grounds for mistrial may be any misconduct or irregularity that prevents a party from receiving a fair trial (see *Clemente v State* (1985) 40 C3d 202, 217, 219 CR 445), including a judge's inability to complete either a bench trial or a jury trial when any issues require court findings (*Guardianship of Sullivan* (1904) 143 C 462, 468, 77 P 153) and a jury's failure to return a verdict (CCP §616).

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§10.84 7. Motion to Amend Pleadings to Conform to Proof

A motion to amend the pleadings to conform to the proof may be made when the issues that have already been tried are different from those in the pleadings. The courts have discretion to permit amendments to pleadings to conform to proof "on such terms as may be just." CCP §469. Amendments are liberally allowed so that disputed issues may be decided on the merits. *Hooper v Romero* (1968) 262 CA2d 574, 580, 68 CR 749. For discussion of amending pleadings during trial, see California Trial Practice: Civil Procedure During Trial §§18.103-18.123 (3d ed Cal CEB 1995).

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.85 I. Instructing Jury

§10.85 I. Instructing Jury

Instructing or charging the jury is governed by CCP §§607-628 and Cal Rules of Ct 2.1050-2.1058, 3.1560. Jury instructions are customarily decided in chambers after counsel have submitted proposed jury instructions and verdict forms.

In an elder abuse cause of action on a neglect theory, violation of regulations governing care of the elderly is grounds for a negligence per se jury instruction. *Norman v Life Care Ctrs. of America, Inc.* (2003) 107 CA4th 1233, 132 CR2d 765.

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§10.86 J. Closing Argument

In a bench trial, unlike a jury trial, closing argument is not a right, but a privilege granted at the court's discretion. *Gillette v Gillette* (1960) 180 CA2d 777, 781, 4 CR 700. On the right to closing argument in jury trial, see CCP §607(7). The judge in a bench trial may ask counsel to submit posttrial briefs as an alternative to closing argument.

PRACTICE TIP: If the judge is willing to hear closing argument, counsel should not waive.

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§10.87 K. Decision, Verdict, and Judgment

After a bench trial, the court issues a tentative decision. Cal Rules of Ct 3.1590(a). In the tentative decision, the court may (1) state that it is the court's proposed statement of decision, subject to a party's objection; (2) indicate that the court will prepare the statement of decision; (3) order a party to prepare the statement of decision; or (4) direct that the tentative decision will become the statement of decision unless a party within 10 days after announcement or service of the decision specifies controverted issues or makes additional proposals not covered in the tentative decision. Cal Rules of Ct 3.1590(c). See CCP §632.

Any party that appeared at trial may request a statement of decision from the court within 10 days after announcement or service of the tentative decision. CCP §632; Cal Rules of Ct 3.1590(d). If a statement of decision is not requested, the judgment rests on the findings implicit in the order and will be upheld if any substantial evidence sustains it. *Elzey v Metropolitan Builders, Inc.* (1971) 16 CA3d 71, 92 CR 461. If the bench trial concludes within one calendar day or in less than eight hours over more than one day, counsel must request a statement of decision *before* submission of the matter for the court's decision. CCP §632.

The time spent in trial means the time the court is in session, including ordinary morning and afternoon recesses when the parties remain at the courthouse. It does not include the time spent by the judge off the bench without the parties present, such as lunch, except for routine recesses that occur during the day. The burden is on the requesting party to show that the trial lasted more than eight hours in total. *Marriage of Gray* (2002) 103 CA4th 974, 127 CR2d 271.

In cases tried by a jury, the court clerk enters judgment in conformity with the verdict. CCP §664. Trial counsel usually are not involved in the process unless the judge asks the prevailing parties to submit a judgment for entry. CCP §§664.5(a), 668.5. Jury verdicts may be either general or special. CCP §624; see also Cal Rules of Ct 3.1580. General verdicts may be with or without special findings. CCP §625. When the verdict is returned, any party may request that the jury be polled. CCP §618.

Every court has statutory and inherent power to correct clerical mistakes in its judgments to conform them to the judgments that were actually made (CCP §473(a)) but judicial error (*i.e.,* an erroneous decision) cannot be corrected after entry unless by attack on the judgment. *Lankton v Superior Court* (1936) 5 C2d 694, 55 P2d 1170. But see *George v Bekins Van & Storage Co.* (1948) 83 CA2d 478, 481, 189 P2d 301 (judicial power to correct clerical error extends to striking out findings of fact, conclusions of law, and judgment, and substituting wholly different ones).

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VIII. POSTTRIAL PRACTICE

§10.88 A. Motion for Judgment Notwithstanding Verdict

The trial court may grant a judgment in favor of a party against whom a verdict was rendered whenever a motion for directed verdict should have been granted if that motion had been made. CCP §629; *Garrett v Shenson Meat Co.* (1970) 5 CA3d 69, 75, 85 CR 65. A motion for judgment notwithstanding the verdict may be granted only when no substantial evidence supports the jury's verdict. See *McCoy v Hearst Corp.* (1991) 227 CA3d 1657, 278 CR 596. The motion may be made by a party or by the court on its own motion after the verdict has been rendered. CCP §629.

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.89 B. Motion for New Trial

§10.89 B. Motion for New Trial

Ordinarily, a party may move for new trial and request the trial court to reexamine an issue of fact or law. CCP §§656-662.5. To order a new trial, the court must examine the entire cause, including the evidence, and conclude that a miscarriage of justice occurred. Cal Const art VI, §13. The error must be prejudicial, *i.e.,* a different result would have been probable if the error had not occurred. CCP §475. For the grounds for a new trial motion, see CCP §§657-657.1.

In decedent estate proceedings in the probate department, a party may move for a new trial *only* in cases (Prob C §7220):

- Involving the contest of a will or revocation of probate of a will; or
- In which a right to jury trial is expressly granted, whether or not the case was tried by a jury.

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.90 C. Motion to Vacate and Enter Different Judgment

§10.90 C. Motion to Vacate and Enter Different Judgment

A motion to vacate and enter different judgment is available only when (CCP §663):

- The judgment is based on an erroneous decision in a bench trial that is inconsistent with or unsupported by the facts; or
- The judgment or decree is inconsistent or unsupported by a jury's special verdict.

The procedure for making such a motion is governed by CCP §663(a).

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§10.91 D. Attorney Fees and Costs

Attorney fees incurred in litigation are not recoverable unless authorized by statute, contract, or case law. *Steele v Gold* (1984) 150 CA3d 928, 198 CR 257. Depending on the basis for a fee award, the party seeking fees may either file a memorandum of costs or make a posttrial motion. See CCP §§1021.5, 1032, 1033.5; CC §1717; Cal Rules of Ct 3.1700, 3.1702; California Attorney Fee Awards (3d ed Cal CEB 2010).

To recover costs, the prevailing party submits a memorandum of costs or a "costs bill." The party who is assessed costs can seek to reduce or eliminate them by moving to tax costs. See CCP §§1021-1038; Cal Rules of Ct 3.1700. For interest on a judgment, see Cal Const art XV, §1; CCP §§685.010-685.030; Cal Rules of Ct 3.1802. Courts have discretion to order costs to be paid by any party to the proceedings or out of the assets of the estate, as justice may require, in actions brought in the probate department. Prob C §1002.

In a will contest proceeding, a court may award attorney fees from a common fund to an attorney who has succeeded in preserving that fund when equity requires it, as, *e.g.,* when a single beneficiary undertakes the risk and expense of litigation while the remaining beneficiaries do nothing. The equitable rule does not apply when there are multiple beneficiaries of the fund and most or all of them are represented by counsel. *Estate of Stauffer* (1959) 53 C2d 124, 346 P2d 748; *Estate of Korthe* (1970) 9 CA3d 572, 88 CR 465.

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§10.92 1. Governing Authority [Deleted]

This section has been deleted. For discussion of appeals, see chap 23.

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§10.93 2. Notice of Appeal [Deleted]

This section has been deleted. For discussion of appeals, see chap 23.

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§10.94 3. Designation of Record [Deleted]

This section has been deleted. For discussion of appeals, see chap 23.

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§10.95 4. Stay of Enforcement [Deleted]

This section has been deleted. For discussion of appeals, see chap 23.

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§10.96 5. Briefs, Oral Argument, and Issuance of Opinion [Deleted]

This section has been deleted. For discussion of appeals, see chap 23.

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§10.97 6. Petition for Rehearing [Deleted]

This section has been deleted. For discussion of appeals, see chap 23.

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§10.98 7. Remittitur [Deleted]

This section has been deleted. For discussion of appeals, see chap 23.

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§10.99 8. Petition for Review [Deleted]

This section has been deleted. For discussion of appeals, see chap 23.

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E. Civil Writs

§10.100 1. Introduction

When no statute makes an order appealable, the only immediate option for obtaining appellate review is by extraordinary writ petition. Unlike appeals, which appellate courts must accept, writ petitions are subject to the court's discretion. See *Brandt v Superior Court* (1985) 37 C3d 813, 816, 210 CR 211. Writ petitions are basically of two types: writs expressly authorized by statute (*e.g.,* CCP §877.6(e)) and "common law" writs of mandate, prohibition, and certiorari. Writs typically allow the court of appeal to correct error when the petitioner has no immediate right of appeal, no adequate remedy at law, and a beneficial interest in the outcome. Cal Const art VI, §10; CCP §§1068-1069, 1086, 1103. The granting of writ review is rare.

When the court of appeal summarily denies a writ petition, the denial does not constitute the appellate court's approval of a lower court order. Summary denial without comment is not a ruling on the merits and does not preclude re-arguing the same issues in a later appeal, unless otherwise provided by statute. *Kowis v Howard* (1992) 3 C4th 888, 12 CR2d 728. When the extraordinary writ petition is the only authorized mode of appellate review, however, a summary denial is necessarily on the merits. *Leone v Medical Board of Cal.* (2000) 22 C4th 660, 94 CR2d 61.

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.101 2. Procedure

§10.101 2. Procedure

Civil writ proceedings are governed by CCP §§1063-1110b and Cal Rules of Ct 8.485-8.493 (except for writs in the appellate division of the superior court; see Cal Rules of Ct 8.485).

The two major types of writ in California are mandate and prohibition. Certiorari now is used primarily to review contempt orders when the person in contempt is sentenced to a fine.

A writ of mandate seeks to compel a court, corporation, board, or person to perform a legal duty. CCP §1085. A writ of prohibition seeks to restrain a court from acting without or in excess of the court's jurisdiction. CCP §1102.

In writ proceedings, the parties are:

- The petitioner (the party seeking relief who files the petition requesting that the court issue a writ);
- The respondent (the trial court in cases challenging judicial action); and
- The real party in interest (the opposing party below in cases challenging judicial action).

Petitions for writs generally must be filed in the next highest court that has jurisdiction to hear the case. Cal Const art VI, §10. See *Hagan v Superior Court* (1962) 57 C2d 767, 769, 22 CR 206. Accordingly, when a superior court order is being challenged, the writ petition should be filed in the court of appeal. See Cal Const art VI, §11.

As a general rule, in the absence of a specific statutory provision, an appellate court may consider a petition for extraordinary writ at any time subject to its power to deny relief on the ground of laches. *Popelka, Allard, McCowan & Jones v Superior Court* (1980) 107 CA3d 496, 499, 165 CR 748; *Peterson v Superior Court* (1982) 31 C3d 147, 163, 181 CR 784. It is good practice, however, to file the petition as soon as possible and in any event not later than 60 calendar days after the order or judgment from which relief is sought. Some statutes that authorize relief specify a filing deadline, failure to comply with which may result in the court not having the power to hear the petition. See CCP §437c; *Eldridge v Superior Court* (1989) 208 CA3d 1350, 1355, 256 CR 724.

Counsel for the real party in interest is not required to file a preliminary opposition to the writ petition unless it is requested by the court. See Cal Rules of Ct 8.487(a). Once a writ petition has been filed, the court of appeal generally will either summarily deny the petition or issue an alternative writ or an order to show cause. An alternative writ directs the trial court to act in conformity with the prayer of the petition or, in the alternative, to show cause why it should not be ordered to so act. When an alternative writ is issued, a formal briefing schedule is set. After briefing and oral argument, a peremptory writ may be issued by the court if the petitioner is successful. The order to show cause differs from the alternative writ in that it does not give the lower court the chance to act in conformity with the prayer. A formal briefing schedule is set when an order to show cause is issued. Although oral arguments are not held in every case, the California Supreme Court has suggested that the right to oral argument exists in any appeal or original proceeding decided on the merits except when the appellate court issues a peremptory writ in the first instance, instead of issuing an alternative writ or order to show cause. Cal Const art VI, §3; *Lewis v Superior Court* (1999) 19 C4th 1232, 1256, 82 CR2d 85; *Moles v Regents of Univ. of Cal.* (1982) 32 C3d 867, 187 CR 557.

The procedures used in the California Supreme Court concerning writs of mandate and prohibit are the same as in the courts of appeal.

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§10.102 IX. ENFORCEMENT PRACTICE

Both the civil department and the probate department have the power to enforce their orders and judgments by contempt. CCP §128(a)(4); Prob C §800. In general, CCP §§680.010-724.260 govern enforcement of orders and judgments, whether in the probate department or the civil department. Prob C §§1000, 1049.

Money judgments against a ward, conservatee, or decedent must be collected in the course of administration (CCP §709.030; Prob C §§9300-9301, 19300-19301), but this restriction does not apply to nonmonetary judgments (Prob C §§9302, 19302; CCP §709.030).

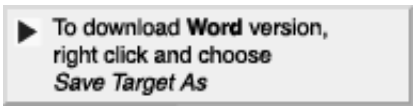
The method for levying on a judgment debtor's interest in a decedent's estate is governed by CCP §700.200. Creditor's rights against the interest of a beneficiary in a trust are governed by the provisions of Prob C §§15300-15309.

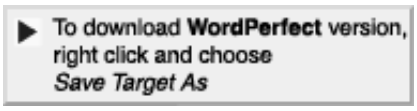
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X. APPENDIXES

§10.103 A. Form: Sample Special Interrogatories in Will Contest Proceeding





[*Title of court*]

Estate of _ _[*name*]_ _,	**)**	**No. _ _ _ _ _ _**
Deceased	**)**	
	)	**FIRST SET OF SPECIAL**
	)	**INTERROGATORIES**
	)	**DIRECTED TO**
_____	**)**	_ _[*NAME(S)*]_ _

FIRST SET OF SPECIAL INTERROGATORIES

REQUESTING PARTY: _ _[*Name*]_ _, _ _[*Plaintiff/Defendant*]_ _

RESPONDING PARTY: _ _[*Name*]_ _, _ _[*Plaintiff/Defendant*]_ _

SET NUMBER: One

PLEASE TAKE NOTICE that requesting party requests that responding party answer the following interrogatories under oath within thirty (30) days after service of these interrogatories, or such additional time as may be permitted by law, under Code of Civil Procedure §§2030.010-2030.410.

DEFINITIONS

The following definitions are used in these interrogatories:

1. "ADDRESS" shall mean the street number, street name, city, state or province, country (if other than the United States of America), and zip code.

2. "COMMUNICATE" or "COMMUNICATED" shall mean the act of making a COMMUNICATION.

3. "COMMUNICATION" shall mean every manner or means of disclosure, transfer, or exchange of information, whether orally, by DOCUMENT, or in any other manner, and whether face to face, or by telephone, mail, personal delivery, or otherwise.

4. "CONCERNING" shall mean referring to, alluding to, responding to, relating to, connected with, commenting on, in respect of, about, regarding, discussing, showing, evidencing, describing, mentioning, reflecting, analyzing, and constituting. A document or communication may concern a certain person or subject without that person being the sole or even significant topic of that document or communication.

5. "DOCUMENT" shall mean a writing, as defined in Evidence Code §250, and includes the original or a copy of handwriting, typewriting, printing, photostatting, photographing, photocopying, transmitting by electronic mail, or facsimile, and every other means of recording upon any tangible thing and form of communicating or representation, including letters, words, pictures, sounds, or symbols, or combinations of them, and any record thereby created regardless of the manner in which the record has been stored.

6. "IDENTIFY"

(a) When used with respect to a natural person, shall mean to give his or her full name, business ADDRESS

and telephone number, present employer, and position or job title.

(b) When used with respect to a PERSON other than a natural person, shall mean to state its full name, the present or last known ADDRESS of its principal office or place of doing business, and the type of entity (for example, corporation, partnership, or unincorporated association).

(c) When used with respect to a DOCUMENT, shall mean to identify the document's author, signor, sender, addressee, and all recipients; to state the document's title, date, and number of pages; to describe its subject matter; and to state the document's present location, the name and ADDRESS of any PERSON currently having custody or control of it, and any other descriptive information necessary to identify such DOCUMENT sufficiently in a subpoena duces tecum or a request for production.

(d) When used with respect to a COMMUNICATION other than a DOCUMENT, shall mean to identify the person making the COMMUNICATION, its recipients, and all natural persons who were present at the time the COMMUNICATION was made, and to state the date, place, and subject matter of the COMMUNICATION.

7. "MEETING" shall mean any gathering of two or more PERSONS, whether by chance, prearranged, informal, formal, in connection with some other activity, or otherwise.

8. "PERSON" or "PERSONS" shall include individuals, firms, associations, partnerships, joint ventures, corporations, trusts, organizations, other business or governmental entities, and all combinations of them.

9. "YOU" or "YOUR" shall mean _ _[*name of responding party*]_ _, and shall also include all representatives and agents of _ _[*name of responding party*]_ _, all of _ _[*name of responding party*]_ _'s predecessors or successors in interest, and all other PERSONS acting or purporting to act on behalf of _ _[*name of responding party*]_ _.

INTERROGATORIES

INTERROGATORY NO. 1:

For the period beginning on _ _[*date*]_ _, through the date of death of _ _[*name of decedent*]_ _, IDENTIFY each PERSON who had any COMMUNICATION with _ _[*name of decedent*]_ _ CONCERNING any will, trust, or other means considered by _ _[*name of decedent*]_ _ of disposing of some or all of _ _[*his/her*]_ _ property on _ _[*his/her*]_ _ death, and each PERSON who witnessed any such COMMUNICATION.

INTERROGATORY NO. 2:

For the period beginning on _ _[*date*]_ _, through the date of death of _ _[*name of decedent*]_ _, IDENTIFY each PERSON to whom _ _[*name of decedent*]_ _ COMMUNICATED _ _[*his/her*]_ _ intention or desire to have _ _[*his/her*]_ _ then-existing will destroyed or otherwise revoked, and each PERSON who witnessed any such COMMUNICATION.

INTERROGATORY NO. 3:

For the period beginning on _ _[*date*]_ _, through the date of death of _ _[*name of decedent*]_ _, IDENTIFY each PERSON who COMMUNICATED to _ _[*name of decedent*]_ _ that _ _[*name of decedent*]_ _'s then existing will had been destroyed or otherwise revoked, and each PERSON who witnessed any such COMMUNICATION.

INTERROGATORY NO. 4:

For the period beginning on _ _[*date*]_ _, through the date of death of _ _[*name of decedent*]_ _, IDENTIFY each PERSON to whom _ _[*name of decedent*]_ _ COMMUNICATED _ _[*his/her*]_ _ intention or desire to have _ _[*his/her*]_ _ assets distributed on _ _[*his/her*]_ _ death equally among _ _[*name(s)*]_ _ and each PERSON who witnessed any such COMMUNICATION.

INTERROGATORY NO. 5:

For the period beginning on _ _[*date*]_ _, through the date of death of _ _[*name of decedent*]_ _, IDENTIFY each PERSON to whom _ _[*name of decedent*]_ _ COMMUNICATED _ _[*his/her*]_ _ intention or desire to have

_ _[*his/her*]_ _ assets distributed on _ _[*his/her*]_ _ death in accordance with the laws governing intestate succession, and each PERSON who witnessed any such COMMUNICATION.

INTERROGATORY NO. 6:

IDENTIFY any will or trust executed by _ _[*name of decedent*]_ _ besides the will executed by _ _[*him/her*]_ _ on _ _[*date will executed*]_ _ (the "_ _[*year will executed*]_ _ WILL"). This interrogatory is not limited as to time period.

INTERROGATORY NO. 7:

IDENTIFY any PERSON with knowledge of any will or trust executed by _ _[*name of decedent*]_ _ besides the _ _[*year will executed*]_ _ WILL. This interrogatory is not limited as to time period.

Date: _ _ _ _ _ _ **By:** __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Comment: Any terms specially defined must be typed with all letters capitalized wherever the term appears. CCP §2030.060(e).

For discussion of captions and a complete sample caption, see §§10.5-10.6.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.104 B. Form: Sample Requests for Admission in Will Contest Proceeding

§10.104 B. Form: Sample Requests for Admission in Will Contest Proceeding

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[*Title of court*]

Estate of _ _[*name*]_ _,	**)**	**No. _ _ _ _ _ _**
Deceased	**)**	
	)	**FIRST SET OF REQUESTS**
_____)		**FOR ADMISSION**

FIRST SET OF REQUESTS FOR ADMISSION

REQUESTING PARTY: _ _[*Name*]_ _, _ _[*Plaintiff/Defendant*]_ _

RESPONDING PARTY: _ _[*Name*]_ _, _ _[*Plaintiff/Defendant*]_ _

SET NUMBER: One

PLEASE TAKE NOTICE that propounding party requests responding party to admit the following matters under oath within thirty (30) days after service of these requests for admission, or such additional time as may be permitted by law, under Code of Civil Procedure §§2033.010-2033.420.

DEFINITIONS

The following definitions are used in these requests for admission:

1. "ADDRESS" shall mean the street number, street name, city, state or province, country (if other than the United States of America), and zip code, and any other information needed to facilitate service of process by the propounding party.

2. "AUTHENTICITY" shall mean the characteristic of a writing resulting from that writing having been "authenticated," as that term is used in Evidence Code §§1400-1421.

3. "CLAIMS" mean the allegations made by YOU in the Will Contest and Objections to Probate of Purported Will, filed in this proceeding on _ _[*date*]_ _.

4. "COMMUNICATION" shall mean every manner or means of disclosure, transfer, or exchange of information, whether orally, by DOCUMENT, or in any other manner, and whether face to face, or by telephone, mail, personal delivery, or otherwise.

5. "CONCERNING" shall mean referring to, alluding to, responding to, relating to, connected with, commenting on, in respect of, about, regarding, discussing, showing, evidencing, describing, mentioning, reflecting, analyzing, and constituting. A document or communication may concern a certain person or subject without that person being the sole or even significant topic of that document or communication.

6. "DOCUMENT" shall mean a writing, as defined in Evidence Code §250, and includes the original or a copy of handwriting, typewriting, printing, photostatting, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing and form of communicating or representation, including letters, words, pictures, sounds, or symbols, or combinations of them, and any record thereby created regardless of the manner in which the record has been stored.

7. "HOLOGRAPHIC WILL" shall mean the holographic will executed by _ _[*name of decedent*]_ _ and dated _ _[*date*]_ _, a true and correct copy of which has been produced to YOU in this matter.

8. "IDENTIFY"

(a) When used with respect to a natural person, shall mean to give his or her full name, home ADDRESS and telephone number, and business ADDRESS and telephone number.

(b) When used with respect to a PERSON other than a natural person, shall mean to state its full name, the present or last known ADDRESS of its principal office or place of doing business, and the type of entity (for example, corporation, partnership, or unincorporated association).

(c) When used with respect to a DOCUMENT, shall mean to identify the document's author, signor, sender, addressee, and all recipients; to state the document's title, date, and number of pages; to describe its subject matter; and to state the document's present location, the name and ADDRESS of any PERSON currently having custody or control of it, and any other descriptive information necessary to identify such DOCUMENT sufficiently in a subpoena duces tecum or a request for production.

(d) When used with respect to a COMMUNICATION other than a DOCUMENT, shall mean to identify the person making the COMMUNICATION, its recipients, and all natural persons who were present at the time the COMMUNICATION was made, and to state the date, place, and subject matter of the COMMUNICATION.

9. "MEETING" shall mean any gathering of two or more persons, whether by chance, prearranged, informal, formal, in connection with some other activity, or otherwise.

10. "_ _[*Year trust executed*]_ _ TRUST" shall mean the trust instrument executed by _ _[*name of decedent*]_ _ on _ _[*date*]_ _, a true and correct copy of which is attached as Exhibit A to the Will Contest and Petition to Revoke Probate of Will, filed by _ _[*name of plaintiff*]_ _ in the above-captioned proceeding on _ _[*date*]_ _.

11. "_ _[*Year will executed*]_ _ WILL" shall mean the will executed by _ _[*name of decedent*]_ _ on _ _[*date*]_ _, a true and correct copy of which is attached as Exhibit B to the Will Contest and Petition to Revoke Probate of Will, filed by _ _[*name of plaintiff*]_ _ in the above captioned proceeding on _ _[*date*]_ _.

12. "PERSON" or "PERSONS" shall include individuals, firms, associations, partnerships, joint ventures, corporations, trusts, organizations, other business or governmental entities, and all combinations of them.

13. "TRIAL" shall mean any trial or evidentiary hearing held to resolve the allegations made by YOU in the Will Contest and Objections to Probate of Purported Will, filed in this proceeding on _ _[*date*]_ _.

14. "YOU" or "YOUR" shall mean _ _[*name*]_ _, the contestant in the Will Contest and Objections to Probate of Purported Will, filed in this proceeding on _ _[*date*]_ _, and shall also include all other PERSONS acting or purporting to act on _ _[*his/her*]_ _ behalf.

REQUESTS FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1:

Admit that _ _[*name of decedent*]_ _'s _ _[*year will executed*]_ _ WILL was not a product of undue influence by plaintiff.

REQUEST FOR ADMISSION NO. 2:

Admit that _ _[*name of decedent*]_ _'s _ _[*year trust executed*]_ _ TRUST was not a product of undue influence by plaintiff.

REQUEST FOR ADMISSION NO. 3:

Admit that _ _[*name of decedent*]_ _'s HOLOGRAPHIC WILL was not a product of undue influence by plaintiff.

REQUEST FOR ADMISSION NO. 4:

Admit that plaintiff and _ _[*name of decedent*]_ _ did not have a confidential relationship at any time from

_ _[*date*]_ _ **through** _ _[*date*]_ _**.**

REQUEST FOR ADMISSION NO. 5:

Admit that plaintiff did not actively participate in the preparation of _ _[*name of decedent*]_ _**'s** _ _[*year will executed*]_ _ **WILL.**

REQUEST FOR ADMISSION NO. 6:

Admit that plaintiff did not actively participate in the preparation of _ _[*name of decedent*]_ _**'s** _ _[*year trust executed*]_ _ **TRUST.**

REQUEST FOR ADMISSION NO. 7:

Admit that plaintiff did not actively participate in the preparation of _ _[*name of decedent*]_ _**'s HOLOGRAPHIC WILL.**

REQUEST FOR ADMISSION NO. 8:

Admit that _ _[*name of decedent*]_ _**'s designation of plaintiff as beneficiary in the** _ _[*year will executed*]_ _ **WILL did not result in an undue benefit to plaintiff.**

REQUEST FOR ADMISSION NO. 9:

Admit that _ _[*name of decedent*]_ _**'s designation of plaintiff as beneficiary in the TRUST did not result in an undue benefit to plaintiff.**

REQUEST FOR ADMISSION NO. 10:

Admit that _ _[*name of decedent*]_ _**'s designation of plaintiff as beneficiary in the HOLOGRAPHIC WILL did not result in an undue benefit to plaintiff.**

REQUEST FOR ADMISSION NO. 11:

Admit that _ _[*name of decedent*]_ _**'s disinheritance of** _ _[*name*]_ _ **in the will dated** _ _[*date*]_ _**, a copy of which is attached to YOUR Petition for Probate of Will and for Letters Testamentary, filed on** _ _[*date*]_ _**, was not the product of undue influence by plaintiff.**

REQUEST FOR ADMISSION NO. 12:

Admit that _ _[*name of decedent*]_ _**'s disinheritance of** _ _[*name*]_ _ **in the will dated** _ _[*date*]_ _**, a copy of which is attached to YOUR Petition for Probate of Will and for Letters Testamentary, filed on** _ _[*date*]_ _**, was not the product of undue influence by plaintiff.**

REQUEST FOR ADMISSION NO. 13:

Admit that _ _[*name of decedent*]_ _**'s disinheritance of** _ _[*name*]_ _ **in the** _ _[*year will executed*]_ _ **WILL was not the product of undue influence by plaintiff.**

REQUEST FOR ADMISSION NO. 14:

Admit that _ _[*name of decedent*]_ _**'s disinheritance of** _ _[*name*]_ _ **in the** _ _[*year trust executed*]_ _ **TRUST was not the product of undue influence by plaintiff.**

REQUEST FOR ADMISSION NO. 15:

Admit that _ _[*name of decedent*]_ _**'s disinheritance of** _ _[*name*]_ _ **in the** _ _[*year holographic will executed*]_ _ **HOLOGRAPHIC WILL was not the product of undue influence by plaintiff.**

REQUEST FOR ADMISSION NO. 16:

Admit the "genuineness" of the videotape of _ _[*name of decedent*]_ _ taken on _ _[*date*]_ _ as that term is used in Code of Civil Procedure §2033.010.

REQUEST FOR ADMISSION NO. 17:

Admit the AUTHENTICITY of the videotape of _ _[*name of decedent*]_ _ taken on _ _[*date*]_ _.

REQUEST FOR ADMISSION NO. 18:

Admit that the videotape of _ _[*name of decedent*]_ _ taken on _ _[*date*]_ _ will be admissible evidence at any evidentiary hearing on the issues raised by YOUR CLAIMS.

Date: _ _ _ _ _ _ **By:** __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Comment: Any terms specially defined must be typed with all letters capitalized wherever the term appears. CCP §2033.060(e).

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/10 Litigation Tools: An Overview/§10.105 C. Form: Sample Request for Production in Will Contest Proceeding

§10.105 C. Form: Sample Request for Production in Will Contest Proceeding

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[*Title of court*]

Estate of _ _[*name*]_ _,	**)**	**No. _ _ _ _ _ _**
Deceased	**)**	
	)	**DEMAND FOR**
	)	**IDENTIFICATION AND**
	)	**PRODUCTION OF**
_____)		**DOCUMENTS**

DEMAND FOR PRODUCTION: FIRST SET

REQUESTING PARTY: _ _[*Name*]_ _, _ _[*Plaintiff/Defendant*]_ _

RESPONDING PARTY: _ _[*Name*]_ _, _ _[*Plaintiff/Defendant*]_ _

SET NUMBER: One

PLEASE TAKE NOTICE that propounding party demands that responding party identify, produce, and permit the inspection and copying or photographing of all documents falling within the categories described below.

This demand is made under CCP §§2031.210-2031.320, which require the responding party to serve a written response subscribed under oath. Sections 2031.210-2031.220 further require the responding party to identify the documents falling within the categories specified below that are in its possession, custody, or control and to state that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection must be stated.

The propounding party requests that the documents be produced and that inspection and copying or photographing be permitted at the law offices of _ _[*name and address of law offices*]_ _, beginning at _ _[*time*]_ _ on _ _[*date*]_ _ and continuing until the inspection, copying, and photographing have been completed.

INSTRUCTIONS

1. This demand requires the responding party to produce all documents that are in its possession, custody, or control, whether actual or constructive, including documents that may be in the physical possession of another entity holding the documents on behalf of responding party, such as a business or a law firm. If any document was, but no longer is, in the possession, custody, or control of the responding party, the response should state whether it has been lost, destroyed, or transferred to another person either voluntarily or involuntarily, or has been otherwise disposed of. In each instance, explain the circumstances surrounding the disposition, and state the date or approximate date.

2. If the responding party contends that any document requested is protected from disclosure by the attorney-client privilege, by the work product doctrine, or by any other claimed privilege, the responding party should:

(a) Identify the document request to which the withheld document is responsive;

(b) Specify the nature of the protection claimed;

(c) Describe the precise ground for the protection; and

(d) Identify the document with particularity, including its author, dates of authorship and publication, all recipients of the document, the subject matter, and the number of pages.

3. This demand requires the production of documents in the same form and in the same order in which they existed before this demand for production. The documents are to be produced in the boxes, file folders, bindings, or other containers in which the documents are ordinarily kept. The titles, labels, or other descriptions on the boxes, file folders, bindings, or other containers are to be left intact.

4. This demand is a continuing demand for all documents described below and that may hereafter come into the possession, custody, or control of the responding party.

DEFINITIONS

1. The word "ADDRESS" includes the street number, street name, city, state or province, country (if other than the United States of America), and zip code or other mailing code for the place at which the designated person's business is principally conducted.

2. Whenever the word "ALL" or "ANY" appears, each includes "any and all."

3. Whenever the word "AND" or "OR" appears, each includes the logical inclusive "and/or."

4. Whenever a reference to a business entity—such as a corporation, partnership, or joint venture—appears, the reference means the business entity; its affiliated companies, partnerships, joint ventures, divisions, subdivisions, directors, officers, employees, agents, or other present and former representatives; affiliated third parties; and all other persons presently or formerly acting or purporting to act on its behalf, individually or collectively.

5. The word "COMMUNICATION" includes every manner or means of disclosure, transfer, or exchange of information, whether orally, by document, or in any other manner or whether face to face or by telephone, mail, personal delivery, or otherwise.

6. The word "CONCERNING" includes referring to, alluding to, responding to, relating to, connected with, commenting on, in respect of, about, regarding, discussing, showing, evidencing, describing, mentioning, reflecting, analyzing, and constituting. A document may concern a certain person or subject without that person being the sole or even significant topic of that document.

7. The word "DOCUMENT" has the same broad meaning as it has in CCP §2016.020(c) and includes documents, papers, books, accounts, letters, photographs, objects, and all other tangible things. It specifically includes all originals, copies, duplicates, drafts, or other recordings of any written, graphic, or otherwise recorded matter, however produced or reproduced, whether inscribed by hand or by mechanical, electronic, microfilm, photographic, phonic, or any other means. It includes abstracts; address books; advertisements; affidavits or statements; agreements; analyses of any kind; appointment books; architectural blueprints or drawings; balance sheets; bids; billings; blueprints; books or records of account; brochures; bulletins; calendars; charts; checks and canceled checks; circulars; compilations; computer cards, runs, and printouts; computer programs; computer tapes and discs; consultants' reports or studies; contracts; correspondence; data processing input and output; data sheets; desk calendars; diagrams; diaries; directories; discs; drawings; estimates; expense account records; experts' reports or studies; financial statements or calculations; graphs; house publications; income statements; inspection records, sheets, and reports; interoffice and intra-office communications; invoices; job descriptions or assignments; journals; layouts; ledgers; letters; licenses; lists; magnetic tapes; manuals; maps; memorandums of any kind; microfiche; microfilm; minutes or records of any kind; movies; notations; notes; notebooks; opinions; organizational charts; pamphlets; permits; photographs; pictures; plans; projections; promotional materials; press releases or clippings; publications; punch cards; procedures; questionnaires and answers to them; quotations; records and recordings of any kind; renderings; reports of any kind; rework instructions, orders, and procedures; routing slips; schedules; sound recordings; specifications; statistical analyses; stenographers' notebooks; studies of any kind, analyses, forecasts, and evaluations; subcontracts; summaries; surveys; tables, indices, and lists; tabulations; tallies; tapes; telegrams; telephone messages, telephone logs, and telephone billings and statements; teletype and telex messages; trade letters; transcripts, minutes, reports, and recordings of telephone or other conversations, interviews, conferences, committee meetings, or other meetings; undertakings; video tapes; vouchers; and working drawings, papers, and files.

8. The word "EACH" includes "each and every."

9. The word "IDENTIFY":

(a) When used with respect to a natural person, means to give his or her full name, home and business addresses and telephone numbers, present employers, and position or job title.

(b) When used with respect to an entity other than a natural person, means to state its full name, the present or last known address of its principal office or place of doing business, and the type of entity (for example, corporation, partnership or unincorporated association).

(c) When used with respect to a document, means to identify the document's author, signor, sender, addressee, and all recipients; to state the document's title, date, and number of pages; to describe its subject matter; and to state the document's present location, the name and address of any person currently having custody or control of the document, and any other descriptive information necessary to identify the document sufficiently in a subpoena duces tecum or a request for production.

(d) When used with respect to a communication, means to identify the person making the communication, its recipients, and all persons who were present at the time the communication was made or who received copies of it and to state the date, place, and subject matter of the communication.

10. The word "INCLUDES" and its derivatives mean "includes, but is not limited to," and its derivatives.

11. The word "PERSON" includes individuals, firms, associations, partnerships, joint ventures, corporations, other business or governmental entities, and all combinations of them.

12. The words "YOU," "YOUR," and "RESPONDING PARTY" refer to _ _[*name of responding party*]_ _ and to any of _ _[*his/her/its*]_ _ predecessors or successors in interest; all entities or identities under which _ _[*he/she/it*]_ _ does or may have done business; any officers, employees, directors, agents, and representatives; an all other persons acting or purporting to act on _ _[*his/her/its*]_ _ behalf, individually or collectively.

13. Any pronoun shall mean masculine, feminine, or neuter gender and the singular or plural, as in each case may be appropriate.

14. The singular form of a word should be construed either disjunctively or conjunctively as necessary to bring it within the scope of this demand any document that otherwise would not be construed to be within the scope of this demand.

DOCUMENTS DEMANDED

REQUEST NO. 1:

All DOCUMENTS CONCERNING any will ever signed by _ _[*name*]_ _ as a testator.

REQUEST NO. 2:

All DOCUMENTS CONCERNING any draft of a will proposed to be signed by _ _[*name*]_ _ as a testator.

REQUEST NO. 3:

All DOCUMENTS CONCERNING any trust signed by _ _[*name*]_ _ as trustor.

REQUEST NO. 4:

All DOCUMENTS CONCERNING any draft of a trust proposed to be signed by _ _[*name*]_ _ as trustor.

REQUEST NO. 5:

All DOCUMENTS CONCERNING any draft or executed estate planning DOCUMENT executed or proposed to be executed by _ _[*name*]_ _.

REQUEST NO. 6:

All DOCUMENTS CONCERNING any fact, occurrence, transaction or COMMUNICATION relevant to any of the following allegations: _ _[*List allegations concerning which documents are demanded*]_ _

REQUEST NO. 7:

All DOCUMENTS CONCERNING any communication that occurred on or after between or among any two or more of the following persons CONCERNING any one or more of the following topics:

(a) PERSONS: _ _[*name*]_ _ AND any PERSON who provided health care services to _ _[*him/her*]_ _.

(b) Topics:

(i) Will of _ _[*name*]_ _;

(ii) Any intention or instruction of _ _[*name*]_ _ to revoke _ _[*his/her*]_ _ will of _ _[*date*]_ _;

(iii) Any intention of _ _[*name*]_ _ to alter _ _[*his/her*]_ _ estate plan or dispositive arrangements;

(iv) Any intention of _ _[*name*]_ _ CONCERNING estate plan or dispositive arrangements;

(v) The specific terms of any proposed estate plan or dispositive arrangement contemplated by _ _[*name*]_ _;

(vi) The specific terms of any trust, charitable remainder trust, or will that _ _[*name*]_ _ considered establishing or did establish after _ _[*date*]_ _;

(vii) The physical condition of _ _[*name*]_ _ at any time after _ _[*date*]_ _;

(viii) The mental condition of _ _[*name*]_ _ at any time after _ _[*date*]_ _;

(ix) The testamentary intent of _ _[*name*]_ _ at any time after _ _[*date*]_ _;

(x) The testamentary capacity of _ _[*name*]_ _ at any time after _ _[*date*]_ _;

REQUEST NO. 8:

All DOCUMENTS CONCERNING any statements made by any one or more of the group composed of _ _[*names*]_ _ to any one or more of the group composed of _ _[*names*]_ _ of any alleged intent of _ _[*name*]_ _ to revoke _ _[*his/her*]_ _ will of _ _[*date*]_ _, or any alleged conduct or statements CONCERNING or causing a revocation of the will of _ _[*date*]_ _.

Date: _ _ _ _ _ _ **By: __[*Signature*]__**
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Comment: Although capitalizing all letters of any terms specially defined is not required for motions under CCP §§2031.010-2031.320, it helps the responding party refer to the defined terms in responding to the requests. Compare CCP §§2031.010-2031.320 with CCP §§2030.060(e) and 2033.060(e).

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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11

Alternative Dispute Resolution

Thomas W. Latham

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I. ALTERNATIVE DISPUTE RESOLUTION (ADR)

§11.1 A. Modern Trend Toward ADR

ADR, which stands for alternative dispute resolution, but which has been aptly called *appropriate* dispute resolution, has become firmly established in the legal lexicon in recognition of a dramatic growth in demand for new approaches to solving old problems. The development of an active ADR market is a healthy departure from the monochromatic methods of case management of the past.

Before the advent of ADR, case management consisted of a predictable progression from initial demand letter to pretrial pleadings, motions, and discovery, to settlement negotiations conducted by counsel, to a court-supervised settlement conference, to trial, to appeal. ADR invites the legal profession to consider a wide array of approaches to case management in the hope of reducing delay and cost while increasing party satisfaction with the process. Just as in each case it is crucial to develop an overall legal strategy, so also it is crucial to develop an overall case management strategy. The challenge for the legal profession is to become sufficiently versed in the different methods of ADR to correctly identify the method, or series of methods, best suited for efficient management of each particular case. This chapter provides a brief outline of ADR procedures available, and the factors involved in selecting the appropriate procedures for management of probate and trust cases.

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§11.2 B. Benefits of ADR: Greater Control Over Case Management

ADR permits parties, acting in their mutual self-interest, to take control of case management in ways not available in the traditional litigation format. ADR allows the parties to control the selection of the process for resolving the dispute (see §§11.3-11.9), the identity of the neutral person who will be involved (see §11.10), and the timing (see §11.11).

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§11.3 1. Selecting Appropriate ADR Method

The traditional litigation format generally includes two settlement formats (negotiation through attorneys and court-supervised settlement conference) and one binding adjudication format (trial). In contrast, ADR offers the parties a wider spectrum of processes, in addition to the traditional formats, that gives them the opportunity to select a process that will be the most conducive to efficiently resolving their case. See §§11.12-11.29. In each case, the key is to develop a case management strategy, and then to control the process using an appropriate ADR method. The challenge is to figure out early in the case which method, including the traditional formats, is likely to be most appropriate for resolving a particular case. Sections 11.4-11.9 provide examples of probate and trust cases with recommended methods for dealing with them.

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§11.4 a. Cases With Strong Emotional Issues

Probate and trust litigation often involves strong emotional issues, as parties act out old family conflicts that create barriers to settlement. Negotiations through attorneys and court-supervised settlement conferences are not effective processes for dealing with emotional issues. In these cases, the parties should consider selecting a skilled mediator using a non-evaluative style. See §11.15.

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§11.5 b. Cases With Complicated Accounting

Probate and trust litigation often involves reconstructing an accounting from unorganized and/or sketchy records. This situation can arise, *e.g.,* when a well-meaning family member (often the surviving spouse) has been lax in administering the standard marital trust/bypass trust, and has prepared no accountings along the way. Traditional litigation might involve expensive discovery of old banking records and reconstruction of an accounting by a forensic accountant on each side, as well as tedious (and expensive) evidentiary hearings. ADR allows the parties to devise a less expensive process. They should consider engaging an independent accountant jointly (the expense of a forensic accountant is unnecessary—in some cases, a really good bookkeeper would be sufficient) to prepare a rough accounting (using reasonable assumptions to bridge the gaps in the records). Then the parties should consider using the rough accounting as the basis for working with a mediator to resolve the case.

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§11.6 c. Cases Involving Disputed Control of Family Business

Sometimes probate and trust litigation involves a dispute over who should control the family business. Court remedies may be limited to appointment of a receiver, dissolution of a closely held corporation, or instructions to a personal representative (on a petition to authorize continuation of business). However, a receivership is a cumbersome and expensive mechanism for running a business, and the parties may lose control over selecting the person who will serve as receiver when the issue is submitted to the court. Dissolution of the business may not preserve its value. A petition for instructions that is heard on a lengthy probate calendar weeks after filing may be inadequate to arrive at a timely solution to a complex business issue. And delay of even a few weeks in resolving a dispute over control could cause major losses in the operation and value of the business.

In this type of dispute, the parties have a common interest in protecting the value of the business. ADR provides a range of alternative processes. This situation provides a classic opportunity for the parties to work with a mediator to identify areas of mutual self-interest and reach a solution that looks to the future success of the business.

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§11.7 d. Cases With Complex Factual or Legal Issues

When the case involves complex factual or legal issues, the traditional approach holds out the prospect of lengthy and expensive discovery, followed by a lengthy trial that is likely to occur no sooner than a year after the initial filing. In such a case, there is also a likelihood that the attorneys will disagree on their valuations of the case, which will present a barrier to successful negotiation of a solution through the attorneys alone. ADR provides opportunities for a more efficient process.

The parties should consider gathering only the important documents, taking only those depositions necessary to tie down crucial witnesses on central disputed facts, and then seeking the early assistance of an experienced probate and trust mediator for evaluative mediation—a style of mediation in which the mediator will be expected to give opinions concerning a reasonable valuation of the case. See §11.19. If the mediation effort falters because the parties have such a divergent view on a crucial factual issue (*e.g.,* a credibility issue), they should consider submitting that issue to the mediator for a nonbinding finding based on excerpts from the videotaped depositions, or even live testimony limited to the crucial factual issue. This process for attempting to settle the case based on a reasonable valuation is likely to be much less expensive and time-consuming than the traditional process.

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§11.8 e. Cases With Undisputed Facts and Simple Legal Issues

Sometimes a probate case may involve undisputed facts and a simple unsettled legal issue. The traditional litigation format may provide the most efficient and appropriate way to resolve these cases.

For example, it may be undisputed that the decedent used embezzled funds to pay the premiums on term life insurance. The legal issue might be whether the embezzlement victim is entitled only to return of the embezzled funds or to the entire proceeds of the life insurance policy. Depending on the goals of the embezzlement victim, the traditional litigation format may be the most appropriate way to resolve the dispute. For example, if the decedent's estate was the named beneficiary of the policy, a petition brought under Prob C §850 based on a constructive trust theory might be an efficient method to submit the legal issue to the probate court for prompt resolution, without great expense or delay to the litigants.

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§11.9 f. Cases With Small Amount at Stake, Simple Facts, and Simple Legal Issues

The traditional litigation format may provide the most efficient and appropriate way to resolve cases when the amount at stake is small, and the facts and legal issues are simple. For these cases, the probate court provides an inexpensive (no fees for mediator or arbitrator), timely (short probate matters can be heard within a couple of months after initial filing), and experienced forum for resolving the dispute.

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§11.10 2. Selecting Neutral Person

ADR allows the parties to select by mutual consent the neutral person who will be involved in the process of resolving the case, whether by settlement or decision. This ability is often an important factor in complex probate and trust disputes.

In many large counties (*e.g.,* Los Angeles, San Francisco, Alameda), a complex probate or trust case (those requiring more than four or five hours of evidence or argument) is likely to be assigned to a trial judge by the master calendar department because the probate department, with dozens of matters assigned to the daily calendar, simply does not have time to devote to a hearing that lasts several days. This results in an assignment that is left largely to the vagaries of master calendar management, with little input from the parties (other than a potential deselecting CCP §170.6 motion). Thus, the traditional system in many large counties results in the anomaly that, for trial, the most complex and important probate and trust cases are the very cases that are diverted away from the judge with the most probate and trust experience. The parties can avoid this problem by opting for ADR and selecting a neutral person with appropriate probate and trust expertise to handle a complex case.

This factor is less important for simple cases or for cases in smaller counties, because such matters are likely to be tried in the probate department.

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§11.11 3. Control Over Timing

ADR allows the parties to have greater control over the timing of the case. This may be unimportant in simple cases, but is usually a major factor in complex cases.

Simple cases. For simple cases, even in large counties, probate and trust petitions are regularly set for an initial hearing date within 2 months from filing. Trust matters generally require at least 30 days' notice. Prob C §17203. If the parties do not need extensive discovery and are willing to submit the matter on declarations without an evidentiary hearing, it is usually possible to submit the matter at the initial hearing. If the parties need a few additional weeks to conduct discovery, probate departments are generally quite flexible in accommodating schedule adjustments that are stipulated to by the parties. In many counties, a simple telephone call to the probate calendar clerk suffices to continue a matter, with no requirement for a confirming letter, much less a noticed motion and appearance.

Complex cases. In large counties, calendar control for complex probate and trust litigation poses a much greater problem because these cases are generally assigned to trial from the master calendar department. See §11.10. There may be a delay of a year or more to get a trial date. Delay alone can increase the expense of a case, because work tends to expand to fill the available time. Even worse, it is not uncommon for cases on the master calendar to be continued for lack of an available department. Continuances cause major wasted expense because each side (particularly the plaintiff) must prepare for trial in anticipation that a department will be available, subpoena witnesses, arrange expert witness schedules, and make travel arrangements each time a case is continued.

ADR permits the parties to control the calendar and avoid the expense of lengthy delays and unpredictable continuances. That extra control is not without cost. The price is the fee of the neutral mediator, arbitrator, or judge pro tem. Generally, however, this cost is far less than the cost of delay and unpredictable continuances.

WARNING: If a case is likely to involve crucial disputed factual issues, there is a hazard to engaging in ADR procedures before depositions of the crucial party witnesses have been taken. Invariably, ADR procedures will force each side to reveal its central legal and factual contentions, and thereby "educate" the other side. As a result of that education, party witnesses may become better prepared to dance around the tough questions at a subsequent deposition, instead of giving straightforward but damaging responses at a time when they do not yet fully understand the issues. Therefore, it is often advisable to take the deposition of crucial party witnesses on the important disputed factual issues before engaging in ADR procedures.

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II. ALTERNATIVE DISPUTE RESOLUTION FORMATS: COMPARATIVE ADVANTAGES IN PROBATE AND TRUST LITIGATION

§11.12 A. Variables Among ADR Formats

ADR covers many formats for resolution of disputes short of the traditional trial and appellate process. The primary variables among the different formats are whether, when, and to what extent:

- A neutral person will be involved in the process;
- The neutral person will be called on to form and express opinions concerning the legal strengths or weaknesses of the disputed claims;
- The opinion of the neutral person will be based on an evidentiary hearing;
- The evidentiary hearing will be abbreviated and/or conducted under relaxed evidentiary rules;
- The opinion of the neutral person will become a "binding" decision;
- The "binding" decision of the neutral person will be subject to review or appeal; and
- Communications and writings in connection with the process are confidential or inadmissible.

The wide variety of ADR formats available is reviewed in §§11.13-11.29.

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§11.13 1. Negotiation Directly by Parties

Settlement negotiations in probate and trust litigation are rarely left to the parties. There are good psychological and legal reasons for this. The parties may feel strong emotional antagonism, or they may have little business acumen or legal knowledge. There may be a great disparity in the bargaining skills or power between the parties.

In some cases, however, direct negotiations by the parties may be advantageous. In probate and trust litigation, there often will be a long relationship between the now-adverse parties. Sometimes the history of that relationship contains some very positive aspects. Siblings may have deep-seated fondness for each other, despite their antagonisms and jealousies. The parties should be encouraged to try to continue their social relationship. If the business acumen and bargaining power of the parties are in parity, it may be advisable to encourage direct negotiation among them once counsel have given their respective clients reasonable guidance on the legal parameters of the claims.

Parties with a realistic businesslike style may be able to cut to the chase rather quickly if they do not feel tied to the tedious and time-consuming conventions that are the standard and expected attorney negotiating process. Direct negotiation among parties with a businesslike style may reduce cost and delay dramatically.

Direct negotiation among the parties can help avoid barriers to settlement that occasionally arise when negotiations are conducted by counsel. For example, the filtering effect of communicating through counsel may lead to an unintended alteration of the message.

In some cases, the opportunity for the parties to conduct a quick and decisive direct negotiation arises only after the cost, delay, and frustration from the normal adversarial process have created a readiness to settle. For example, at the end of a long and frustrating day of negotiations at a mediation or settlement conference over a seemingly intractable dispute, there may be a great temptation to give up and go home. However, if parties with business experience and sufficient settlement authority are invited to negotiate directly at that point, occasionally the case will be settled within minutes.

Thus, from start to finish, counsel should evaluate potential ways to involve the parties in direct negotiation, taking into consideration past relationships, the emotional context of the dispute, the magnitude of the stakes and complexity of the claims, and the relative business acumen, bargaining skill, and legal sophistication of the parties.

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§11.14 2. Negotiation Through Counsel

Negotiation through counsel is a traditional and standard approach to dispute resolution. The readiness and skill of a litigator to initiate and facilitate settlement through negotiation is as important to overall service to the client as any other set of litigation skills. This ability rests on three primary factors:

- An ability to develop a reasonably accurate valuation of the case early on;
- An ability to bring the client to a reasonable valuation of the case; and
- An ability to work cooperatively with opposing counsel and the adverse parties toward settlement, before the litigation takes on a life of its own.

For discussion of negotiating a settlement, see chap 11A.

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§11.15 3. Party-Initiated Nonevaluative Mediation

Nonevaluative mediation involves a neutral mediator whose focus is to facilitate communication among the parties at a mediation meeting, while refraining from giving express opinions concerning the legal and factual claims, or settlement offers and demands, of the parties. Sometimes referred to as "classic" mediation, this format is based on the hope that, through open communication and a collaborative attitude, the parties will be able to develop for themselves a solution that may resolve nonlegal issues as well as the legal disputes. This is particularly relevant to probate and trust litigation, in which the nonlegal interests of the parties may be so important as to provide the basic opportunity for, and even drive, the settlement.

The hallmark of the classic mediation style is an expectation that the mediator will not express opinions concerning legal and factual claims or settlement demands (although even in classic mediation the mediator will generally ask probing questions that may imply an opinion). By having the mediator refrain from expressing opinions on the legal claims or the settlement value, the process is intended to bring the parties to a realization that they must collaborate to solve the problem by themselves. The mediator can facilitate their collaboration, but will not provide the solution.

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§11.16 a. Factors in Selecting Nonevaluative Mediation

Factors that suggest the use of nonevaluative mediation include cases in which:

- The emotional content is large and the economic stakes are small;
- Properly managed venting may be helpful;
- Communications have been hindered due to a high level of acrimony or distrust between counsel or the parties;
- The legal or factual issues are relatively simple; and
- A past relationship among the parties suggests a basis for settlement that might be outside the scope of normal legal remedies.

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§11.17 b. Role of Party Participation and Controlled "Venting" in Nonevaluative Mediation

An essential part of the nonevaluative mediation process is for the mediator to engage the parties directly in discussion of their legal and nonlegal interests, motivations, and objectives. Thus, whether during private caucuses or joint sessions, a mediator operating under this format is likely to address questions directly to the parties in order to engage them in the discussion.

Many litigators feel uncomfortable with a mediator's attempts to draw their client into direct conversation, whether in the presence of the mediator alone or in the presence of opposing counsel and the adverse party as well. Litigators believe that they can advocate the client's legal claims better than the client, and they worry that the client may unnecessarily "give away the store," or inadvertently reveal a motivation or bargaining weakness that the other side will seize on.

Although these concerns are natural and legitimate, they should be balanced against other factors. First, the process of moving the client from the passive role of letting the attorney be the advocate to the active role of explaining the dispute and talking about his or her legal and nonlegal needs and objectives is an important step in getting the client to adopt an active role in a collaborative effort to resolve the problem. Second, in the process of striving for resolution and closure, particularly in probate and trust litigation among family members, there can be great value in giving each party an opportunity to "vent" grievances and frustrations to the mediator (a watered-down version of having a day in court), or to "vent" directly to the adversary. In an emotionally charged case, the venting process is perhaps the greatest test of the mediator's skill because the mediator, as moderator, must decide whether to invite direct venting between adversaries and bears the burden of preventing the emotional exchange from becoming counterproductive.

In probate and trust cases, when properly managed venting may be an important factor in reaching a settlement, nonevaluative mediation is probably a better vehicle for settlement than direct negotiations between the parties (when there is no management of the venting; see §11.13), negotiations through counsel (when there is no opportunity for venting), or evaluative mediation (when the mediator takes on more of an advocacy role, and may not be in as good a position to manage the venting; see §11.19).

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§11.18 c. Mediator Qualifications

Because nonevaluative mediation is a process-driven approach, the effectiveness of the mediator may depend not so much on substantive knowledge of the applicable law as on the mediator's ability to:

- Get the parties to adopt a collaborative attitude during the mediation;
- Direct the flow of the meeting and keep it productive through flexibility, finesse, and tact;
- Be a good listener and observer of body language in order to understand not only what is explicitly said, but also implicit or unspoken communications;
- Make people feel that they have been heard;
- Analyze complex situations quickly;
- Be creative and think "outside the box" to help the parties break through impasses;
- Be flexible and patient, so as to engender patience and flexibility from the parties; and
- Be persistent and upbeat when faced with seeming impasses.

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§11.19 4. Party-Initiated Evaluative Mediation

Unlike nonevaluative mediation, in evaluative mediation the mediator is expected to express opinions concerning the strengths and weaknesses of each party's case and about the reasonable settlement value of the case.

The expectation that the mediator will express opinions concerning legal strengths and weaknesses and settlement values triggers an important difference in the tone and style of the mediation. The parties are not engaged in a collaborative effort to solve their problems by themselves; rather, they are engaged in an adversarial effort to persuade the mediator of the strength of their case, hoping to enlist the mediator as an advocate for their side. The mediator is likely to emphasize to each party the weaknesses (but not the strengths) of that party's case, and the strengths (but not the weaknesses) of the adversary's case, all with a view to making the parties feel uncertain about the risks of continued litigation. The client is likely to stay in a passive role, leaving the job of advocacy to the attorney. The process is likely to take on the feel of traditional settlement negotiations: lots of posturing and laborious incremental changes in position.

The great strength of evaluative mediation, however, is its recognition that in many cases the factors that legitimately should drive the settlement are the relative strengths of the legal and factual claims, and that the primary impediment to settlement is the failure of one or more of the parties or their attorneys to correctly assess the reasonable settlement value of the case. An experienced and credible mediator can provide a needed reality check.

Evaluative mediation has another great strength: its flexibility. For example, if during the initial stages of the mediation it becomes apparent that the case valuation hinges on a crucial disputed factual issue, the parties and mediator are free to fashion an abbreviated, nonbinding evidentiary hearing to test that issue, without the cost of putting on the entire case. The mediation moves seamlessly to a voluntary nonbinding arbitration of a crucial issue. The mediator's written finding on the crucial issue may provide the necessary element to break through an impasse.

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§11.20 a. Factors in Selecting Evaluative Mediation

Cases in which evaluative mediation would be useful include those:

- That are primarily driven by legal or factual rather than emotional factors;
- That have complex factual and legal issues;
- In which a large difference among the settlement positions suggest that one or more sides are failing to come to a reasonable valuation of their prospects; and
- In which the opportunity to move into a voluntary nonbinding evidentiary mode may be helpful in working through a crucial disputed factual issue.

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§11.21 b. Mediator Qualifications

Because evaluative mediation is based on a substantive valuation of the case, it is essential for the mediator not only to enjoy the respect of the attorneys and parties but also to have complete command of probate and trust law, including tax issues. Thus, in selecting a mediator for a case that is likely to need evaluative mediation (even though the mediation might start out as non-evaluative), counsel should select a person who has current probate and trust law expertise. Mediators who were former judges with lengthy stints in the probate department are good candidates, as are attorney-mediators who have developed an expertise in probate and trust litigation. In addition to having probate and trust law expertise, the evaluative mediator should have the process skills required of a non-evaluative mediator. See §11.18.

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§11.22 5. Court-Initiated Mediation

Some courts have established routine procedures for referring contested probate and trust cases to mediation.

The San Francisco Probate Court has established two panels of volunteer attorneys to serve as pro bono mediators for cases that the court deems appropriate to assign to no-fee mediation. One panel handles probate and trust disputes, the other handles conservatorship and guardianship disputes. The panel members have substantial litigation experience in the relevant subject matter area, as well as mediation training or experience. If the circumstances of the case and the size of the estate do not warrant referral to the volunteer mediators, the court will not require the parties to participate in court-initiated mediation. See San Francisco Ct R 4.

Court-initiated mediation programs offer a ready means to track success rates. In 1998-1999, approximately 80 percent of the cases assigned in the San Francisco program have settled during mediation.

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§11.23 6. Court-Supervised Settlement Conference

The court may set one or more mandatory settlement conferences on its own motion or at the request of any party. Cal Rules of Ct 3.1380(a). Court-supervised settlement conferences include not only the standard mandatory settlement conference usually scheduled shortly before trial but also voluntary settlement conferences that the parties initiate themselves, usually at an earlier point in the litigation process. See §10.44.

Although judges may have different settlement conference styles, they all have the advantage of wearing a black robe when it comes to promoting settlement. Most judges, however, have demanding case loads that limit the time they can devote to settlement conferences. Note that the special confidentiality requirements that apply to mediations under Evid C §§1115-1128 do not apply to mandatory settlement conferences. Cal Rules of Ct 3.1380(d); Comment to Rule 3.1380(d).

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§11.24 7. Court-Ordered Nonbinding Arbitration

In large counties, judicially imposed nonbinding arbitration ("judicial arbitration") is conducted in "civil actions" in which the court believes damages will not exceed $50,000 and equitable relief is not sought. CCP §§1141.10-1141.31. Cases are heard by retired judges, retired commissioners, or attorneys. CCP §1141.18.

Judicial arbitration has not had much impact on probate and trust litigation, perhaps because "proceedings" under the Probate Code are not seen as "civil actions," at least for purposes of CCP §1141.11(a). Disputes between the personal representative or trustee and a third party (as opposed to a beneficiary), however, are often litigated in the form of a traditional civil action, and thus will come within the scope of CCP §1141.11(a) if they involve less than $50,000 and equitable relief is not sought. For a detailed treatment of judicial arbitration practice and procedure, see California Civil Procedure Before Trial chap 37 (4th ed Cal CEB 2004); Toker, California Arbitration and Mediation Practice Guide (2003).

WARNING: Testimony is not recorded at a judicial arbitration and may not be referred to at a subsequent trial de novo. Cal Rules of Ct 3.824. If counsel conducts a strong and effective cross-examination of the adversary at arbitration, he or she may present a convincing case to the arbitrator only to increase the chances that the adversary will request a trial de novo. At the trial de novo, the adversary will be better prepared to avoid counsel's cross-examination traps, but counsel will be unable to impeach the adversary by using the (nonexistent) transcript of cross-examination at the arbitration hearing. The best solution to this problem would require a change in the rules to permit recording of testimony at the arbitration and later use of that testimony at a trial de novo.

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§11.25 8. Voluntary Binding Arbitration

Parties who are unable to resolve their disputes by negotiation and mediation may have a common interest in entering into an agreement to submit to binding arbitration under California's general arbitration statutes. See CCP §§1280-1294.2. If the personal representative of an estate is one of the parties entering into the arbitration agreement, the agreement is not effective unless it is first approved by the probate court. Prob C §9621.

The advantage of binding contractual arbitration compared to traditional court procedures is the opportunity for the parties to fashion a procedure that fits the case and reduces cost or delay (even though the fees of the arbitrator may be substantial). Through contractual arbitration, the parties may:

- **Select an arbitrator with expertise.** The risk that a complex probate or trust case will be assigned from the master calendar to a judge with little or no probate or trust experience can be avoided by an agreement that selects an arbitrator (CCP §1281.6) with probate and trust expertise. See §11.10.

- **Control the calendar.** The parties will have greater control over scheduling the arbitration hearing (CCP §1282.2), and may avoid the tremendous inefficiency of preparing for trial only to have the case continued because of a congested master calendar. See §11.11.

- **Control prehearing discovery.** The parties may agree to appropriate limits on prehearing discovery (CCP §§1283.05-1283.1) that may be desirable in order to contain a major source of litigation costs.

- **Control evidentiary rules.** The parties may agree to modified evidentiary rules in order to reduce the cost of the evidentiary hearing (CCP §1282.2).

- **Obtain a decision that is final.** Generally, one of the goals of agreeing to arbitration is to reduce the delays and costs associated with appeals. The grounds for attacking the award of an arbitrator are limited. CCP §§1286.2 (grounds to vacate), 1287.6 (grounds to correct). Finality can be a double-edged sword, however. Unless there are grounds to vacate or correct an award, the court has no power to review an award even though the award lacks logic (*Department of Pub. Health v Service Employees Int'l Union* (1989) 215 CA3d 429, 433 n4, 263 CR 711) or reveals on its face an error of law that causes substantial injustice (*Moncharsh v Heily & Blase* (1992) 3 C4th 1, 10 CR2d 183).

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§11.26 9. Voluntary General Reference to Referee

As an alternative to binding arbitration, if the parties believe that the case requires the same formality as a normal court trial but wish to avoid the master calendar uncertainties of when the case will be tried and which judge will be assigned (see §§11.10-11.11), they may stipulate to a general reference under CCP §638. The stipulation should be conditioned on the appointment of a specified referee with substantial probate and trust expertise.

A general reference submits all of the issues in the action or proceeding, whether of fact or law, to the referee. The hearing is conducted using the normal rules of evidence. Evid C §300. The decision of the referee on a general reference becomes the decision of the court and is subject to attack or appeal on the same basis as court judgments without reference. CCP §645. See 6 Witkin, California Procedure, *Proceedings Without Trial* §63 (5th ed 2008).

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§11.27 10. Court-Ordered Special Reference to Referee

Sometimes probate or trust disputes involve very complex accountings that naturally lend themselves to a court-ordered special reference. Probate Code §11002 deals specifically with probate accounts. It allows the court to appoint a referee to examine the account and make a report that will be subject to court confirmation.

A court also may, on motion of a party, or on its own motion, direct a special reference to examine or take the account, without the consent of the parties, when the trial of an issue of fact requires the examination of a long account, or the taking of an account is necessary for the information of the court. CCP §639(a)(1)-(2). The decision of a referee on a special reference has the effect of a special verdict. CCP §645. It does not become a judgment without further action by the court.

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§11.28 11. Stipulated Reference to Judge Pro Tem for Summary Determination

Probate Code §9620(a) allows for resolution of disputes between the personal representative of a probate estate and a third person on a summary basis, without pleadings or discovery, by reference to a temporary judge designated by the parties by written agreement. Normally, parties agree to this procedure only when the issues are simple and the economic stakes are small. The Probate Code is silent about the nature and extent of the evidentiary hearing, but the normal rules of evidence would seem to apply under Evid C §300. The temporary judge must issue a statement of decision if a timely request is made by a party. CCP §632. Judgment is entered on the decision and has the same effect as if rendered by a judge by ordinary court process. Prob C §9620(a).

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§11.29 12. Stipulated Trial to Judge Pro Tem

In a format similar to a general reference under CCP §638, the parties may agree to submit the action for trial by a member of the State Bar selected by the parties to serve as judge pro tem. Cal Const art VI, §20. In all regards, the trial will be conducted as before a judge. This procedure provides another mechanism by which parties may avoid the uncertainties of the master calendar call and select a person with probate and trust expertise to try a matter starting on a date certain.

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§11.30 13. Trial by Probate Court

For many disputed probate and trust matters, the probate court is an efficient, timely, and effective forum for resolving the dispute. This is particularly true if the matter does not require a lengthy evidentiary hearing and can be submitted for decision without substantial delay. Disputed matters that cannot be accommodated by the probate court because of the anticipated length of the evidentiary hearing face the greater inefficiency, delay, and uncertainty inherent in assignments for trial from the master calendar department.

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§11.31 B. Flexibility, Innovation, and Control

The great promise and challenge of ADR is the flexibility it offers litigators to develop procedures to resolve a particular case with less expense and delay than the traditional approach. For example, the parties may learn during non-evaluative mediation that the stumbling block in the case is a divergence in settlement evaluation. At that point, the parties can switch to evaluative mediation. If evaluative mediation is stalled due to an impasse over the likely outcome on a crucial disputed factual issue, an abbreviated evidentiary hearing on the crucial factual issue may be held by the mediator (or excerpted deposition transcripts or videos may be submitted) for a nonbinding opinion on that limited but crucial issue. If the case still resists settlement, one of the binding procedures can be used.

As with any smorgasbord, however, there is a risk that indiscriminate sampling of the offerings will lead to indigestion. Many of the ADR formats require a substantial investment of counsel's time, as well as substantial fees of the mediator, arbitrator, or temporary judge. If a case is destined for trial, elaborate pretrial efforts to reach a settlement will only increase the litigants' ultimate financial burden. The ability to develop a case-management strategy early in the case that incorporates an ADR procedure appropriate for that case is a vital litigation skill.

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11A

Negotiating and Drafting Settlement Agreements

Shirley L. Kovar

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§11A.1 I. INTRODUCTION

Most cases settle before trial. Attorneys and their clients typically are happy with a settlement, either because it is a favorable settlement or because, at a minimum, the conflict is over. In many cases, the attorneys agree by telephone, fax, or email that the parties have reached an agreement. The attorney may then call the client to say, "The case has settled. It's done. You can put this dispute behind you." But in fact, all is not yet done. Either the attorney or the opponents must draft the actual settlement agreement, followed by the signing and, frequently, court approval. See §12.11.

To be sure, sometimes the case really is over when the lawyers agree that they have a deal. Some settlement agreements are fairly routine. Grab a form, insert the names and the facts, everyone signs promptly, and the court gives a "preapproved" over the Internet. What could be easier?

When the case goes awry, however, the drafting of the written settlement agreement may turn out to have as many problems as the initial dispute. No matter how patient the client has been up until then, if the deal goes sour during this phase, the client may take his or her frustration out on the attorney. The client may blame the attorney for letting the settlement slip away.

The focus of this chapter is the achievement of three fundamental goals: 1) conducting settlement negotiations to enhance the potential for a settlement in the first instance (see §§11A.2-11A.14), 2) establishing grounds for enforcement of an oral agreement (see §§11A.15-11A.18), and 3) drafting a clear and enforceable settlement agreement (see §§11A.19-11A.60).

Other issues in settlement negotiations, including property division, tax considerations, and court approval, are discussed in chap 12. For a discussion of alternative dispute resolution techniques, see chap 11.

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§11A.2 II. BEFORE NEGOTIATIONS BEGIN

It is usually apparent to the attorney when the parties are ready to begin negotiations. Either the client suggests calling opposing counsel "just to talk," or the other attorney starts to send signals that his or her client is "ready to deal." Before settlement discussions begin, however, the attorney should step back from the heat of battle and prepare not only for the negotiation process but for drafting the actual settlement agreement. Initially, the attorney should consider both some type of facilitation agreement (see §§11A.3-11A.6) and preliminary tax planning (see §§11A.7-11A.8).

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§11A.3 A. Facilitation Agreements

Before negotiations begin, the attorney and opposing counsel may want some type of "facilitation agreement," *i.e.,* a preagreement that facilitates effective settlement negotiations. A facilitation agreement may take the form of a standstill agreement (see §11A.4), a tolling agreement (see §11A.5), or other conditions that precede settlement of the major dispute (see §11A.6).

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§11A.4 1. Standstill Agreements

A standstill agreement sets forth what pleadings, discovery, or other actions will or will not occur during settlement negotiations. If the parties proceed to discuss settlement without a standstill agreement, a twofold dilemma arises:

- If the attorney and the client are optimistic that the parties will settle, the attorney may stop discovery, readily give continuances or make stipulations, or take other actions that can prejudice the client if the other side does not reciprocate.
- On the other hand, in order to avoid potential damage to the client's strategic position, the attorney may decide to continue the same level of litigation at the same level of expense as before settlement discussions. But continuing litigation at the same pace during settlement discussions—with attendant hostile actions and distractions—can hinder the possibility of settlement.

A standstill agreement prevents both of these problems.

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§11A.5 2. Tolling Agreements

A tolling agreement prevents a potential plaintiff from filing suit on the condition that a potential defendant "tolls" the statute of limitation that would otherwise apply. A tolling agreement is frequently used when a potential plaintiff would otherwise file a claim for malpractice against a drafting attorney or another attorney who was involved in a prior transaction in some other way. The period for the tolling may allow the dispute at hand to be resolved and damages to be mitigated before resolution of the malpractice claim.

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§11A.6 3. Other Preconditions

If the client has sufficient leverage at this stage of litigation, or if a certain prerequisite is essential to the client's well-being, the attorney may want to seek other preconditions in addition to a standstill agreement (see §11A.4) or a tolling agreement (see §11A.5). The following are a few examples to consider:

- Requesting a certain level of distribution for a client who is a beneficiary of a discretionary trust, or requesting a limitation on distributions to other beneficiaries;
- Requiring another party to return cash, tangible personal property, or possession of a residence;
- Obtaining a crucial document that could not be obtained during discovery;
- Agreeing that no party will sell or otherwise transfer assets of the trust, estate, or other assets owned by the decedent;
- Having another party sign a sales agreement or other instrument;
- Stipulating to a "voluntary restraining order" of some type; or
- Specifying that a proposed action would not violate a no contest clause;
- Granting of a family allowance or a probate homestead.

The attorney may be successful in seeking preconditions to settlement negotiations when the other side has indicated an interest in settlement or has made a preliminary offer. As an alternative tactic, when the client benefits more from the status quo than the opposing party does, the attorney can stonewall negotiations unless the opposing party grants requested preconditions.

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B. Planning for Taxes

§11A.7 1. Issues to Consider

Failing to address tax issues at the outset of a dispute is settlement sabotage. Determining after settlement that the client (or the opposing party) has a big tax problem will unravel an otherwise well thought out settlement plan. Federal taxes (income tax, federal gift and estate tax, or GST tax) may loom large in the client's eyes. The attorney should be sure to identify state tax issues also, including property taxes. Tax issues that should be considered, depending on the case, include the following:

- Is tax due as a result of a death, transaction, gift, or other disposition?
- Who is liable for payment of the tax?
- From what source?
- Does equitable apportionment apply?
- Is there an applicable deduction or credit?
- Does the trust or will have a tax clause? Are the tax clauses in conflict?

Tax strategy is usually time-sensitive. Tax returns have due dates, and large sums may be due. Penalties and interest may be a concern. Moreover, there may be actions that if taken by a party would either enhance or prejudice desired tax treatment. For these reasons, a tax planning strategy would be a major candidate for a facilitation agreement. See §§11A.3-11A.6.

WARNING: There may be an impediment to this approach because cooperation among the parties may be interpreted as prohibited collusion by the IRS. See, *e.g., Robinson v Commissioner* (5th Cir 1995) 70 F3d 34, 37. (Tax Court found that allocation was not entered in a bona fide adversary proceeding; state trial court "simply 'rubber stamped'" judgment drafted by attorneys). Counsel should proceed with caution when tax consequences are at stake.

Ideally, counsel would give tax advice at the onset of the matter. However, there may have been other issues that occupied the attention of counsel and client, or new disputes may have given rise to new tax issues during the course of litigation. For whatever reason, if tax consequences have not been at the forefront before settlement negotiations are about to begin, now is definitely the time to do the analysis and give tax advice to the client.

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§11A.8 2. Tax Strategies

The tax strategy depends on the particular circumstances. There are three basic types of tax situations:

- Each party believes the tax consequences that affect him or her are clear, or for whatever reason wants to deal independently of other parties with the tax authorities;
- Both parties would benefit from the same tax results; or
- Each party claims that the other is liable for whatever tax is in issue.

When each party wants to deal independently with the tax authorities, there is really no opportunity for a mutual tax strategy. Instead, the parties assume the settlement agreement, if achieved, would state that neither party guarantees any kind of tax result. In effect, the taxes fall where they may.

If each party claims the other is liable for the tax at issue, the tax consequences may be a major issue or the only issue. In this event, it is less likely the parties will agree to pursue a mutual tax strategy at the current stage of the negotiations. The best the parties can probably do as a precondition to settlement negotiations may be to agree who will pay the tax and from what source, *solely* for purposes of satisfying the tax liability and hopefully avoiding penalties and interest on unpaid tax. The ultimate responsibility for the tax would be left to further litigation or a comprehensive settlement agreement.

The real strategic challenge arises when opposing parties would benefit from the same federal tax results, but the federal Treasury would not. For example, a written precondition to pursue a marital or charitable deduction may amount to evidence of collusion in the eyes of the IRS. See §11A.7.

Another dilemma occurs if one party would consider a disclaimer, but only if another party takes certain action favorable to the disclaiming party. A disclaimer for consideration is invalid. Reg §25.2518-2(a), (d).

Although it is important to proceed with knowledge and caution, it may be possible to implement a strategy as a prelude to settlement negotiations that would result in tax consequences favorable to all parties or perhaps a favorable tax result for one party that allows that party to concede on an unrelated issue. That, however, requires careful research of the case law and tax rulings dealing with the client's particular tax issue.

For further discussion of limitations on tax planning and potential tax impacts in the settlement context, see §§12.5-12.10.

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III. CONDUCTING NEGOTIATIONS TO ENHANCE AND SUSTAIN SETTLEMENT

§11A.9 A. Avoiding Conduct That Invites Anger

The client has been through a dispute, perhaps extended litigation, which is never an enjoyable experience. The last thing he or she wants is yet *another* dispute over the validity of the settlement agreement. The best way to *survive* a challenge to the settlement agreement is to *avoid* a challenge in the first place. If the opposing party cannot find any reasonable (or unreasonable) basis for a challenge, he or she is less likely to whine for a renegotiation of terms by claiming an invalid agreement or to file a lawsuit to nullify the agreement.

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§11A.10 B. Ensuring Parties Are Agreeing to Same Deal

The opposing party should never have any basis for claiming that the settlement agreement he or she received in the mail for signature is not the same deal he or she negotiated. The crucial element of any means of communication is that both parties are literally "on the same page." Technology offers numerous means for settlement negotiations: telephone, fax, e-mail, or overnight mail. The best deal in the world will come apart if one party is working from a different version than the other party. The negotiations are meaningless unless both parties agree to the same deal.

Following are some tips for saying "yes" to the same agreement as the opposing party:

- Negotiate in some form of writing, whether fax, e-mail, or mail. See Cane, *Staying at "Yes:" How to Avoid a Busted Settlement*, 15 LA Law 26, 28 (Sept. 1992). When a settlement is proposed in writing, it is more difficult for the opposing party to claim there is a misunderstanding regarding the terms of the settlement or to claim that no settlement exists. Moreover, when one attorney is suspicious that opposing counsel may, intentionally or unintentionally, be conveying less than the whole story to his or her client, an offer in writing should take care of that problem. See Cal Rules of Prof Cond 3-510(A)(2).
- If it is impractical to conduct all negotiations in writing (*e.g.,* if opposing counsel calls on the phone, or perhaps some give and take is necessary), then at the end of the discussion, recapitulate the deal points or changes that have been agreed to, or ask opposing counsel to do so. Promptly confirm the conversation in writing to opposing counsel, with a copy to the client.
- Generally try to prevent getting too far ahead of the client in negotiations. The attorney should not propose or agree to terms the attorney has not discussed with the client.
- Place the date and time of a revised draft on the first page of the draft. Be sure anyone working on the document does the same.
- When exchanging drafts with the opposing party, use redlining for all revisions from the prior draft. If there are multiple parties, the attorney who integrates the comments should use a different color to distinguish the input from each party's attorney.
- Use a cover letter to list the page and paragraph where a change occurs.
- When responding to a draft from an opposing party, refer in the cover letter to the date of the opposing party's draft.
- Each time a new draft is produced, place a diagonal line through the first page of the prior draft and file it. Keep only current drafts out of the file as a current working draft.
- Check every draft sent to an opposing party to be sure the revision the attorney *thinks* is in the draft is actually *in* the draft.
- If exchanging drafts by e-mail, print a revised version and read it before e-mailing it to opposing counsel.
- Read the settlement agreement one last time before the client signs it. Opposing counsel inadvertently may have dropped a line while making revisions.
- Always have the parties initial each page of the agreement.
- Include signature blocks for key paragraphs, such as the general release paragraph.
- Use the spell check word processing tool, and read the agreement for grammar and punctuation.
- Check that all signatories have actually signed on each signature line and have initialed each page and initial block.

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§11A.11 C. Ensuring Attorney Has Legal Authority to Settle

An enforceable agreement requires the consent of both the attorney and the client. Both attorneys should have the authority to settle for their clients. The attorney should not agree to a proposed offer or make an offer unless the client has approved, preferably in writing, all deal points, meaning all points the client requires in an agreement in order to reach a settlement.

If the client repudiates the deal the attorney negotiated, on the grounds that the attorney did not have authority to settle, there are several possible results, all of them bad:

- The deal unravels and negotiations continue, but both the client and opposing counsel are distrustful of anything the attorney says now, and the client is unhappy with the attorney's representation.
- The deal unravels, negotiations are called off by opposing counsel, who believes the attorney and the client are not dealing in good faith, and litigation goes forward.
- Opposing counsel files a claim to enforce the settlement, arguing that the attorney had apparent or ostensible authority to settle the case.

Under California law, a client has the absolute right to reject or approve a settlement, and therefore the client's express authority is required to settle a claim. *Blanton v Womancare, Inc*. (1985) 38 C3d 396, 404, 212 CR 151. The law of apparent authority of an attorney to act on behalf of his or her client in litigation is frequently analyzed in terms of whether the act is "procedural" or "substantive." In *Blanton,* the California Supreme Court noted that (38 C3d at 403)

> An attorney retained to represent a client in litigation is clothed with certain authority by reason of that relationship. "The attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action…." In retaining counsel for the prosecution or defense of a suit, the right to do many acts in respect to the cause is embraced as ancillary, or incidental to the general authority conferred, and among these is included the authority to enter into stipulations and agreements in all matters of procedure during the progress of the trial. Stipulations thus made, so far as they are simply necessary or incidental to the management of the suit, and which affect only the procedure or remedy as distinguished from the cause of action itself, and the essential rights of the client, are binding on the client.

An attorney's authority in procedural matters is generally said to be "implied in law"; in contrast, "an attorney is not authorized, merely by virtue of his retention in litigation to 'impair the client's substantial rights or the cause of action itself.'" 38 C3d at 404, citing *Linsk v Linsk* (1969) 70 C2d 272, 74 CR 544.

When the procedural versus the substantive model of apparent authority is applied to the right to enter into a settlement, the *Blanton* court stated that "the law is well settled that an attorney must be specifically authorized to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation." 38 C3d at 404. See also *Fennell v TLB Kent Co.* (1989) 865 F2d 498 (plaintiff not bound by agreement when attorney had no apparent authority to enter into settlement agreement with defendants); *Marriage of Helsel* (1988) 198 CA3d 332, 243 CR 657 (if issues to which counsel stipulated were dispositive, then stipulation could not stand).

NOTE: A concurring opinion in *Blanton* suggested that, instead of defining the division as "substantial rights" versus "procedural matters," the inquiry should, perhaps more usefully, differentiate between decisions affecting important, substantial rights and decisions on merely routine matters. 38 C3d at 410 (concurring opinion of Bird, J).

Other cases, however, have found the client was bound by the attorney's settlement regardless of the lack of specific authorization. See *Navrides v Zurich Ins. Co.* (1971) 5 C3d 698, 97 CR 309 (client ratified otherwise unauthorized compromise of her personal injury claim); *Phelps v Kozakar* (1983) 146 CA3d 1078, 1082, 194 CR 872 (court upheld settlement over client's objection when attorney had apparent authority to settle).

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§11A.12 D. Negotiating Entire Form of Agreement

Frequently, it is more convenient to negotiate what counsel believes are the deal points and leave the precise "details" to the complete settlement agreement. The problem, though, is that what the attorney believes are the issues and what the client will consider to be a "deal killer" may not be the same. It is therefore better practice to negotiate from the outset on the basis of the entire form of the agreement. See Cane, *Staying at "Yes:" How to Avoid a Busted Settlement*, 15 LA Law 26, 28 (Sept. 1992).

There are other advantages of "building the boat before you sail." Negotiating based on the entire form of the agreement from the beginning has these benefits:

- It will help ensure that both the attorney and the client think through all terms of the settlement. The attorney does not want to spend a lot of time in negotiations before finding out that the client will insist on a particular term that the attorney had no idea was important to the client.
- It should help avoid a claim by opposing counsel that he or she lacked authorization to settle.
- It may help avert "settlement remorse." The sooner the settlement agreement is signed after agreement on deal points, the less likely it is that the opposing party will renege, and, if the attorney is using the complete agreement as the basis for the negotiation, the time elapsed between reaching an agreement and drafting and signing it should be shorter.

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§11A.13 E. Avoiding Misrepresentations

Nothing makes the client angrier than to learn that his or her lawyer misrepresented the facts and that the blunder may cost the client what would otherwise have been a favorable settlement.

The ABA Model Rules of Prof Cond 4.1 expresses the principle as follows:

> In the course of representing a client a lawyer shall not knowingly:
> (a) make a false statement of material fact or law to a third person; or
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

With respect to what is a "material fact," the comment to the Model Rules states (Comment to ABA Model Rules of Prof Cond 4.1):

> This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

One of the unhappy results of misrepresentations or nondisclosure by counsel may be the opponent's attempt to reform or rescind the settlement agreement. For example, in *Stare v Tate* (1971) 21 CA3d 432, 98 CR 264, a divorcing husband and wife, who were attempting to reach a property settlement, disagreed about the value of certain real estate. The husband maintained it was worth $450,000, while the wife asserted the property's value was $550,000. The wife's lawyer conveyed an offer using the $550,000 value but erred by $100,000 in calculating the equity in the property when he subtracted the mortgage. The husband's lawyer perceived the mistake but failed to advise the wife's attorney and instead made a counteroffer based on the same erroneous reduced value. When the wife learned of the mistake (from a gloating ex-husband), she filed for reformation of the property agreement. The husband opposed reformation on the theory that he should not be forced to enter into an agreement to which he did not consent, but the appellate court held that the husband was estopped from contending his intention was different from his wife's. See Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 Ky L J 1055, 1074 (Summer 1998).

For other examples of cases in which a court has rescinded a contract on the basis of nondisclosure, see *Building Serv. Employees Pension Trust v American Bldg. Maintenance Co.* (9th Cir 1987) 828 F2d 576 (contract rescinded for unilateral mistake of fact that other party should have known about); *Dunoco Corp. v Dunoco Dev. Corp. (In re Dunoco Corp.)* (Bankr CD Cal 1985) 56 BR 137 (contract reformed because nondisclosing party deemed to have intended to enter into agreement sought by aggrieved party). See also *La Mancha Dev. Corp. v Sheegog* (1978) 78 CA3d 9, 144 CR 59 (court assumed that knowledge of unilateral mistake imputed to party from properly authorized agent is sufficient basis for reformation).

Watching the settlement unravel is only one of the unhappy results of failure to disclose a material fact. Other consequences may include professional discipline or civil liability. See, *e.g., Kentucky Bar Ass'n v Geisler* (Ky 1997) 938 SW2d 578 (in proceeding brought by state bar, court publicly reprimanded attorney for not disclosing that client had died before settlement of client's claims); *In re Rothwell* (SC 1982) 296 SE2d 870 (in negotiations with client's former employer, attorney committed fraud by altering property deed in client's favor); *Wright v Pennamped* (Ind App 1995) 657 NE2d 1223 (attorney has duty to disclose to opposing side any changes or alterations made to contract).

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§11A.14 F. Avoiding Pressure Tactics

Using pressure tactics is inadvisable. Even if pressuring the opposing party does not rise to the level of outright duress, the more the attorney's approach to negotiating resembles a "cram-down," the less likely the opposing party will like the agreement, and the more likely that, at some point, he or she may find a way to challenge the agreement or otherwise seek revenge.

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G. Acting Promptly If Opponent Reneges

§11A.15 1. Consider Tactics to Discourage Reneging and Enforce Settlement

To prevent the opposing party from reneging and to respond when the opposing party does renege, counsel should consider doing the following:

- Promptly confirm the terms of a settlement in writing so that it will be more readily enforceable. (On enforcing oral agreements, see §§11A.17-11A.18.)
- Promptly identify reneging behavior as such and proceed to enforcement. Do not let time pass between the reneging and starting to enforce oral agreement.
- If the client does not *want* the oral negotiations to result in an enforceable settlement, confirm in writing to the other side that oral negotiations of the terms are expressly contingent on documentation and agreement to all "details."
- Consider these enforcement techniques (see Cane, *Staying at "Yes:" How to Avoid a Busted Settlement*, 15 LA Law 26 (Sept. 1992)):
- Filing a cross-complaint;
- Filing a separate suit in equity;
- Asserting the settlement as an affirmative defense;
- Noticing the deposition of opposing counsel;

NOTE: The subject of the deposition will be the circumstances surrounding the settlement negotiations. For example, the testimony can confirm communications between counsel and whether opposing counsel had authority to negotiate and settle for his or her client. It may be preferable to depose opposing counsel before deposing the opposing party because counsel may be more candid about the extent of the client's authorization. The attorney-client privilege is waived under these circumstances, particularly if the party rejecting the settlement asserts that his or her attorney lacked authorization. Cane, *Staying at "Yes:" How to Avoid a Busted Settlement*, 15 LA Law 26 (Sept. 1992).

- Filing a motion for summary judgment after completing the depositions; and
- Putting settlement proceeds in an interest-bearing, segregated account.

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§11A.16 2. Confirm No Obstacles to Enforcement

When the attorney believes the other side has reneged on an agreement, he or she should, in addition to considering various enforcement tactics (see §11A.15), also confirm that there are no obstacles to enforcement. The attorney should ascertain the following:

- Both sides agreed to the same terms (and this can be proved).
- The attorney had the client's authority to settle on the terms of the agreement.
- The attorney has not made any misrepresentation during negotiations or in documenting the settlement.
- Enforcement does not depend on inadmissible confidential mediation communications or writings, including the settlement agreement itself. See Evid C §§1119-1128. See also, *e.g., Simmons v Ghaderi* (2008) 44 C4th 570, 80 CR3d 83; *Rael v Davis* (2008) 166 CA4th 1608, 83 CR3d 745; *Eisendrath v Superior Court* (2003) 109 CA4th 351, 134 CR2d 716.

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3. Consider Enforceability of Oral Agreement

§11A.17 (a) Oral Agreements on the Record

Code of Civil Procedure §664.6 provides for enforcement of an oral agreement that has been placed on the record, as follows:

> If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement.

Note that the statute applies only if there is "pending litigation." If there is no complaint or petition on file with the court, there is no provision for placing an oral settlement on the record.

To determine if an oral settlement is binding and enforceable under CCP §664.6, a court should consider whether (1) the settlement's material terms were explicitly defined; (2) the supervising judicial officer questioned the parties regarding their understanding of those terms; and (3) the parties expressly acknowledged their understanding of and agreement to be bound by those terms. *Marriage of Assemi* (1994) 7 C4th 896, 911, 30 CR2d 265.

An oral settlement agreement is unenforceable under CCP §664.6 if the assent of a party is indicated by a nod of the head rather than orally. *Conservatorship of McElroy* (2002) 104 CA4th 536, 550, 128 CR2d 485.

It is also unenforceable if agreement was not reached on all material terms. In *Terry v Conlan* (2005) 131 CA4th 1445, 1459, 33 CR3d 603, the court concluded that the parties reached agreement on the goals of a settlement, but did not reach agreement on the means to achieve the goals, and that the means to achieve the goals were material to the settlement because they had a significant financial impact on the parties. Accordingly, under basic contract law principles, the agreement was unenforceable. In a footnote, the court made an interesting suggestion (131 CA4th at 1458):

> By this opinion, we do not mean to say that a failure to agree on the means to achieve settlement goals will necessarily cause a settlement agreement to fail. On the contrary, many settlements are reached by an initial agreement on the goals of the settlement. However, agreement to the goals alone may not result in a judicially enforceable settlement agreement. We think the better practice in goals-oriented settlement discussions is to use the services of an independent arbitrator who can specify the details of the means in reaching the goals of the agreement.

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§11A.18 (b) Oral Agreements Not on the Record

Oral agreements made outside the courtroom are enforceable in California. See *Gauss v GAF Corp.* (2002) 103 CA4th 1110, 127 CR2d 370 (even if CCP §664.6 does not apply, settlement agreements may still be enforced by motion for summary judgment, by separate suit in equity or by amendment of pleadings to raise settlement as affirmative defense). For an oral agreement reached in a mediation to be enforceable, the oral agreement must be reduced to writing and signed by the parties within 72 hours after it is recorded by a court reporter or tape recorder. Evid C §§1118, 1124. See generally Cane, *Staying at "Yes:" How to Avoid a Busted Settlement*, 15 LA Law 26 (Sept. 1992). Cases in which courts have enforced oral agreements include the following:

- *Estate of Stephens* (2002) 28 C4th 665, 122 CR2d 358 (aunt cared for grandfather for 6 years before his death; grandfather gave aunt his house and orally instructed her to sign his name for him on the deed to transfer house to her; oral instruction was sufficient and transfer was valid);
- *Kilpatrick v Beebe* (1990) 219 CA3d 1527, 269 CR 52 (out-of-court settlement agreement in California may be enforced through motion for summary judgment despite CCP §664.6; that statute is not exclusive—it only provides optional streamlined method to enforce settlement agreements);
- *Hastings v Matlock* (1985) 171 CA3d 826, 217 CR 856 (out-of-court oral settlement agreement for rescission of written contract to sell land could be enforced without jury trial, and agreement was not subject to statute of frauds); and
- *Gorman v Holte* (1985) 164 CA3d 984, 989, 211 CR 34 (dictum; oral agreements to compromise and settle lawsuits reached at judicially supervised settlement conferences are enforceable).

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§11A.19 IV. DRAFTING SETTLEMENT AGREEMENT

The attorney's biggest nightmare during the settlement of a case is the possibility of the client's signing a settlement agreement that does not achieve its purpose: a permanent end to the dispute and the trauma and expense that typically accompany disputes. Therefore, the attorney's fundamental goals in drafting or reviewing a settlement agreement should be the following:

- Stability, *i.e.,* avoid giving any party a reason to challenge the settlement, and
- Enforceability, *i.e.,* avoid giving any party grounds for a *successful* challenge to the settlement.

Why would a party want to challenge a settlement he or she has agreed to? Three possible reasons come to mind:

- The agreement does not reflect one party's understanding of the deal, *i.e.,* a breakdown in communication between party and attorney or between attorneys;
- An unanticipated issue is not covered by the agreement, and the parties disagree on the resolution; or
- A party regrets signing the agreement because, on further reflection, he or she does not like the bargain.

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A. Drafting Considerations

§11A.20 1. Settlement Agreement as Type of "Estate Plan"

Depending on the nature of the controversy, it may be helpful to think of a settlement agreement in a trust or estate matter as an updated estate plan. In an estate plan, the attorney determines the value of each asset; who receives each asset; who is charged with payment of asset-related expenses, other expenses of administration, and debts and taxes; and who receives the income generated by each asset. If the attorney leaves any of these issues for resolution during the remaining course of trust or estate administration, he or she risks disputes among the parties, including litigation over interpretation or even validity of the settlement agreement.

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§11A.21 2. Drafting for Consequences

Another approach to drafting a settlement agreement requires analysis of the consequences of the validity or invalidity of each document to be covered by the settlement agreement. For example, if the decedent's will, dated January 31, 1987, is "valid," what are the consequences of the settlement agreement with respect to every paragraph of the will? The attorney may find that a specific provision of an agreement conflicts with the conclusion that a particular instrument is valid. Thus, a will that the parties agree is "valid" may include a gift the parties have also determined is *invalid* or, by way of compromise, passes to someone other than the beneficiary of the gift named in the will.

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§11A.22 3. Organization of Agreement

There are many ways to organize a settlement agreement. These include organization according to chronology, by topic, by party, by asset, by document, and by many more factors. The attorney should choose one that appears to best fit the settlement at hand and stick to it.

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§11A.23 4. Stating the Obvious

There may be an issue that the parties readily resolved at the outset or may not even have discussed. For example, the parties may have always agreed that "of course, Aunt Jane gets to keep the antique diamond ring." However, just because an "obvious" issue has not been in active discussion, it still may become a source of dispute in the future. Therefore, the settlement should address all possible issues.

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§11A.24 5. Watching for "Premature Settlements"

Some settlements are more difficult to reach than others. If the attorney or opposing counsel is doing contortions to draft language for the agreement, maybe the settlement is simply "premature." There may be several reasons that a settlement is premature. These include the following:

- There may need to be discovery or more discovery. If the client and the opposing party disagree on excluding a particular claim from the settlement agreement, maybe the issue can still be resolved short of trial. The parties may just need some degree of certainty, through discovery of more evidence, either formal or informal, that the settlement is sufficiently fair in light of the facts.
- The settlement does not include key players. If one of the attorneys is asking for multiple indemnities, especially with respect to the potential for action by nonparties, the underlying problem may be the failure to explore (or achieve) settlement with that third party.
- There is a fundamental legal issue that would be better resolved by a court than by settlement.

PRACTICE TIP: Before drafting the next settlement agreement, consider reviewing previous drafts of the last one, rather than the signed agreement. Maybe what opposing counsel negotiated away last time can make its way into the current agreement. Maintain a file for signed agreements *and* their drafts.

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§11A.25 B. Form Provisions

The suggestions in §§11A.26-11A.60 address specific provisions the attorney should consider including in a settlement agreement. Because every case is different, there is no "form" settlement agreement that fits all cases. The most important factor in drafting a successful settlement agreement is analyzing what is unique about the case at hand. The suggested provisions are to help the attorney keep in mind possible terms for the agreement. Few, if any, of these provisions should be used verbatim in a settlement agreement and, in any event, not without analysis of the effect of that term on the unique circumstances of the case. There is no substitute for thoughtful analysis of each dispute.

For a sample complete settlement agreement, see §11A.60.

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C. Signatories to Agreement

§11A.26 1. Heirs and Beneficiaries

All heirs and beneficiaries who would be affected by the settlement should sign the agreement. If all the heirs and beneficiaries who would be affected have not participated in settlement negotiations, counsel should do the following:

- Contact the nonparticipants and request them to be parties to the settlement agreement; or
- Petition the court to approve the agreement and send a notice of the hearing and a copy of the settlement to the nonparticipants. To avoid litigation over the agreement, ask each heir or beneficiary who is not a signatory to consent to the petition for approval of the settlement agreement. On obtaining court approval of settlements and notice requirements, see §§12.11-12.20.

Frequently, the spouse or domestic partner (or other family member or friend) of an affected heir or beneficiary will influence the position of the interested party. Making the party's spouse or other influential person a party to the agreement serves several purposes. A party's spouse who signs the settlement agreement may feel that he or she has a stake in it and thus be more likely to encourage his or her spouse (the heir or beneficiary) to adhere to the terms of the settlement rather than succumb to "settlor's remorse" and attempt to rescind it.

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§11A.27 2. Trustees, Personal Representatives, Guardians, and Other Fiduciaries

The attorney should consider all fiduciaries with a potential interest in the settlement. They may or may not have played a major role in settlement negotiations, but it may be useful to have them on board. For example, the dispute may have been conducted solely by the trustee of a decedent's revocable trust; the executor of the will may not have participated in negotiations. Nevertheless, it is good practice to make the executor a signatory to the settlement.

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§11A.28 D. Definitions

A settlement agreement is a contract. Like any other contract, definitions in a settlement agreement provide consistency, clarity, an underlying structure, and can frequently help to convert what appears to be mere "legalese" into an understandable agreement.

The following are some examples of terms to consider defining:

- Probate estate;
- Residue of the probate estate;
- Nonprobate assets;
- Creditors' claims;
- Business assets;
- Tangible personal property;
- Agreed net value; and
- Distribution date.

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§11A.29 E. Recitals

Recitals are important in a settlement agreement. They provide context and evidence of the mutual understanding of the parties, and they avoid the need for explanatory material in the body of the settlement. They also provide a good checklist of issues that should be covered.

Recitals should include these items:

- A description of the parties and their relationships;
- The factual background leading to the litigation;
- A description of the disputes;
- The procedural history of the case;
- A general statement of what the parties intend to accomplish by the settlement;
- A description of the documents establishing the capacities of the respective parties and their attorneys;
- A description of all documents giving rise to the claims or otherwise involved in the case;
- A description of the claims filed with the court and all significant pleadings; and
- Either a statement that the parties wish to resolve all their disputes without further litigation or that the parties wish to resolve "certain" disputes.

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§11A.30 F. Agreements and Releases

The settlement agreement should describe what each party is agreeing to do and by what date.

PRACTICE TIP: It is important to include the dates for each party's performance in the settlement, because otherwise the entire purpose of the agreement can slip away. An agreement to perform without a deadline is like docking the boat without securing it.

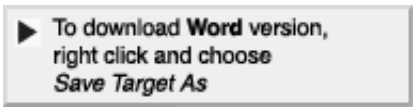
The settlement agreement should include a provision regarding taxes. See §11A.31. This is an appropriate provision to include when each party has independent responsibility for assessing the tax liabilities and where they fall. See §11A.8. On tax planning to facilitate settlement agreements, see §§11A.7-11A.8, 12.5-12.10.

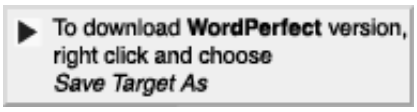
The attorney should also consider adding the following to the agreement:

- A consent to ex parte relief for a temporary restraining order; and
- An irrevocable appointment of agent for service of process.

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§11A.31 1. Form: Agreement Regarding Tax Consequences





11A.31-1 Agreement regarding tax consequences

All Parties acknowledge that no person participating in any discussion of this Settlement Agreement has made a guarantee of any kind to any Party, and no Party can avoid this Agreement or attempt to set it aside for any reason whatsoever concerning tax costs, tax liabilities, or tax consequences.

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§11A.32 2. Form: Exclusion of Specific Clause

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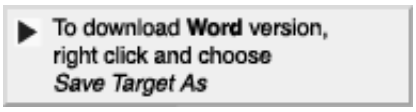
11A.32-1 Exclusion of specific clause

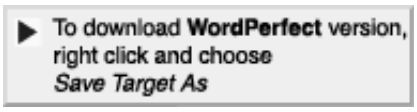
This Agreement is not intended to effect a release or waiver of any claims of any Party that could be presented in any wrongful death action concerning Decedent's death, or to constitute in any way an allocation of damages among the Parties in any such action, or to be a release or waiver regarding any person or entity not a Party or signatory to this Agreement.

Comment: If there is or may be a wrongful death action or other litigation arising out of the decedent's death (other than the litigation covered by the settlement agreement), the agreement should specifically exclude it, as in this clause.

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§11A.33 3. Form: Agreement Admissible as Evidence





11A.33-1 Agreement admissible as evidence

This Agreement is made under the terms and provisions of California Evidence Code §§1123 and 1152. It may be used and is admissible and subject to disclosure for any purpose to enforce or uphold the terms of this settlement, and this document is fully binding on all Parties.

Comment: As this clause suggests, the agreement should provide that it is admissible as evidence in a suit to enforce it.

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4. Release

§11A.34 a. Scope of Release

The agreement should include a form of release. If one party has petitioned against or sued another party, then a release by the plaintiff may suffice. See form 11A.35-1. If the defendant has counterclaimed, or the plaintiff insists, the agreement should include mutual releases. As provided in form 11A.35-1, however, the release should specifically not apply to claims arising from the settlement agreement.

In addition, all signatories to the settlement agreement should not necessarily be covered by the release. For example, if the heirs have filed claims against each other, but not against the executor or other fiduciary, the fiduciary should not be released from liability. However, if an heir or beneficiary has filed a claim against the fiduciary and the settlement includes resolution of that claim, it would be appropriate to release the fiduciary for liability for that claim. The attorney should analyze the facts of each case and not attempt to use a boilerplate form for the release provisions.

The California Civil Code places a limitation on the scope of a general release and provides that a general release does not extend to claims that would materially affect the settlement and of which the creditor is unaware at the time of the release. CC §1542.

PRACTICE TIP: Many lawyers include a waiver of CC §1542 as boilerplate in their agreements; however, that is a trap. Each case should be considered on its own facts. The client may have an existing claim that he or she does not want to waive as part of the settlement. For example, if the case has settled via a mediation, there may have been limited discovery, and the client may suspect there are facts he or she may discover in the future that would give rise to an even larger claim than the current one. However, if the opposing party makes the client's failure to waive §1542 a deal-killer, counsel should help the client assess his or her options.

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§11A.35 b. Form: General Release

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11A.35-1 General release

Release by _ _[*Name*]_ _

The PARTIES to this Agreement, on their own behalf and on behalf of their heirs, predecessors, successors, assignees, attorneys, insurers, trustees, executors, trust beneficiaries, and any other agents or representatives, hereby and forever release and discharge one another and each PARTY to this Agreement and any and all of their heirs, agents, predecessors, successors, assignees, attorneys, insurers, trustees, executors, trust beneficiaries, and other agents or representatives in their fiduciary, individual and/or beneficiary capacity from any and all past, present, or future claims, demands, entitlements, obligations, indebtedness, damages, losses, suits, costs, liabilities, expenses, and/or demands of any kind, whether known or unknown, now existing or that might arise hereafter, based upon any acts or omissions to act that have taken place at or before the effective date of this Agreement between the PARTIES or that relate to, arise out of, or are in connection with the facts and statements set forth in the Recitals including all allegations contained in or that could have been contained in _ _[*case name and number*]_ _, except for the terms and obligations specifically contained in this Agreement.

Comment: See discussion in §11A.34.

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§11A.36 5. Form: Dismissal of Pending Cases

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11A.36-1 Dismissal of pending cases

_ _[*Name*]_ _ **shall take off calendar, withdraw with prejudice, and cease to prosecute all claims, demands, objections, obligations, or causes of action pending in the Action (regardless of whether such claims, demands, obligations, or causes of action were brought in the form of a petition, objection, motion, application, opposition, response, declaration, or any other form of pleading that can be filed with the court).**

Comment: As this clause provides, the settlement agreement should require the relevant party to dismiss pending litigation with prejudice.

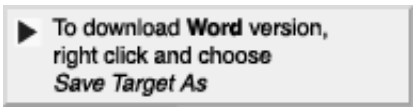
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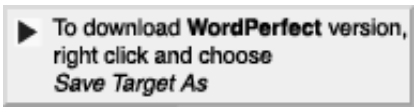
§11A.37 6. Violation of No Contest Clause

Many instruments contain a "no contest clause." If one is present in any document involved in the case at hand, the settlement agreement should state the resolution of that issue. Did the parties agree there was no violation of the no contest clause? Did they agree there was a contest with the resulting consequences?

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§11A.38 7. Form: Payment of Each Party's Legal Fees





11A.38-1 Payment of each party's legal fees

Each Party to this Agreement is responsible for the payment of his or her own legal fees and expenses and any and all other sums that have been expended in connection with the Action.

Comment: This form is an illustration of a provision in which each party pays his or her own legal fees.

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§11A.39 8. Form: Disclaimer of Liability

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11A.39-1 Disclaimer of liability

This Settlement Agreement is a compromise of disputed claims, and it shall not be considered an admission of any liability whatsoever by any Party to this Agreement.

Comment: The agreement should include a disclaimer of liability, such as this provision.

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§11A.40 9. Form: Liquidated Damages and Venue

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11A.40-1 Liquidated damages and venue

In the event of any suit or other proceeding to enforce or for breach of this Agreement, the prevailing Party or Parties shall be entitled to, in addition to any other relief the Court may award, reasonable litigation costs, expenses, expert witness fees, and attorney's fees incurred. In addition, if _ _[*name*]_ _ breaches this Agreement by continued pursuit of any alleged Claim, _ _[*name*]_ _ shall within ten days of a request by a Fiduciary of the Will or Trusts reimburse the Settlement Amount to the Fiduciary who paid the Settlement Amount. Venue shall be in _ _[*county of venue*]_ _ County, California, on any suit to enforce this Agreement.

Comment: The attorney should consider including in the agreement a provision such as this one for liquidated damages, which may act as a deterrent to further litigation. However, a liquidated damages provision must be reasonable to be enforceable, so it should not be prohibitive, even if the client has the leverage to extract an onerous penalty.

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§11A.41 10. Form: Disclosure Acknowledgment

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11A.41-1 Disclosure acknowledgment

Each Party to this Agreement warrants and represents that he or she has made a full and fair disclosure of all assets owned by the Decedent or which could be claimed as part of the probate estate of the Decedent, including the assets listed in the attached Declaration of Personal Property.

Comment: The agreement should usually include a disclosure by each party that the party has revealed all of the decedent's property.

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§11A.42 G. Standard Provisions

Standard boilerplate provisions such as those in §§11A.43-11A.60 can work for or against the attorney. The attorney should review each standard contract provision and tailor it in the client's favor. A properly worded paragraph at the end of the settlement agreement could turn out to be a lifesaver.

A provision such as that in §11A.43 can help avoid a challenge to the settlement agreement on grounds that a party did not understand the agreement, including charges of "legalese," small type size, English as a second (or third) language, or that the party was uneducated or unsophisticated. If any of these concerns might apply in the client's case, the attorney should take the time to tailor this provision to the specific circumstances.

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§11A.43 1. Form: Comprehension of Agreement

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11A.43-1 Comprehension of agreement

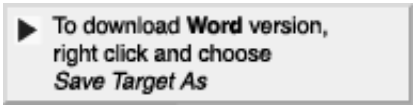
When entering into this Agreement, the Parties represent that they have read the contents of this Agreement and that they fully understand and voluntarily accept its terms.

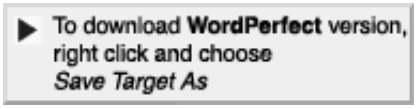
Comment: Signature blocks can be added at the end of this paragraph as evidence that the other party read and agrees that he or she understood the provision.

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Source: Estate Planning/California Trust and Probate Litigation/11A Negotiating and Drafting Settlement Agreements/ §11A.44 2. Form: Opportunity to Be Represented by Counsel

§11A.44 2. Form: Opportunity to Be Represented by Counsel





11A.44-1 Opportunity to be represented by counsel

Each Party has had a sufficient opportunity to seek the advice of independent counsel of his or her own choosing. No Party may deny the validity of this Agreement on the grounds that he or she did not have advice of legal counsel.

Comment: This is a crucial provision. If a party to the agreement is not represented by legal counsel, signature blocks should be added.

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§11A.45 3. Form: Integration of Agreement

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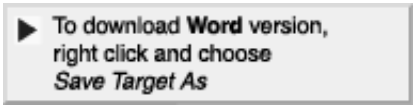
11A.45-1 Integration of agreement

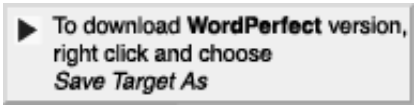
This Agreement constitutes the entire written agreement of compromise and settlement between the parties. There are no other agreements, oral or written, that modify its terms. Its terms can be modified only by a writing, signed by the parties, that expressly states that the parties intend to modify this Settlement Agreement.

Comment: An integration agreement is a crucial provision. It may require a specific reference to a prior agreement if there are special circumstances (for example, the parties signed a facilitation agreement, a letter agreement, or a letter of intent, had an oral agreement preceding the written settlement agreement, or have an agreement in principle on the record).

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§11A.46 4. Form: Governing Law





11A.46-1 Governing law

This Agreement shall be governed by, construed under, and enforced in accordance with the laws of the State of California.

Comment: This clause provides that California law governs the agreement. However, if more than one state or country is involved in the facts of the case, there may be an opportunity to choose a forum that is better for the client. In certain circumstances, the issue may be at the heart of the relevant claims. See, *e.g., Mohammad v Stassburger* (Pa 1991) 587 A2d 1346 (malpractice lawsuit against attorneys for negligent settlement barred because clients had consented to settlement before becoming dissatisfied with it). But beware: A disputed settlement agreement that winds up in a foreign forum whose laws and judiciary are not favorable to the client would be a major problem.

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§11A.47 5. Form: Interpretation of Agreement

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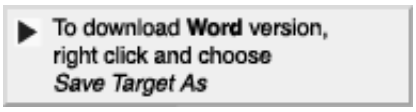
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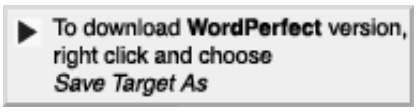
11A.47-1 Interpretation of agreement

This Agreement shall not be construed against any Party on the basis that the Party's attorney drafted it.

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§11A.48 6. Form: Further Documents





11A.48-1 Further documents

Each Party to this Agreement agrees to perform such further acts, and to execute and deliver any and all further documents, that may reasonably be necessary or desirable to carry out the purpose of this Agreement, including the following:

_ _[*List documents and actions, e.g.,*

a. Execute a quitclaim deed for a 100 percent interest in the property at 125 North Main Street, Woodford, California, from Party "A" to Party "B" and Party "C," husband and wife, as community property;

b. Obtain notarization of this Settlement Agreement; and

c. File the fully executed Settlement Agreement with the Probate Court of San Diego County, California, in case no. 12345.]_ _

Comment: All documents that need to be signed and actions the parties need to take should be listed in this provision.

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§11A.49 7. Covenant Not to Sue

A covenant not to sue may be helpful in recovering costs and attorney fees if the client is subsequently sued, especially if the subsequent lawsuit is specifically described in the covenant and the covenant explicitly provides for the right to recover costs and fees. Note that a court may determine that a "release" and a "covenant not to sue" are different. See *Colton v New York Hosp.* (App Div 1976) 385 NYS2d 65.

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§11A.50 8. Form: Warranty of Capacity to Execute Agreement

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11A.50-1 Warranty of capacity

Each Party represents and warrants that no other person or entity has or had any interest in the claims, demands, obligations, or causes of action referred to in this Agreement, that he or she has the full right and exclusive authority to execute this Agreement, and that he or she has not sold, assigned, transferred, conveyed, or otherwise disposed of any of the claims, demands, obligations, or causes of action referred to in this Agreement.

Comment: Because a warranty of capacity may be important if the circumstances should arise, it should always be included in a settlement agreement.

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Source: Estate Planning/California Trust and Probate Litigation/11A Negotiating and Drafting Settlement Agreements/ §11A.51 9. Form: Authorization to Sign

§11A.51 9. Form: Authorization to Sign

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11A.51-1 Authorization to sign

Each Party to this Agreement and each person who signs this Agreement represents that he or she is fully authorized and legally entitled to sign in the capacity indicated in the Agreement.

Comment: This provision is especially important when a signatory is signing in a capacity other than for himself or herself, such as a guardian ad litem.

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§11A.52 10. Form: Attorney Fees for Enforcement Proceedings

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11A.52-1 Attorney Fees for Enforcement Proceedings

In the event of any suit or other proceeding to enforce or for the breach of this Agreement, the prevailing Party or Parties shall be entitled to, in addition to any other relief the Court may award, reasonable litigation costs, expenses, expert fees, and attorney fees incurred.

Comment: This provision should be included in the agreement only if the liquidated damages provision (in form 11A.40-1), which also provides for attorney fees in enforcement proceedings, is not used.

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11. Severability Clause

§11A.53 a. Consider Including Severability Clause

A severability clause is included to prevent invalidation of the entire settlement agreement merely because an individual clause, which may not be significant to the overall agreement, is invalid. The attorney should consider carefully whether to add a severability clause to the settlement agreement. It may or may not be desirable, depending entirely on the circumstances of the case, and the parties have no way of knowing what circumstances may cause a portion of the agreement to become unenforceable. It may be undesirable, for example, if the court declares that a deal point in the client's favor is unenforceable.

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§11A.54 b. Form: Severability

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11A.54-1 Severability

If any portion of this Agreement is unenforceable for any reason whatsoever, the invalid portion shall be severed from the remainder, and the remaining portions of this Agreement shall remain in full effect.

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§11A.55 12. Form: Disputes to Be Mediated

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11A.55-1 Disputes to be mediated

All disputes and controversies that may arise in the construction or enforcement of this Settlement Agreement must first be submitted to mediation as a condition precedent to filing any complaint or initiating any other court action related in any way to this Settlement Agreement.

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§11A.56 13. Confidentiality Provision

Confidentiality provisions are routinely included in settlement agreements. The purpose, of course, is to prevent the parties from reporting the dispute to the public or otherwise disclosing the circumstances of the litigation to third parties. Most people do not want their "dirty laundry" to go any farther than the settlement agreement. Although attorneys usually remember to include a confidentiality provision in a settlement agreement, they may neglect to inform their clients of the difficulty of enforcing it.

There are several reasons for the difficulty. A court requested to enforce a confidentiality provision may balance the defendant's First Amendment rights against enforcement of the provision and decide in favor of the defendant's constitutional rights. One way around this problem may be to frame the issue and the claim in a way that avoids raising the First Amendment issue. See *Ferlauto v Hamsher* (1999) 74 CA4th 1394, 1400, 88 CR2d 843 (language such as "the nature of the claims asserted … or any other matter" is too vague to constitute knowing waiver of First Amendment rights in confidentiality agreement).

Assuming the plaintiff proves violation of the confidentiality provision, there is still the sticky issue of damages. Because damages are so difficult to prove, the solution may be to include a liquidated damages provision with respect to the confidentiality provision that applies to both the payor and the payee. Thus, for example, if the confidentiality provision is violated by either the payor or the payee of the settlement amount, the breaching party must pay a certain sum of money to the innocent party.

A third potential problem occurs if one of the parties breaches the confidentiality provision and an attorney representing a party is offended by the breach and wishes to enforce the provision. See, *e.g., Ferlauto v Hamsher, supra*. The attorney may wish to make the attorney a party regarding this provision.

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§11A.57 14. Form: Agreement Is Binding on Successors

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11A.57-1 Agreement binding on successors

This Agreement shall be binding on and inure to the benefit of the Parties to the Agreement and their respective representatives, assigns, and successors.

Comment: Usually, all parties to a settlement agreement wish to include a statement that it is binding on successors.

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§11A.58 15. Form: Counterparts

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11A.58-1 Counterparts

This Agreement may be executed in counterparts, and when each Party has signed and delivered at least one such counterpart, each one shall be deemed an original and, when taken together with other signed counterparts, shall constitute one Agreement, which shall be binding on and effective regarding all Parties. Facsimile signatures have the same force and effect as original signatures.

Comment: This is a typical provision for counterparts. It may be useful if there are numerous parties living in multiple locations and time is of the essence.

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§11A.59 16. Effective Date

The attorney who does not pay close attention to effective date provisions may wind up without a desirable settlement or with an undesirable settlement. Of course, each settlement agreement depends on its own specific facts, but following are some issues to keep in mind:

- **Signature of all parties.** In most situations, all parties should sign the settlement before it becomes effective. However, there may be instances when the settlement should be effective regarding the parties who have signed, assuming all but one potential party has signed.
- **Signature by attorneys.** It is standard procedure for the attorneys to sign the settlement agreement, but not generally as parties. Before automatically signing the agreement, however, the attorney should consider the extent of his or her involvement. What if the attorney participated in settlement negotiations at the inception of the case, but as time evolved, the client took over the negotiations (either with the opposing party or even with the opposing counsel)? The attorney may wish to decline signing the settlement agreement under these circumstances. There does not appear to be a downside for the attorney failing to sign the agreement. The argument is different, of course, for the opposing attorney. If at all possible, opposing counsel should sign the agreement as counsel for a party, but not as a party.
- **Court approval.** If the agreement is subject to court approval, the effective date should be conditioned on the court's approval. The effective date should be the actual date of court approval, *i.e.,* the date of the hearing when the court approves the agreement. For clarity, include a specific term in the court order approving the settlement agreement that states the "date of court approval" and the effective date of the settlement agreement. On court approval of settlement agreements generally, see §§12.11-12.20.
- **Sale of business, sale of real property, or other condition.** The client may have a situation in which the settlement will work properly only if another event takes place. The attorney should be sure the effective date of the agreement is expressly contingent on the escrow or whatever event makes it possible for the settlement to go forward.
- **Private letter ruling.** If the settlement agreement does not work without a favorable IRS private letter ruling, the effective date provision should require the favorable private letter ruling before the agreement becomes effective. The agreement should define what is a "favorable" ruling. On private letter rulings to determine tax issues in the settlement context, see §12.7.

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§11A.60 V. APPENDIX: SAMPLE MUTUAL GENERAL RELEASE AND SETTLEMENT AGREEMENT

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MUTUAL GENERAL RELEASE AND SETTLEMENT AGREEMENT

This Mutual General Release and Settlement Agreement ("Agreement") is made with regard to the facts set forth below in the Recitals and is entered into by, between, and among the following parties (collectively known as the "Parties"):

Jane Roe ("Jane"), an adult and an individual beneficiary under the Will of Richard Doe ("Decedent," her father);

John Roe ("John"), an adult and the spouse of Jane;

Richard Roe II ("Richard II"), a minor, and a biological child of Jane and adopted child of John. Richard II is represented by William Black, Esq. ("William") as guardian ad litem [and as guardian of the Estate of Richard II].

Scott Doe ("Scott"), an adult and an individual beneficiary under the Will of Richard Doe, and as executor of the Will of Richard Doe; and

Pamela Doe ("Pamela"), an adult and the spouse of Scott.

I. DEFINITIONS

1. "Probate estate" means the property of the Decedent that is subject to administration by the personal representative in the Probate.

2. "Residue of the probate estate" refers to the part of the Decedent's probate estate remaining after payment of all debts, expenses of administration, statutory claims, taxes, and specific gifts.

3. "Nonprobate assets" refers to Decedent's assets that pass by operation of law without going through a probate proceeding, such as a joint tenancy interest in real property or a beneficiary designation on a life insurance policy.

4. "Creditors' claims" refers to claims owed to a creditor by the probate estate for goods or services provided to the Decedent before his death.

5. "Business assets" includes the cash, inventory, equipment, real estate, accounts receivable, and goodwill owned by Doe & Roe, Inc.

6. Decedent's residence is that property known as 3030 Sunbelt Street, Los Angeles, California, 90000.

7. "Action" means the Superior Court for the State of California, for the County of San Diego, Probate Department Case No. P1234.

8. "Estate taxes" refers to federal and California estate tax.

II. RECITALS

1. Decedent executed the Last Will and Testament of Richard Doe ("the Will") on August 14, 1998. The Will included a provision permitting Jane to live in Decedent's residence until such time as Jane was able to purchase her own residence.

2. Decedent thereafter executed a Codicil to the Last Will and Testament of Richard Doe on February 27, 1999 ("Codicil"). The Codicil gave Jane $100,000 and 10 percent of all of the residue of the probate estate, free of all estate taxes. The Codicil did not refer to the provision in the Will allowing Jane to remain in the residence until such time as Jane was able to purchase her own residence.

3. In the last year of Decedent's life, Scott performed various services for the Decedent, including but not limited to the administration of his medication, payment of his bills, and providing transportation for Decedent. The Decedent did not compensate Scott for these services during the Decedent's lifetime.

4. Decedent died on September 10, 2004. His probate estate is being administered in San Diego Superior Court, Case No. P1234 (the "Probate").

5. Disputes have arisen between Jane and Scott regarding Scott's administration of this Estate ("Disputes"), including but not limited to the following:

a. Petition for a Family Allowance, on behalf of Jane and Richard II, filed by Jane on October 8, 2004;

b. Creditor's Claim, filed by Scott on October 23, 2004 for payment for services performed for Decedent;

c. Petition for Construction of the Will, filed by Scott on November 1, 2004, in which Scott claims that Jane is entitled only to the $100,000 gift and 10 percent of the residue of the probate estate left to her by Decedent in the Codicil, and that she is not entitled to live in the residence of the Decedent until she can afford to purchase a residence of her own;

d. Response to Petition for Construction of the Will, filed by Jane on November 10, 2004, in which Jane counterclaims that because Decedent made no reference in the Codicil to the provision allowing Jane to remain in Decedent's residence, that provision remains in full effect, even though Jane also receives a gift, free of estate taxes, in the amount of $100,000 and 10 percent of the residue of the probate estate.

All of the foregoing matters were originally filed in, or have been consolidated for trial in the Probate Court.

6. As a result of Decedent's death, Scott, individually and as executor, and Jane filed a wrongful death action entitled *Estate of Richard Doe, et al. v XYZ*, Los Angeles Superior Court case no. X9999 (Central District). This case is still pending.

7. All Parties have reviewed and are familiar with the federal estate tax return (Form 706) that Scott filed as a result of Decedent's death.

8. All Parties have reviewed and are familiar with the inventories that Scott has filed in the Probate.

9. The probate estate included Decedent's interests in a certain business known as Doe & Roe, Inc.

10. All Parties are aware that nonprobate transfers of assets have been made to certain of the Parties as a result of the Decedent's death, such as by beneficiary designation.

11. The Parties mediated their differences on February 11, 2005, before the Honorable J.J. Jones (Ret.) ("Judge Jones"). This agreement is a result of that mediation.

12. The Parties intend to fully and finally settle and resolve their Disputes regarding all property ever owned, claimed, or possessed by Decedent, including but not limited to all assets properly included in Decedent's gross estate on the federal estate tax return (Form 706) filed as a result of his death, together with all assets properly inventoried in the probate estate, including all later discovered assets belonging to the probate estate, and settle all claims brought in the Disputes in their totality without the further expenditure of time and expense on presently pending or future litigation, and for that reason have entered into this Agreement.

13. Each Party warrants and represents to the best of his or her actual knowledge that he or she has made a full and fair disclosure of all assets owned by the Decedent or that could be claimed as part of the Decedent's probate estate, or that would be required to be included on the Decedent's federal estate tax return, including the assets listed in the attached property declaration (Exhibit "A").

In consideration of the mutual promises and agreements of the Parties specified here, the Parties agree as follows:

III. RELEASE AND AGREEMENT

This Agreement is made under the terms and provisions of California Evidence Code §§1123 and 1152. This Agreement is admissible and subject to disclosure for any purpose to enforce or uphold the terms of this settlement, and this document is fully binding on all Parties.

Incorporating all of the above as though set forth in full herein and in consideration of all the recitals, warranties, mutual covenants and agreements contained in this Agreement, the Parties agree as follows:

1. Distributions to Jane, payable no later than ten days after the effective date of this Agreement, as set forth below:

a. Fifty thousand dollars in cash;

b. Twenty-five percent of the residue of the probate estate;

c. The right to reside in Decedent's residence until June 1, 2005.

2. Distributions to Richard II, payable no later than 10 days after the effective date of this Agreement, as set forth below:

Fifty thousand dollars to be held by William, as custodian, in a blocked account, until Richard II reaches his eighteenth birthday.

3. Distributions to Scott, payable no later than 10 days after the effective date of this Agreement, as set forth below:

Seventy-five percent of the residue of the probate estate.

4. *Estate Taxes.* Federal and California estate taxes shall be prorated as provided by California law.

5. *Family Allowance Payments.* Family Allowance payments will cease on June 1, 2005. No family allowance payment shall be charged against any person's distributive share of the residue of the probate estate.

6. *Nonprobate Transfers.* All nonprobate transfers are confirmed. No nonprobate transfer will be charged against any person's distributive share of the residue of the probate estate.

7. *Cooperation.* This Agreement is subject to the approval of the Probate Court. Each Party to the Agreement agrees to cooperate so that the Agreement can be presented to the court as quickly as possible. If the Agreement is not approved by the Probate Court, then on its disapproval, the Parties will occupy the same positions, with the same rights, duties, and privileges they had on February 11, 2005.

8. *Release.* The Parties to this Agreement on their own behalf and on behalf of their heirs, predecessors, successors, assignees, attorneys, insurers, trustees, executors, trust beneficiaries, and any other agents or representatives hereby and forever release and discharge one another and each Party to this Agreement and any and all of their heirs, agents, predecessors, successors, assignees, attorneys, insurers, trustees, executors, trust beneficiaries, and other agents or representatives in their fiduciary, individual, or beneficiary capacity, from any and all past, present, or future claims, demands, entitlements, obligations, indebtedness, damages, losses, lawsuits, costs, liabilities, expenses, and/or demands of any kind, whether known or unknown, now existing or that might arise hereafter, based on any acts or omissions to act that have taken place at or before the effective date of this Agreement between the Parties or that relate to, arise out of, or are in connection with the facts and statements set forth in the Recitals, including all allegations contained in or that could have been contained in San Diego Superior Court Case No. P1234, except for the terms and obligations specifically contained in this Agreement.

9. *General Release.* It is understood and agreed that this Agreement constitutes a general release by each of

the Parties in favor of each of the other Parties and shall be effective as a full and final accord and satisfaction, and as a bar to all actions, causes of action, costs, expenses, attorney fees, damages, claims for sanctions, claims for malicious prosecution by any Party or their counsel, or any other claims or liabilities whatsoever, whether or not now known, suspected, claimed or concealed, with respect to all issues, claims, and disputes raised by the facts set forth in the Recitals. The Parties acknowledge that they are familiar with California Civil Code §1542, which provides as follows:

> **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.**

_ _[*Party 1*]_ _ _ _[*Party 2*]_ _ _ _[*Party 3*]_ _ _ _[*Party 4*]_ _ _ _[*Party 5*]_ _

10. *Waiver Separately Bargained For.* The Parties acknowledge that the foregoing waiver was separately bargained for and is a key element of the Agreement, of which their releases are a part.

_ _[*Party 1*]_ _ _ _[*Party 2*]_ _ _ _[*Party 3*]_ _ _ _[*Party 4*]_ _ _ _[*Party 5*]_ _

IV. GENERAL PROVISIONS

1. *Joint Preparation.* This Agreement was jointly prepared by the Parties, and if any uncertainty or ambiguity exists, there shall be no legal presumption that the uncertainty or ambiguity is to be construed in favor of, or against, any Party. Judge Jones shall retain jurisdiction to resolve all disputes that may arise regarding this Agreement, with his decision as arbitrator to be final, without appeal. While the probate estate is open, the executor shall advance the fees or costs demanded by the arbitrator. After the probate estate has closed, the Party seeking the arbitration shall advance the fees or costs demanded by the arbitrator. In either case, the arbitrator's fees and costs, and the fees and costs (including expert witness fees) of the prevailing Party shall be awarded by the arbitrator as he or she determines. Each Party is aware that this provision waives any right the Party otherwise would have to litigate in the probate court with rights of appeal. If Judge Jones is unable or unwilling to act as arbitrator, then the Parties will agree on an arbitrator or, if they cannot agree, the probate court shall appoint a replacement arbitrator.

2. *Good Faith Cooperation.* Each of the Parties shall execute any and all further documents and take any and all further action that reasonably may be necessary or required to effectuate the provisions and purposes of this Agreement.

3. *Independent Advice.* The Parties represent and declare in executing this Agreement that they rely solely on their own judgment, belief, and knowledge, and the advice and recommendations of their own independently selected counsel, concerning the terms and effect of the Agreement, that they have not been influenced to any extent whatsoever in executing the same by any representations or statements made by any Party or by any person representing him or her and that they have made their own investigation of the facts relating to the matters released here. Each of the Parties to this Agreement, having been advised by their own independently selected counsel, and having been fully apprised of any potential conflicts of interest, knowingly and voluntarily waive any potential conflicts of interest with respect to representation in these proceedings and specifically with respect to entering into this Agreement.

4. *No Waiver Concerning Executor.* The executor is not releasing or waiving any claim against any Party. No Party is releasing or waiving any claim against the executor.

5. *No Representations regarding Tax Consequences.* All Parties acknowledge that no representation or guarantee regarding the tax cost, tax liabilities, or tax consequences of any kind is made by any Party to any other Party, and no Party can avoid this Agreement (or any part of this Agreement) or set aside this Agreement (or any part of this Agreement) based in any way on any tax costs, tax liabilities, or tax consequences, or any claim that taxes imposed or claimed by a taxing entity to be owed are contrary to the Party's assumptions, belief, or predictions.

6. *Choice of Law.* This Agreement shall be governed by, construed under, and enforced in accordance with the laws of the State of California.

7. *Severability Agreement.* The invalidity or unenforceability of any provision of this Agreement shall in no way affect the validity or enforceability of any other provision of this Agreement. Any such provision found to

be invalid is severable from the remaining provisions of this Agreement.

8. *Nonwaiver Provision.* No breach of any provision of this document can be waived unless in writing. Waiver of any one breach shall not be deemed to be a waiver of any other breach of the same or any other provision here. No delay or omission by a Party in the exercise of any of its rights or remedies constitutes a waiver of (or otherwise impairs) such right or remedy. A consent to or approval of an act does not waive or render unnecessary the consent to or approval of any other or subsequent act. This Agreement may be amended only by a written agreement executed by the Parties in interest at the time of the amendment.

9. *Dismissal of Actions.* All Parties to this Agreement _ _[*or name*]_ _ shall take off calendar with prejudice and cease to prosecute all claims, demands, objections, obligations, or causes of action pending in the Action (regardless of whether such claims, demands, obligations, or causes of action were brought in the form of a petition, objection, motion, application, opposition, response, declaration, or any other form of pleading that can be filed with the court).

10. *No Admission of Liability.* This Agreement shall not constitute an admission of liability, culpability, negligence, or wrongdoing and shall not be construed for any purpose as an admission of liability, culpability, negligence, or wrongdoing by any of the Parties, or their present or former agents, predecessors, successors, assignees, attorneys, insurers, heirs, trustees, executors, trust beneficiaries, and/or any other person acting by, through, under, or in concert with each or any of them.

11. *Integration Provision.* This Agreement constitutes the entire and final agreement between the Parties pertaining to the subject matter, and fully integrates and supersedes any and all prior understandings, representations, warranties, negotiations and agreements between the Parties, or any of them, pertaining to the subject matter of this document.

12. *Exclusion Agreement—Wrongful Death Action.* This Agreement is not intended to and does not effect a release or waiver of any claims or any Party that could be presented in any wrongful death action against third persons or others not a Party to this agreement concerning Decedent's death, or to constitute in any way an allocation of damages between the Parties in any such action, or to be a release or waiver for any person or entity not a Party or signatory to this Agreement. Specifically, this Agreement is not a release or waiver of any right or claim in the wrongful death case and is not an allocation of damages in that case.

13. *Mediated Settlement.* By signing this Agreement, each Party, attorney, or law firm participating in the mediation and whose signature appears below acknowledges and agrees that he or she has read this document and understands that this document is intended (1) to memorialize the settlement arrived at during mediation as modified and clarified in this agreement, and (2) to be a written settlement agreement that, subject to all the terms in it, resolves the disputes and the various claims made concerning the disposition and division of the property subject to this Agreement, and all other matters set forth here, and that this Agreement is entered into freely, voluntarily and without duress.

14. *Confidentiality.* The Parties agree that the terms of this Settlement Agreement shall be confidential. Any disclosure of any confidential information shall be deemed a material breach of this Settlement Agreement and shall trigger a Party's right to liquidated damages as provided above.

15. *Binding Effect.* This Agreement shall be binding on and inure to the benefit of the Parties and their respective assigns and successors.

16. *Authority to Enter into Agreement.* Each Party represents and warrants that no other person or entity has or had any interest in the claims, demands, obligations, or causes of action referred to in this Agreement, that he or she has the full right and exclusive authority to execute this Agreement, and that he or she has not sold, assigned, transferred, conveyed, or otherwise disposed of any of the claims, demands, obligations, or causes of action referred to in this Agreement.

17. *Waiver of No Contest Clause.* The Parties to this Agreement have agreed that with respect to all claims, demands, objections or causes of action pending in this Dispute, no Party has triggered the application of the No Contest Clause contained in the Will of Decedent.

18. *Each Party to Bear Own Fees and Costs.* Each Party to this Agreement is responsible for the payment of his or her own legal fees and expenses and any and all other sums that have been expended in connection

with the Action or this Agreement.

19. *Waiver of Independent Counsel.* Each Party has had a sufficient opportunity to seek the advice of independent counsel of his or her own choosing. No Party may deny the validity of this Agreement on the grounds that he or she did not have advice of legal counsel.

20. *Covenant Not to Sue.* The Parties for themselves and their agents, predecessors, successors, assignees, attorneys, heirs, executors, trustees, administrators, insurers, officers, directors, employees and other representatives, covenant and agree that they will forever refrain and forebear from commencing, instituting, or prosecuting any claim, demand, lawsuit, proceeding or action, or in any manner voluntarily aid the commencement, institution or prosecution of any claim, demand, lawsuit, proceeding or action or cause of action, state or federal, against a Party, or the Party's agent, predecessor, successor, assignees, attorneys, heirs, executors, trustees, administrators, insurers, and other representatives with respect to the subject matter of this Agreement based in whole or in part, relating to, or existing, by reason of the transaction, events, occurrences, acts, omissions, or failure to act, of whatever kind or character whatsoever alleged or which could have been alleged in the Recitals section, above. This paragraph does not apply to any action to enforce this Agreement.

21. *Read Entire Agreement.* Each Party, attorney, or law firm whose signature appears below, by signing this Agreement, acknowledges and agrees that he or she has read this document, understands this document to be a written settlement agreement that, subject to all the terms herein, resolves the disputes and the various claims made as set forth in this document, and that this Agreement is entered into freely, voluntarily, and without duress.

22. *Effective Date.* The effective date of this Agreement is the date the Court approves this Agreement.

23. *Signature by Counterparts or Facsimile.* This Agreement may be executed in counterparts by the Parties. All counterparts shall be binding on all Parties, notwithstanding that all Parties are not signatory to the original or same counterpart. The Parties agree to accept signatures by facsimile provided that original executed documents are sent by United States mail to counsel for the other Parties.

Date: _ _ _ _ _ _ __[*Signature*]__
Jane Roe, individually

Date: _ _ _ _ _ _ __[*Signature*]__
John Roe, individually

Date: _ _ _ _ _ _ __[*Signature*]__
William Black, Esq., as Guardian ad litem for Richard Roe II

Date: _ _ _ _ _ _ __[*Signature*]__
Scott Doe, individually and as Executor of the Will

Date: _ _ _ _ _ _ __[*Signature*]__
Pamela Doe, individually

APPROVED FOR FORM AND CONTENT:

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorneys for Jane and John Roe

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorneys for William Black, Esq., Guardian ad litem for Richard Roe II

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorneys for Scott Doe and Pamela Doe

Comment: The attorney must be sure that each provision of the agreement is appropriate and edited to apply to the particular case. The attorney may or may not want or need court approval of the settlement agreement. See chap 12.

As the dismissal of actions clause provides, the settlement agreement should require the relevant party to dismiss pending litigation with prejudice.

An integration provision may require a specific reference to a prior agreement if there are special circumstances, such as a signed facilitation agreement, a letter agreement, a letter of intent, or an oral agreement preceding the written settlement agreement.

A confidentiality provision may be inserted if desired by the parties to an agreement. For problems that may arise with confidentiality provisions and proposed solutions to them, see §11A.56. Counsel must also consider how to obtain court approval without filing the agreement.

The warranty that each party has authority to enter into the agreement may become important and should always be included in a settlement agreement.

If a party to the agreement is not represented by legal counsel, signature blocks should be added to paragraph IV.19.

A covenant not to sue may be helpful in recovering costs and attorney's fees if the client is subsequently sued, especially if the subsequent lawsuit is specifically described in the covenant, and the covenant explicitly provides for the right to recover costs and fees. Note that a court may determine that a "release" and a "covenant not to sue" are different.

Signature blocks may be advisable following paragraph IV.21.

For issues to keep in mind when designating an effective date for the agreement, see §11A.59.

All signatories to the settlement agreement should not necessarily be covered by the release. For example, if the heirs have filed claims against each other, but not against the executor or other fiduciary, the fiduciary should not be released from liability. If an heir or beneficiary has filed a claim against the fiduciary, and the settlement includes a resolution of that claim, it would be appropriate to release the fiduciary from liability for that claim.

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12

Trust and Probate Litigation Settlement Issues

Thomas W. Latham

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§12.1 I. INTRODUCTION

Settlement of probate and trust disputes shares many of the characteristics of settlement of civil disputes generally. There are some special factors, however, that are commonly encountered in negotiating settlements of probate and trust litigation: division of property among adverse parties, tax ramifications of alternative settlement scenarios, and emotional barriers to settlement. In addition, probate and trust settlements will frequently be subject to court review and approval, either because approval is required by law or because a fiduciary desires approval to obtain protection from future complaints by beneficiaries. For discussion on negotiating and settlement, see chap 11A.

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II. SETTLEMENT ISSUES COMMONLY ENCOUNTERED IN PROBATE AND TRUST LITIGATION

§12.2 A. Dividing Real Property

Some parents envision that their children or grandchildren will happily enjoy together the legacy of the family homestead. Others may have invested the bulk of their net worth in real property, leaving little else to pass along to the family. The expectation that a family group will be peaceful co-owners of real property is frequently unrealistic. In these situations, the beneficiaries will need procedures for avoiding or terminating co-ownership of the real property.

One approach is to sell the real property and divide the proceeds. This approach has the virtue of avoiding controversy over an uncertain value; the property's value is determined on the open market. Any beneficiary who believes that the property is being sold at too low a figure can be a bidder. The disadvantages of this approach include the costs of sale (*e.g.,* the real estate broker's commission), and income taxes on gain in value over the tax basis. Furthermore, this approach will not be satisfactory to a beneficiary who has an emotional attachment to the property.

Another approach is for the beneficiary who wants to retain the property to buy the others out based on an appraised value. This approach avoids the broker's commission but still involves potential income tax on the gain over tax basis on the interests that are sold. Furthermore, the appraisal process may pose its own problems. Will the beneficiaries accept the appraisal that was prepared for the estate tax return as definitive? If there is going to be a new appraisal, how will this affect the valuation used on the estate tax return? Can the adversaries agree on a single appraiser or will some more complicated process be necessary? Who will pay the cost of the appraisal? Finally, this approach may not be feasible if the purchasing beneficiary is unable to fund the purchase price, whether by using his or her own resources, by trading his or her interest in other estate assets, or by obtaining financing on the real property.

A third approach is to conduct an auction among the beneficiaries. The beneficiary making the highest bid buys out the others. This approach avoids a broker's commission, potential disputes over the appraisal process, and the cost of an appraisal. However, it requires the adversaries to agree on an auction procedure, *e.g.,* whether the auction should be conducted by sealed bids or open bidding. Because the effect of an auction is for one beneficiary to buy out the others, this approach involves potential income tax on gain.

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§12.3 B. Dividing Property With Emotional Rather Than Economic Value

Probate and trust disputes often involve fights over who should get what estate property. In a common scenario, the parties negotiate vigorously over the division of hundreds of thousands of dollars of property before grudgingly reaching a settlement. Then, almost as an afterthought, the discussion turns to disposition of a few items of miscellaneous personal property. Within minutes, the settlement has fallen apart because each side demands that a certain vase or other tangible object with emotional value be distributed to himself or herself. When this happens, it can be very difficult to get the settlement back on track. Each side has committed itself to its "final" dollar figure and is unwilling to make a dollar value adjustment to "buy" the valueless item. Yet each side refuses to give the other side a psychological victory by yielding. The valueless item becomes the lightning rod for lingering resentments and the settlement vaporizes due to an impasse over bric-a-brac, to the great frustration of the attorneys and causing self-inflicted expense to the parties.

The way to avoid this negotiation trap is to bring items with emotional value into the settlement discussions at the very first offer. A written list should be used, with an express allocation of all items not expressly listed ("Items 1 and 2 to Party A; all other personal effects to Party B"). In this way, as the economic settlement is hammered out, these items will already have been dealt with.

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§12.4 C. Fixed Sum Negotiations Versus Percentage Negotiations

When the dispute involves distribution of a probate or trust estate, the settlement negotiations can be structured in either of two basic ways.

One way is for one party to be "cashed out" at a specific fixed dollar sum, with the other party to take the rest (which means the second party takes the risk of inaccurate appraisals, incomplete accounting, and future value fluctuations). An advantage to this approach is the certainty for the party who is to receive the fixed dollar sum. Another advantage is that the person receiving the fixed sum waives an accounting, which frees the estate and the other party from a procedure that can be time-consuming and expensive. One disadvantage of this approach is that it may trigger recognition of capital gains for income tax purposes. Another disadvantage is that a fixed sum settlement may not have as much psychological appeal because of suspicions that appraisals are not accurate, or that the other side is receiving property with high appreciation potential. A final disadvantage is that the second party may be taking on an inappropriate risk (of, *e.g.,* future value fluctuations or adverse tax developments). In order to remove any incentive for delay in implementation, the party who is to receive the fixed sum should also receive interest at a reasonable rate from the date of settlement to date of distribution.

The second way is for each side to receive a negotiated percentage of the estate. This approach may have psychological appeal; however, it may pose problems in some cases. For example, if the estate contains real property, adversaries will usually want to avoid becoming co-owners. Furthermore, a percentage negotiation may require that a complete and accurate accounting be prepared, which in some cases may involve substantial expense, delay, and continuing disputes.

The circumstances of each specific case determine whether it is more fruitful to structure the settlement discussions as a fixed sum cash-out or as a percentage distribution.

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III. TAX PLANNING TO FACILITATE SETTLEMENTS IN TRUST AND PROBATE LITIGATION

§12.5 A. Importance of Tax Analysis

Tax savings often play an important role in facilitating settlements in trust and probate litigation. Parties who otherwise might not be willing to settle a case may agree to settle if they can be shown that a portion of the settlement will be provided by tax savings. Estate tax savings are usually paramount; however, income taxes may become a major factor as well.

At the very outset of litigation, counsel should analyze carefully the estate and income tax consequences of each viable claim. This analysis will often reveal substantial differences in after-tax benefits of the various potential claims. Although it is common practice for parties to plead all viable claims, the tax analysis will show which claims deserve to be developed. High priority should be given to claims that involve dramatic tax savings, even if the claims may initially seem weak.

The magnitude of the tax swings in probate and trust cases frequently presents a unique opportunity, not usually available in other civil cases, to structure a settlement that uses tax savings to bridge the gap between the parties. As the case is developed, it often becomes apparent that the most secure way to achieve important tax savings is through settlement rather than continued litigation. Thus, the tax analysis will help not only to shape the overall case strategy and guide the allocation of litigation resources but also will reveal the best settlement structure and may provide the critical element to reaching settlement.

For discussion of deductibility of attorney fees in estate and trust litigation, see §§3.40-3.41.

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§12.6 B. Using Spreadsheets

When different litigation strategies involve different tax impacts, particularly in large estates in which there may be multiple viable claims, it is essential that the attorney develop a spreadsheet program to keep track of the after-tax impact of the alternative strategies. This should be done using a computer-based program such as Excel or Quattro Pro. The spreadsheet analysis should be refined and updated as part of the preparation for settlement negotiations. As proposals and counterproposals are made during the negotiations, the after-tax impact can be quickly determined by making the appropriate adjustments in the spreadsheet program. A party who attempts to negotiate a settlement without some reasonable estimate of the net result after taxes will be unable to determine the true value of the alternative settlement proposals.

NOTE: If the attorney does not have sufficient computer literacy and tax expertise to be able to develop the spreadsheet, then an appropriate person (most likely an accountant) should be added to the team.

The spreadsheet represents an extremely valuable item of work product, and the attorney must decide to what extent, and when, it will be advantageous to share the work product, or information from the work product, with the adverse party. Normally, the spreadsheet analysis will have maximum impact if it is revealed at the pivotal settlement conference or mediation session; this reduces the opportunity for the adversary to figure out other settlement permutations with equally favorable tax results but that favor the adversary. Waiting until this point may undermine the settlement process, however, because the adversary may realize that he or she has failed to properly analyze the tax issues and may cut off settlement discussion until his or her own analysis is completed.

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§12.7 C. Effect of Settlement Agreement on IRS

Although the settlement agreement is often structured to achieve a favorable tax result, a good faith settlement of a bona fide controversy is not conclusive and binding on the IRS, and therefore does not guarantee the tax result. Even a probate court order approving a settlement agreement or a consent decree will not bind the IRS. When application of a federal statute is involved, the IRS is not bound by a state trial court adjudication of property rights or characterization of property interests. *Commissioner v Estate of Bosch* (1967) 387 US 456, 18 L Ed 2d 886, 87 S Ct 1776; *Estate of Wayne-Chi Young* (1998) 110 TC 297 (probate court order determining character of property—joint tenancy versus community property—not binding on IRS). The IRS is not even necessarily bound by an intermediate state appellate court ruling, unless the state law issue has been affirmed by the highest state court. *Commissioner v Estate of Bosch* (1967) 387 US 456, 465, 18 L Ed 2d 886, 894, 87 S Ct 1776.

This is not to say that a probate court order approving a settlement or adjudicating the character of property or distribution rights on uncontested prima facie proof is useless; the order is entitled to "proper regard" in interpreting a will in a bona fide adversary proceeding. 387 US at 464, 18 L Ed 2d at 893. Therefore, as part of the settlement structure, it is usually helpful to seek court approval of the settlement agreement or adjudication of a foundational issue based on uncontested prima facie proof. The settlement agreement is usually made contingent on success in obtaining the desired probate court order. Because the court order is not a guarantee of the tax result, however, the settlement agreement should specify which party will bear the risk if the desired tax benefit is rejected by the IRS.

If no party is willing to bear the risk of the IRS rejecting the desired tax benefit, the settling parties may have to make their settlement contingent on satisfactory resolution of the tax issues with the IRS. However, this approach may leave the settlement contingent for an uncertain and extended period. If such delay is unacceptable to the parties, they may be able to probe the IRS position on an expedited basis by seeking a private letter ruling (PLR). For a detailed discussion of using private letter rulings in the settlement context, see Wyatt, *Scouting for Settlements With IRS Help: Using the PLR Compass*, 12 ABA Prob & Prop 6 (Mar./Apr. 1998).

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D. Examples of Potential Tax Impacts

§12.8 1. Marital Deduction

When there is a distribution dispute between the surviving spouse and other parties, the nonspouse parties may face a major disadvantage. The value of the distribution to the surviving spouse will be sheltered from estate tax due to the marital deduction (IRC §2056). To the extent that the nonspouse parties succeed in pursuing a claim that exceeds the unified credit (IRC §2010), they will be reducing the assets sheltered by the marital deduction and subjecting them to estate tax. After the unified credit has been exhausted, out of each additional settlement dollar that the nonspouse parties fight for, a major portion will go to the tax collectors. The nonspouse parties are often pained to learn they bear 100 percent of their attorney fees, but the tax collectors stand to reap a major portion of the benefit.

PRACTICE TIP: An attempt should be made to alleviate the pain by seeking, as part of the settlement package, court approval of payment of nonspouse attorney fees from the estate as an expense of administration, in hopes of qualifying them as a deduction under IRC §2053. Even with court approval, however, deductibility may be uncertain. See Reg §20.2053-3(a), (c)(3); §12.7.

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§12.9 2. Fractional Interest Discount

When a decedent owns a fractional interest in real property or a fraction of the shares of a closely held corporation, the value of that fractional ownership is generally discounted for estate tax purposes from the proportionate value of the whole, in recognition of various impediments to selling a fractional interest. This is true even when the fractional interest is the decedent's one-half interest in community property and the other one-half interest belongs to the surviving spouse. *Propstra v U.S.* (9th Cir 1982) 680 F2d 1248; *Estate of Bright v U.S.* (5th Cir 1981) 658 F2d 999.

The possibility of a fractional interest discount becomes important when a decedent attempts to leave all of a supposed separate property asset to a nonspouse beneficiary. If the surviving spouse has no community property interest, there is no discount on the value of the asset for estate tax purposes. If the surviving spouse has a viable community property claim, even if only to a small fraction of the ownership interest, the value of the fractional interest treated as the decedent's combined separate and community property interest may be eligible for a substantial valuation discount. In the context of a settlement, the nonspouse beneficiary may achieve substantial tax advantages by reasonable and good faith acquiescence in the surviving spouse's community property claim. The IRS, however, will not be bound by a settlement agreement. See §12.7.

NOTE: The surviving spouse may have a community property claim, for example, when the decedent initially owns all of the shares of a closely held corporation as separate property but the value of the shares increases during the marriage due to the time, talent, and labor of the decedent. *Marriage of Dekker* (1993) 17 CA4th 842, 21 CR2d 642; *Pereira v Pereira* (1909) 156 C 1, 103 P 488; *Van Camp v Van Camp* (1921) 53 CA 17, 199 P 885. The situation may also arise when the decedent owned sole title to real property (such as a residence) before marriage, but community property was used to pay down the mortgage or to make improvements during the marriage. *Marriage of Marsden* (1982) 130 CA3d 426, 181 CR 910.

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§12.10 3. Joint Tenancy Versus Community Property

Spouses frequently hold assets in joint tenancy form, even though the property was acquired with community property assets. Generally, when the predeath tax basis of an asset is lower than its date-of-death fair market value, there is an income tax advantage to treating the asset as community property for estate tax purposes because both halves of the community property receive a stepped-up basis (a new tax basis equal to the value accepted on the estate tax return), whereas only the decedent's one-half interest in joint tenancy property held with a spouse receives a stepped-up basis. IRC §1014. (Note that §1014 will not apply to decedents dying after December 31, 2009. IRC §1014(f).) Thus, the surviving spouse faces a potential income tax on additional gain if the surviving spouse subsequently sells the joint tenancy property interest.

However, joint tenancy property passes to the survivor outside of the will and is generally immune from claims of creditors. *Grothe v Cortlandt Corp.* (1992) 11 CA4th 1313, 15 CR2d 38. Thus, in structuring a settlement when there are viable conflicting claims over whether property should be considered community property or joint tenancy property, a surviving spouse may need to weigh the tax disadvantages of joint tenancy property against the distribution advantages. Beginning July 1, 2001, spouses will be permitted to hold community property with right of survivorship. Property owned in this form apparently retains all the features of community property (including receipt of a new basis on death for both halves under IRC §1014) except that the property passes on death to the survivor, without administration, in the same manner as joint tenancy property. See CC §682.1.

WARNING: The IRS will not be bound by the settlement characterization of the property interest. See §12.7. Joint tenancy deeds create a rebuttable presumption that the property is not community property. *Schindler v Schindler* (1954) 126 CA2d 597, 272 P2d 566. Transmutation of property from joint tenancy to community property requires a writing containing language that expressly states that the characterization or ownership of the property is being changed. Fam C §852; *Estate of MacDonald* (1990) 51 C3d 262, 272 CR 153; *Estate of Bibb* (2001) 87 CA4th 461, 104 CR2d 415 (grant deed conveying separate real property to both spouses as joint tenants satisfies "express declaration" requirement of Fam C §852, but unsigned DMV printout showing automobile previously registered in decedent's name alone reregistered in names of decedent and surviving spouse does not); *Marriage of Barneson* (1999) 69 CA4th 583, 81 CR2d 726 (written request to "transfer" separate property security from one spouse to other does not satisfy "express declaration" requirement); *Marriage of Starkman* (2005) 129 CA4th 659, 28 CR3d 639. See *Estate of Wayne-Chi Young* (1998) 110 TC 297.

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§12.11 IV. COURT APPROVAL OF SETTLEMENTS

Probate and trust litigation provides a fertile field for people to second-guess a settlement entered into by the fiduciary. A fiduciary who wants to be protected from future criticism needs to focus on three issues:

- Does the fiduciary have authority to enter into the proposed settlement without obtaining court approval?
- What should the fiduciary do to obtain protection against claims that the settlement was not advantageous?
- What should the fiduciary do to make sure that beneficiaries who are currently minors or are yet unborn will be bound?

The analysis depends on various factors, including whether the fiduciary is a personal representative (as opposed to a trustee), whether the personal representative has powers under the Independent Administration of Estates Act (IAEA) (Prob C §§10400-10592), and the nature of the claim being settled. Although court approval is not required under some circumstances (see Prob C §10552), fiduciaries will generally obtain the best protection if they obtain court approval. For settlements that may affect (now or in the future) beneficiaries who are minors, or are yet unborn, the fiduciary should seek the appointment of a guardian ad litem to represent those interests in connection with court approval of the settlement in order to obtain protection against future claims.

Even when the court grants an order approving a settlement, the order may be subject to later collateral attack if it was obtained by extrinsic fraud. *Estate of Beard* (1999) 71 CA4th 753, 774, 84 CR2d 276. "Extrinsic fraud includes a false promise of compromise that induces a party to act or refrain from acting in such a way as to deprive the party of a fair opportunity to litigate his or her case." *Estate of Beard, supra*.

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§12.12 A. Probate Settlements

Probate settlements are generally governed by Prob C §§9830-9839 and 9850-9851 (personal representative without IAEA powers), or Prob C §§10501(a)(8)-(9), 10518, 10552, and 10563-10564 (personal representative with IAEA powers). A personal representative with IAEA powers generally has broad authority to enter into settlements without court approval. With or without IAEA powers, however, the personal representative has the duty to use "ordinary care and diligence" in arriving at settlements (Prob C §9600(a)), and generally a settlement must be made in good faith and to the advantage of the estate (*Treharne v Laftin* (1984) 153 CA3d 878, 882, 200 CR 668; *Estate of Lucas* (1943) 23 C2d 454, 464, 144 P2d 340). Thus, in order to obtain protection from future complaints, the personal representative with IAEA powers should consider giving notice of the proposed action or seeking court approval, even if not required, and should consider obtaining the appointment of a guardian ad litem and obtaining court approval when a settlement may affect the current or future interests of minor or unborn beneficiaries.

For a discussion of court approval of settlements of will contest litigation, see §§17.85-17.92.

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§12.13 1. Personal Representative Without IAEA Powers

Probate Code §9830 permits a personal representative without IAEA powers to settle claims for or against the decedent, personal representative, or estate without court involvement, if the settlement is to the advantage of the estate, "[u]nless this chapter or some other applicable statute requires court authorization or approval." The exceptions that require court authorization are so broad, however, that they largely swallow up the general rule:

- **Before time to file creditor claims has expired.** Court authorization is required to settle claims *for* or *against* the decedent, personal representative, or estate if the creditor claims period has not yet expired. Prob C §9831. For purposes of this statute, the creditor claims period means 4 months from the date letters are first issued to a personal representative with general powers. Prob C §§58, 8545, 9100(a)(1), (b).

- **Settlements involving title to or an interest in real property.** Court authorization is required for settlements that affect title to, an interest in, a lien on, or an option to purchase real property (Prob C §9832(a)), except for extensions, renewals, or modifications of certain leases (Prob C §9832(b)).

- **Settlements requiring transfer of estate property or creating estate liability exceeding $25,000 in value.** Court authorization is required for settlements that require transfer or encumbrance of estate property, or creation of an unsecured liability of the estate, exceeding $25,000 in value. Prob C §9833.

- **Settlement of claim by estate against personal representative or attorney.** Court authorization is required for settlement of a claim by the estate against the personal representative or the personal representative's attorney. Prob C §9834(a).

- **Settlement of wrongful death or personal injury claims.** Court authorization is required for settlements of claims for wrongful death or personal injury of the decedent. Prob C §9835.

- **Accepting deed in lieu of foreclosure and granting partial satisfaction or partial reconveyance.** Court authorization is required for a personal representative to accept a deed to property in lieu of foreclosure. Court authorization is also required for the personal representative to give a partial satisfaction or partial reconveyance, unless the partial satisfaction or reconveyance is executed under the terms of the mortgage or deed of trust. Prob C §§9850-9851.

Although a personal representative without IAEA powers may enter into some settlements without court authorization, the personal representative has the *option* to seek court approval (Prob C §9830(b)), and will obtain greater protection from future criticism if a court order is obtained on a properly noticed petition, absent fraud, conspiracy, or material misrepresentation or omission in the petition or order (Prob C §7250). On the procedure to seek court approval, see §12.16.

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§12.14 2. Personal Representative With IAEA Powers

In general, a personal representative with IAEA powers is not required to obtain court approval to settle claims for or against the decedent or the estate, and is not even required to give notice of proposed action to the persons interested in the estate, no matter what the magnitude of the settlement. Prob C §§10550, 10552(b), 10563-10564. There are two primary exceptions:

- **Settlement of decedent's or third party's claim to property.** If the dispute involves a third-party claim to property of which the decedent died with possession or title, or a decedent's claim to property of which a third party has possession or title, a personal representative with IAEA powers must nevertheless at least give notice of proposed action in order to enter into a settlement of the claim. Prob C §§10510, 10518. See Comment to Prob C §10552.

- **Settlement of claims between personal representative or attorney and estate.** Even for personal representatives with IAEA powers, court approval is required to settle claims of the personal representative or attorney for the personal representative against the estate (Prob C §10501(a)(8)), or claims of the estate against the personal representative or attorney (Prob C §10501(a)(9)).

Although a personal representative with IAEA powers may enter into most settlements without giving notice of proposed action and without obtaining court authorization, the personal representative always has the *option* to give notice of proposed action (Prob C §§10580(b), 10589(b)), or to seek court authorization (Prob C §§10500(b), 9830(b)). Either of these procedures will give the personal representative greater protection against future criticism.

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§12.15 a. Notice of Proposed Action by Personal Representative With IAEA Powers

A personal representative who is required, or voluntarily chooses, to give notice of proposed action must give at least 15 days' advance notice by mail or personal delivery using Judicial Council Form DE-165 (Notice of Proposed Action). Prob C §10586. If the personal representative properly gives a valid notice of a proposed settlement, then every heir, devisee, and person who has requested special notice will waive the right to have a court review the settlement unless he or she makes timely objection (Prob C §10590(d)), proves that he or she did not actually receive the notice before the settlement took effect (Prob C §10590(b)), or proves that he or she lacked capacity or was a minor, and that his or her guardian, conservator, or legal representative did not actually receive the notice, did not waive notice, and did not consent to the settlement (Prob C §10590(c)).

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§12.16 b. Procedure for Obtaining Court Authorization

A personal representative who is required, or voluntarily chooses, to obtain court authorization for a settlement must file a petition with the court administering the estate, not the court where the claim is pending (Prob C §9836), showing the terms of the settlement and advantage to the estate (Prob C §9837(b)). At least 15 days' notice of a petition for approval of a compromise, composition, or settlement must be given by the representative in the manner prescribed by Prob C §1220. Prob C §9837(c).

In the case of a settlement accepting a deed in lieu of foreclosure, the advantage must be proved by clear and convincing evidence. Prob C §9850(c). If the personal representative obtains court authorization for the settlement on a properly noticed petition, the personal representative is released from all claims of heirs, devisees, or affected persons, unless the court order is obtained by fraud, conspiracy, or material misrepresentation or omission contained in the petition or order. Prob C §7250. See also *Estate of Beard* (1999) 71 CA4th 753, 84 CR2d 276, in which, in a complex factual and procedural setting, a final order approving a settlement agreement was set aside after one party had breached the settlement agreement without justification. The breach amounted to extrinsic fraud (false promise of compromise that deprives other party of fair opportunity to litigate) and extrinsic mistake (excusable neglect, hardship, or other grounds for failure to press a claim, including reliance on a promise that is subsequently breached).

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§12.17 3. Minors and Persons With Disabilities

If a minor or a person with a disability is a party interested in the estate, court approval may be necessary before a compromise or settlement agreement affecting that person can be made. See Prob C §§2500-2507, 3600-3613. Court approval is required before a guardian may make certain compromises affecting real property in the minor's estate (Prob C §2501) or other property if worth more than $25,000 (Prob C §2502). Disposition of the net settlement proceeds is governed by Prob C §§3602, 3610-3613.

The Probate Code allows several alternatives for disposition of the balance of the funds, depending on whether a guardian or conservator has been appointed. The court can order the balance to be:

- Paid to the guardian or conservator (Prob C §§3602(b), 3611(a));
- Deposited in a "blocked" insured account at a financial institution in California subject to withdrawal only on court order (Prob C §§3602(c)(1), 3611(b));
- Deposited with the county treasurer under specified circumstances (Prob C §3611(h));
- Delivered to a custodian for the benefit of a minor under the California Uniform Transfers to Minors Act (Prob C §§3602(c)(2), 3611(f));
- Transferred to a "special needs" trust (Prob C §§3602(d), 3611(c));
- If for a minor, transferred to a trust revocable by the minor at age 18 (Prob C §§3602(c)(3), 3611(g));
- Held as the court may determine if the balance is less than $20,000 (Prob C §3611(d));
- Delivered to a parent of a minor without bond under conditions specified in Prob C §§3400-3402, if the balance is $5000 or less (Prob C §3611(e)); or
- Delivered to the person with the disability (Prob C §3611(i)).

Except to the extent the court orders otherwise, the court has continuing jurisdiction of the money or property paid, delivered, deposited, or invested for a minor until the minor reaches the age of 18. Prob C §3612(a). However, the court will maintain continuing jurisdiction over the trusts of certain persons with a disability even after those persons reach the age of 18 until jurisdiction is terminated by the court. Prob C §3612(b). When dealing with an adult who has the capacity to consent and who has no conservator of the estate authorized to do so, the court may not act under Prob C §§3600-3612 without the express consent of that adult. Prob C §3613.

A special-needs trust may be established only if the court determines that the minor or incompetent person has a disability that substantially impairs the individual's ability to provide for his or her own care or custody and that the minor or incompetent person is likely to have special needs that will not be satisfied without the trust. The amount paid to the trust may not exceed the amount that is reasonably necessary to meet the minor or incompetent person's special needs. Prob C §3604(b).

A trust funded by court order under Prob C §§3600-3613 must remain under continuing court jurisdiction, and prior court approval or subsequent confirmation of certain actions of the trustee may be required. Cal Rules of Ct 7.903(a)-(b). Further, the trust instrument must include provisions as specified unless the trust assets are $20,000 or less. Cal Rules of Ct 7.903(c)-(d).

Counsel should be aware, however, that approval by the court of a special needs trust does not ensure that the plaintiff's public benefits are preserved. Poor drafting of the special needs trust could result in the trust being considered a "nonexempt resource," thus disqualifying the beneficiary from benefits such as Medi-Cal and Supplemental Security Income. Careful evaluation should be made of mechanisms other than a special needs trust that will protect the plaintiff's public benefits. For detailed discussion of special needs trusts, see Drafting California Irrevocable Trusts, chap 13 (3d ed Cal CEB 1997).

When the Department of Health Services (DHS) has provided health care to the beneficiary of a special needs trust, DHS usually has the right to be reimbursed out of the trust on the beneficiary's death. However, there is no such right of reimbursement if the trust property passes to an individual who is a disabled person within the meaning of §1614 of the Social Security Act (42 USC §1382c). *Shewry v Arnold* (2004) 125 CA4th 186, 22 CR3d 488.

A trust under Prob C §§3602(c)(3) and 3611(g) for a minor who does not require a special needs trust may be very useful. The terms of the trust can be tailored to the child's situation and requirements. A trust allows much more flexibility than either a guardianship of the estate or a transfer under the California Uniform Transfers to Minors Act (Prob C §§3900-3925). Although the trust is revocable by the minor when he or she has attained the age of 18, there still remains the opportunity for the child to allow the trust to continue for a period of years after reaching 18. The trust's established structure of investments and distributions could benefit an immature or unsophisticated beneficiary in the early years of his or her majority.

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§12.18 B. Trust Settlements

Except to the extent that the trust instrument provides otherwise (Prob C §§16000, 16200), a trustee has the duty and power to enforce, defend, and settle claims by or against the trust (Prob C §§16010-16011, 16242(b)), without obtaining court authorization (Prob C §16200), using reasonable care, skill, and caution (Prob C §16040(a)). Thus, the position of a trustee is somewhat similar to that of a personal representative with IAEA powers: broad authority to settle claims without court authorization. As with personal representatives holding powers under IAEA, however, in order to obtain protection from future criticism, it is generally advisable for a trustee to obtain court approval of any proposed settlement, and certainly those of substantial import.

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§12.19 1. Procedure for Obtaining Court Authorization

A trustee seeking court authorization of a settlement must file a petition under Prob C §17200(b)(6) for instructions. The petition is filed in the county where the principal place of administration of the trust is located, or, in the case of a testamentary trust, if preferred, where the decedent's estate was administered (Prob C §17005(a)). Generally, 30 days' notice of the hearing on the petition will be required. Careful attention must be given to the notice requirements. Prob C §§17203, 17100, 1200-1212; Cal Rules of Ct 7.51. Probate Code §17203(a)(2) requires notice to "[a]ll beneficiaries, subject to Chapter 2 (commencing with Section 15800) of Part 3." Of primary relevance is Prob C §15804, which obviates notice to certain future contingent beneficiaries. Notice of the hearing must be given using Judicial Council Form DE-120 (Notice of Hearing-Decedent's Estate or Trust). See Prob C §1211. The petition must provide information about the settlement sufficient to justify the court granting an order approving the trustee's proposed action.

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§12.20 2. Binding Minor and Unborn Beneficiaries

By their very nature, trusts often designate classes of beneficiaries that contain minor and unborn beneficiaries. Sometimes the interest of these beneficiaries is contingent, *e.g.*, when the trust requires that they outlive a prior beneficiary. If the trustee has decided to seek court approval of a settlement, the surest way to have confidence that the court order will bind these beneficiaries is to seek appointment of a guardian ad litem and to give proper notice of the hearing to the guardian ad litem.

Appointment of the guardian ad litem is made under Prob C §1003, based on the court's finding that representation of the interest of a minor, an incapacitated person, or an unborn person would otherwise be inadequate. The mere appointment of a guardian ad litem is not sufficient to protect the trustee from collateral attack, however, if the guardian does not act to protect the interests of the minor and/or unborn beneficiaries. See *Wogman v Wells Fargo Bank* (1954) 123 CA2d 657, 665, 267 P2d 423 (court reversed trial court order terminating trust before expiration of period stated in trust, finding that guardian ad litem appointed for unborn and unascertained heirs failed to act to protect their remainder interests). Thus, the trustee should not propose a guardian whom the trustee expects to act as a rubber stamp.

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Accountings and Surcharge

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I. TRUSTEE'S DUTY TO ACCOUNT AND REPORT INFORMATION

§13.1 A. Scope of Duty

The scope of a trustee's duty to account and to report information is governed generally by Prob C §§16060-16064 (general and specific duties, and exceptions), 15800, 15802-15805 (beneficiaries entitled to notice), and the provisions of the trust instrument concerning accounting and reporting of information.

The trustee's statutory duties vary depending on whether the trust is a revocable trust, an irrevocable trust, or a testamentary trust still subject to continuing court supervision. Furthermore, the duties can be modified by the terms of the trust instrument so as to be more stringent against the trustee. See Prob C §16000 (trustee required to administer trust according to trust instrument). Alternatively, the statutory duties can be modified by the terms of the trust so as to be more relaxed for the trustee. For example, a trustee usually is not required to report information under Prob C §16061 or to account to a beneficiary under Prob C §16062 to the extent that the trust instrument waives a report or account under Prob C §16064(a).

However, the duty to report or account by a sole trustee who is a "disqualified person" under Prob C §21350.5 cannot be validly waived by the trust instrument. Prob C §16064(a). Even when the trust instrument waives the duty to account, a court may compel the trustee to report and account on a showing that a material breach of trust is reasonably likely to have occurred. Prob C §16064(a).

Furthermore, under Prob C §16060 a trustee has an affirmative duty to keep the beneficiaries reasonably informed of the trust and its administration. There is a reasonable argument that this duty cannot be waived by the trust instrument. Whereas Prob C §16061 (reports) and §16062 (accounts) both start with the limiting clause "except as" provided in §16064 (regarding waivers), Prob C §16060 contains no such proviso. Additionally, the Law Revision Commission Comments to Prob C §§16061 and 16062 both refer to the exceptions under Prob C §16064, but the Comment to Prob C §16060 makes no reference to any waiver. Instead, the Comment refers to *Strauss v Superior Court* (1950) 36 C2d 396, 224 P2d 726, which held that the trustee's records as to the administration of a trust are deemed part of the trust estate, which means that beneficiaries have a right to inspect the records due to their common interest in the property along with the trustee. There is no suggestion that this right is subject to limitation by the trust instrument. Indeed, the Comment states without limitation that "[t]he trustee is under a duty to communicate to the beneficiary information that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights under the trust or to prevent or redress a breach of trust."

The duty to provide information under Prob C §16060 is independent of, and potentially broader than, the duty to account under Prob C §16062. "The duty to provide information under Section 16060 is not necessarily satisfied by compliance with Section 16062." Comment to Prob C §16062.

Regardless of whether in a given instance a trustee has an affirmative duty to report information or to account, it is often in the best interests of the trustee as well as the beneficiaries for the trustee to report information and to account voluntarily on a regular basis. When a trustee fails or refuses to report and account, secrecy tends to breed suspicion. Good communication is crucial to building a good relationship between a trustee and its beneficiaries. The act of preparing a report or account may lead a trustee to discover a mistake soon enough so that damage may be avoided or minimized. By mitigating the risk of future controversy and liability, the trustee protects the interest of all beneficiaries in preserving the trust estate. Finally, a trustee who withholds information deprives himself or herself of the potential protection of the statute of limitations. See §13.19.

On the other hand, there may be instances when settlor or beneficiary concerns about privacy may suggest restraint as long as the trustee would not be breaching a statutory duty or a term of the trust by withholding information.

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§13.2 1. Revocable Trust

Except to the extent the trust instrument otherwise provides, during the time that a trust is revocable and the person holding the power to revoke is competent, the trustee does not have a statutory duty to report information to, or account to, beneficiaries other than the holder of the power to revoke. Prob C §§15800, 16064(b). If the settlor becomes incompetent and has had a conservator appointed, the beneficiaries are still not entitled to receive information or accounts, because the settlor's conservator holds the power to revoke the trust and the beneficiaries' interest in it. *Johnson v Kotyck* (1999) 76 CA4th 83, 90 CR2d 99. For criticism of *Johnson,* see 21 CEB Est Plan Rep 88 (Dec. 1999).

When a revocable trust becomes irrevocable, the beneficiaries may be able to compel an account, on a proper showing, for the period when the trust was revocable. *Evangelho v Presoto* (1998) 67 CA4th 615, 624, 79 CR2d 146 (accounting ordered when evidence showed that appellant moved trust funds to joint checking account, used that account for personal expenses, and wrote checks on trust account after she ceased to be trustee).

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.3 2. Irrevocable Trust

§13.3 2. Irrevocable Trust

The trustee has a statutory duty to give written notice in either of these two situations (Prob C §16061.7(a)(1)-(2)):

- A revocable trust (or any portion of it) becomes irrevocable because of the death of a settlor or because the trust becomes irrevocable within one year of the death of the settlor because of a contingency related to settlor's death as expressly stated in the trust; or
- There is a change of trustees of an irrevocable trust.

In the first situation, when the event triggering the notice requirement is the death of a settlor or the above-described contingency related to the settlor's death, the trustee must give notice to the beneficiaries (except for certain contingent future beneficiaries under Prob C §15804) and to the heirs of the deceased settlor. Prob C §16061.7(b)(1)-(2). The notice must include the identity of the settlors; the date of execution of the trust; the name, mailing address, and telephone number of each trustee; the principal place of administration of the trust; any other information expressly required by the trust; a notice that the recipient is entitled to a copy of the terms of the trust; and a warning in a separate conspicuous paragraph of the 120-day limit under Prob C §16061.8 on actions to contest the trust. Prob C §16061.7(g), (h).

A notice that omits information required by Prob C §16061.7(g) may nonetheless be valid if the beneficiaries and heirs already knew that information. *Germino v Hillyer* (2003) 107 CA4th 951, 132 CR2d 478 (notice that failed to say that recipients were entitled to terms of the trust was valid, because trustee had already given them copies of trust instrument). The trustee must, however, comply with the warning requirement described in Prob C §16061.7(h). *Harustak v Wilkins* (2000) 84 CA4th 208, 100 CR2d 718 (notice defective because warning in 12-point type is not reasonable equivalent of warning in 10-point boldface type).

In the second situation, when a change of trustees of an irrevocable trust occurs, the successor trustee must give notice to the beneficiaries (except for certain contingent future beneficiaries under Prob C §15804). The notice in this situation must include all the same information as that required on the death of the settlor (Prob C §16061.7(g)), except that no warning of the 120-day time limit on actions to contest the trust is required (see Prob C §16061.7(h)).

When a revocable trust or any portion of it becomes irrevocable, the trustee has a statutory duty to provide a copy of the irrevocable portions of the trust to the beneficiaries and heirs of a deceased settlor who request a copy. If the trustee does not know of any final judicial determination of the heirship, the trustee has discretion to make a good faith determination by any reasonable means of the heirs. Prob C §16061.5.

When the trustee fails to give notification to a known beneficiary entitled to notice, the trustee is responsible for all damages, attorney fees, and costs caused by the failure unless the trustee has made a reasonably diligent effort to comply with the notification requirements. If the failure affects a known heir, the trustee is responsible for all damages (but perhaps not attorney fees) unless the trustee has made reasonably diligent efforts to comply. Prob C §16061.9.

The trustee of an irrevocable trust also has a statutory duty to keep the beneficiaries reasonably informed of the trust and its administration. Prob C §16060. On reasonable request by a beneficiary, the trustee of an irrevocable trust has a statutory duty to provide a report of information about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and particulars relating to the administration of the trust that are relevant to the beneficiary's interest. Prob C §16061. A "beneficiary" of a trust refers to any person who has any present or future interest, vested or contingent. Prob C §24(c).

Even if no beneficiary has made a request for information or an account, the trustee of an irrevocable trust generally has an affirmative statutory duty to account at least annually, at the termination of the trust, and on a change of trustee, to at least some beneficiaries—those to whom income or principal is required or authorized in the trustee's discretion to be currently distributed. Prob C §16062(a). This affirmative statutory duty to provide an unrequested annual account to certain beneficiaries does not apply to a living trust created by an instrument executed before July 1, 1987, nor to a testamentary trust created by a will executed before July 1, 1987, unless the testamentary trust was removed from continuing court supervision. Prob C §16062(b)-(c). The affirmative statutory duty to provide unrequested annual

accounts under former Prob C §1120.1a (repealed by Stats 1986, ch 820) for testamentary trusts created under a will executed before July 1, 1977, continues to apply if the testamentary trust was removed from continuing court supervision. Prob C §16062(d).

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.4 3. Testamentary Trust Subject to Continuing Court Supervision

§13.4 3. Testamentary Trust Subject to Continuing Court Supervision

The trustee of a testamentary trust that was not removed from continuing court supervision under former Prob C §1120.1a (repealed by Stats 1986, ch 820) was permitted to seek court approval of periodic reports and accounts under former Prob C §1120 (repealed by Stats 1986, ch 820). It has been customary, although not mandated by former Prob C §1120 nor current Prob C §§17301 and 17200(b)(5), that the trustee seek court approval of accounts on a biennial basis, or sometimes on an annual basis.

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§13.5 B. Effect of Beneficiary Waiver of Account

A trustee's duty to report information or to account to a particular beneficiary may be waived in writing by that beneficiary. Prob C §16064(c). The waiver applies only to that beneficiary, however (except, perhaps, when the doctrine of virtual representation embodied in Prob C §15804 comes into play; see §13.8). Furthermore, since the beneficiary can withdraw the waiver in writing at any time, the waiver is effective for, at most, only a temporary or indeterminate amount of time. Prob C §16064(c).

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.5A C. Exculpatory Provision in Trust Instrument

§13.5A C. Exculpatory Provision in Trust Instrument

A provision in a trust instrument that releases the trustee from liability if a beneficiary fails to object to an item in an interim or final account or other written report is effective if all of the following conditions are met (Prob C §16461(c), effective January 1, 2005):

- The account or report adequately discloses the item (see also Prob C §16461(e));
- The period for the beneficiary to object is not less than 180 days; and
- The beneficiary is given written notice of the opportunity to object in the format (12-point boldface type) and with the content prescribed in the statute.

Other affected beneficiaries may join the original objection within the specified time; however, this provision is not intended to establish a class of beneficiaries for an action on account or report. Prob C §16461(f).

If the trust instrument creates an ineffective objection period, *i.e.,* less than 180 days, the trustee may still elect to be governed by Prob C §16461(c), and "180 days" will be substituted for the ineffective period. Prob C §16461(d). See §5.21A.

A beneficiary who fails to object in writing within the required period to an account or report that complies with Prob C §16461(c) is barred from asserting any claim against the trustee regarding an item that is adequately disclosed in the report or account unless the trustee committed a breach of trust intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary, or derived profit from the trust. Prob C §16461(b), (e), (i). See §5.32.

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D. Trust Account to Beneficiaries

§13.6 1. Contents

When a trustee has a statutory duty to account, but is not required to submit the account for court approval, the content and presentation of the account is governed by Prob C §16063. The account must contain (Prob C §16063(a)):

- A statement of receipts and disbursements of principal and income;
- A statement of assets and liabilities;
- Information concerning the compensation of the trustee and agents hired by the trustee;
- The relationship of the agents to the trustee;
- A statement that the recipient may petition for court review of the account and of the acts of the trustee; and
- A statement that claims against the trustee for breach of trust may not be made after 3 years from receipt of a report or account disclosing facts giving rise to the claim. (But see also Prob C §16461(h), discussed in §5.21A.)

The trustee is not required to use the format that is required for accounts submitted for court approval, however. On the form and content of accounts, see California Trust Administration §§7.71-7.111 (2d ed Cal CEB 2001).

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§13.7 2. Statute of Limitations

Although the statutory duty to account may seem like a burden to a trustee, it should really be viewed as a blessing. An accounting starts a limitations period running for claims of breach of trust if it discloses the facts giving rise to the claims or provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into the existence of the claim. The limitations period is 3 years from receipt of the report or account. Prob C §16460(a)(1). An account or report with sufficient information will trigger the running of the 3-year statute, even though it may not conform to the content requirements of Prob C §16063. Prob C §16460(c). See also *Noggle v Bank of America* (1999) 70 CA4th 853, 82 CR2d 829.

The trust may contain express provisions relieving the trustee from liability if the beneficiaries fail to object within a shortened period that must be at least 180 days, however, after receipt of an account. Prob C §16461(c)-(d) (effective for accounts or reports filed on or after January 1, 2005). See §13.5A. These provisions are ineffective in relieving the trustee of liability for breaches of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiaries, or for any profit that the trustee derives from a breach of trust. Prob C §16461(b), (i). See §5.32. These provisions probably are effective, however, in relieving a trustee of liability for negligent breaches of trust, except liability for profit that the trustee derives from the breach. See Prob C §16461(b).

Compliance with notice requirements regarding objections to an account in Prob C §16461(c) excuses failure to comply with Prob C §16063(a)(6), which otherwise requires notice to beneficiaries of the applicable 3-year statute of limitation period on receipt of an account or report. Prob C §16461(h). See §21.56.

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§13.8 3. Proof of Service

For a trustee to obtain the full benefit of the statute of limitations, or an exculpatory provision shortening the time period for objecting to an account, the trustee should do two things:

First, the trustee should make sure that the time period is running for all potential claimants. This means that the trustee must maintain an accurate and up-to-date list of the name and address of every beneficiary and must ensure that the account is actually delivered to every beneficiary.

PRACTICE TIP: There is a possible argument that some classes of contingent beneficiaries might be barred by the statute of limitations from bringing a claim, even if they did not actually receive a copy of an account. Under the doctrine of virtual representation (codified in Prob C §15804), it is "sufficient compliance with a requirement in this division that notice be given to a beneficiary" by giving notice to current members of the first class of future contingent beneficiaries, without giving notice to current members of a second class of future contingent beneficiaries (beneficiaries who receive benefits on the happening of a second contingent event). Prob C §15804(a)(3). For these purposes, "notice" includes "other papers." Prob C §15804(d). The Law Revision Commission Comment to Prob C §15804(d) notes that subsection (d) was added "to make clear that other papers, such as accounts to beneficiaries under Section 16062, are covered by the rules governing notice in this section." For the cost of an extra stamp, however, a cautious trustee might prefer to mail an account to all beneficiaries, even second-event contingent beneficiaries, to avoid any uncertainty about whether the limitations period has begun to run.

Second, the trustee should maintain a permanent record of the account that was served. The trustee should also maintain permanent documentation that will prove that every beneficiary received a copy of the account, such as a verified proof of service by mail, or, better yet, a beneficiary's written acknowledgment of receipt. A beneficiary is considered to have received the account if it is (Prob C §16460(b)):

- Personally received by a competent adult;
- Received by the legal representative or guardian ad litem of an adult not reasonably capable of understanding the account; or
- Received by the guardian ad litem or parent (if the parent does not have a conflict of interest) of a minor.

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.9 4. Beneficiary Approval and Release

§13.9 4. Beneficiary Approval and Release

In addition to asking each beneficiary to provide a written acknowledgment of receipt of an account (see §13.8), it makes sense for the trustee simultaneously to ask each beneficiary to give written approval of the account and release of liability with respect to matters disclosed in the account. A release is not effective when the beneficiary does not know of his or her rights and of the material facts that the trustee knows or reasonably should have known and that the trustee did not reasonably believe that the beneficiary knew. Prob C §16464. Therefore, even a written approval and release might not provide ironclad protection to a trustee in every case.

On the other hand, a beneficiary's refusal to provide a written approval and release may be an early warning signal that the trustee should find out why, and start working to correct the problem.

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.10 E. Trust Account to Court

§13.10 E. Trust Account to Court

For most trusts, there is no longer a statutory duty for trustees to submit periodic accounts for court approval. See §§13.1-13.4. Under Prob C §17200(b)(5), however, a trustee can choose to seek court approval of his or her accounts.

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.11 1. Contents, Format, and Notice

§13.11 1. Contents, Format, and Notice

The contents and format of a trust account submitted for court approval are governed by Prob C §§1060-1064. Prob C §16063(b). Notice of the hearing on the petition for approval of the account is governed generally by Prob C §§17203-17205 and 1200-1265. Prob C §17100; see Cal Rules of Ct 7.51. The notice period is a minimum of 30 days, and service by mail is generally sufficient for notice to trustees and beneficiaries. On the contents, format, and notice requirements for court accounts, see California Trust Administration §§7.53-7.124 (2d ed Cal CEB 2001).

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§13.12 2. Court Review and Res Judicata

Even if no beneficiary files objections to an account submitted for court approval by a trustee, the court is likely to conduct a careful review. In many of the larger counties, the probate department is supported by a staff of highly experienced and conscientious probate examiners and probate attorneys who conduct the initial review in advance of the hearing date. Very little escapes their scrutiny. When they discover correctable technical faults with the petition or account, a good strategy for counsel is to scramble to correct the problem as quickly as possible (with diligence and luck, quickly enough to avoid a continuance of the hearing date), rather than to argue with the probate department staff. A continuance, at best, is an embarrassment for counsel. Potentially much worse, a continuance may provoke some beneficiaries to question or object to the account themselves.

Among other matters, the court is likely to compare the trustee fees and attorney fees charged during the account period against local court rules of thumb concerning compensation. See, *e.g.,* Marin Ct R 5.84; San Francisco Ct R 14.94.

Even if no beneficiary appears in the proceeding by filing objections, if the court obtains in rem jurisdiction by proper notice under the Probate Code, the order approving the account generally has a res judicata effect. There are limitations, however. The order is not res judicata concerning matters not raised and passed on, or when the order is obtained by extrinsic fraud. See *Lazzarone v Bank of America* (1986) 181 CA3d 581, 226 CR 855 (orders settling accounts entitled to res judicata effect as to trustee negligence and fraud and could not be set aside for extrinsic fraud when trustee had disclosed losses in accounts); *Estate of Schneider* (1979) 95 CA3d 55, 156 CR 838 (orders approving prior annual accounts did not protect trustee who failed to fully report income to trust and compensation to trustee in prior accounts). These limitations are analogous to the limitations expressly set forth in Prob C §7250, which applies to orders in estate proceedings. See §§13.28-13.31. See also *Estate of Beard* (1999) 71 CA4th 753, 774, 84 CR2d 276, for discussion of setting aside a final order when there has been extrinsic fraud or extrinsic mistake.

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.13 F. Trustee's Protective Strategies: Factors in Deciding Whether to Seek Court Approval

§13.13 F. Trustee's Protective Strategies: Factors in Deciding Whether to Seek Court Approval

For the majority of trusts, court accounts are not required in the absence of some beneficiary action to force court review. A trustee, however, can elect to seek periodic court approval of accounts. In deciding whether to seek court approval, the trustee may need to weigh various competing factors, including trust privacy, whether beneficiaries are willing to provide written approvals of the account and releases, and the length of exposure periods.

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§13.14 1. Privacy

Accounts to beneficiaries are not public records. An account submitted for court approval generally is available for public inspection in the clerk's office unless special steps are taken to request that the account be filed under seal and the court is willing to cooperate by granting an order sealing the account portion of the file. Whether privacy is an important issue depends on the particular circumstances of the trust.

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.15 2. Beneficiary Approval

§13.15 2. Beneficiary Approval

If a beneficiary refuses to give written approval of an account and to release the trustee (see §13.8), the trustee should try to find out why. If the beneficiary's complaint appears to be unfounded, if the trustee is uncertain, or if the beneficiary refuses to explain the nature of the complaint, then it may make sense for the trustee to seek closure and certainty by obtaining court approval.

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§13.16 3. Length of Exposure Period

If the trust does not contain an exculpatory provision limiting the time period for beneficiaries to object to an account (see §13.7), then the statute of limitations for accounts to beneficiaries generally is 3 years from receipt of the account or discovery of the breach. Prob C §16460(a). Thus, even when a trustee gives annual accounts to the beneficiaries, the period of uncertainty about exposure may last up to about 4 years from the event (if the event occurs early in the account period). It may make sense for a trustee to shorten the period of uncertainty by seeking immediate court approval.

The choice to shorten the period of uncertainty is particularly appropriate in two circumstances. The first circumstance is when the matter that creates exposure is not a single event but a continuing practice, such as discretionary distributions of principal to a current beneficiary that a remainder beneficiary might oppose as being in excess of the trustee's discretion. If there is going to be exposure for such a continuing practice, the trustee needs to find out before 4 years of distributions have added up.

The second circumstance is when a trustee is resigning, whether on his or her own initiative (see Prob C §15640) or in response to a request by certain beneficiaries that the trust be transferred to a successor trust company (see Prob C §15645). As the resigning trustee exits, it is appropriate for all sides that uncertainties be resolved at that time, whether by beneficiary approvals and releases or by court review.

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G. Compelling Trustee to Account

1. Standing and Grounds to Compel Account

§13.17 a. Requirements of Written Request, 60-Day Wait, and No Account Within Previous Six Months

The trustee has a duty to keep all beneficiaries reasonably informed Prob C §16060. This requires that the trustee communicate information that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights under the trust or to prevent or redress a breach of trust. Comment to Prob C §16060. This duty is apparently not subject to waiver by the trust instrument. See §13.1.

Generally, any beneficiary has a right to obtain financial and other information concerning the trust on reasonable request to the trustee, except to the extent that a trust instrument waives a report (Prob C §16064(a)) or is revocable (Prob C §§15800, 16064(b)). Prob C §16061.

Under Prob C §16062, generally each beneficiary entitled to current mandatory or discretionary distributions has a right to receive accounts, except to the extent that a trust instrument waives an account (Prob C §16064(a)), is revocable (Prob C §§15800), or is subject to certain other exceptions. Prob C §16062(a).

A beneficiary can petition for an order compelling the trustee to report information or to account if (Prob C §17200(b)(7)):

- The trustee has failed to submit a requested report or account within 60 days after a written request by the beneficiary; and
- No report or account has been made within 6 months preceding the request.

Presumably a beneficiary may ground a Prob C §17200(b)(7) petition independently on requests made under Prob C §§16060, 16061, or 16062. In *Esslinger v Cummins* (2006) 144 CA4th 517, 50 CR3d 538, a remainder beneficiary asked the trustee to produce trust documents and to account. Two months later the beneficiary filed a Prob C §17200(b)(7) petition asking the court to direct the trustee to account for the preceding 7-year period, later amended to a 4-year period. The trial court ordered the trustee to prepare formal accounts for the 4-year period. The court of appeal affirmed, holding that although the trustee had no statutory duty to account to the remainder beneficiary under Prob C §16062, the beneficiary was entitled to request information under Prob C §16061, and if the trustee did not reasonably comply, to petition under Prob C §17200(b)(7) to compel an account. See Comment to Prob C §16061 ("A beneficiary who is not entitled to an annual account under Section 16062 may be entitled to information or a particular account under this section [Prob C §16061]").

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§13.18 b. No Requirements on Showing of Reasonable Likelihood of Material Breach

Beneficiaries have standing to petition the court to compel the trustee to report and account on a showing of reasonable likelihood that a material breach of the trust has occurred, even if the trust instrument waives accounts. Prob C §16064(a). Section 16064(a) does not expressly waive the Prob C §17200(b)(7) requirements of a written request, a 60-day wait, and lack of an account within the preceding 6 months. Logic suggests, however, that these requirements should not apply when a breach of trust may have occurred. What need is there for a businesslike period to prepare an account or for avoidance of repetitious accounts when there is a showing that a material breach is reasonably likely to have occurred? Furthermore, the petition in such a situation could be founded alternatively on Prob C §17200(b)(12) (compelling redress of breach of trust), which is not preconditioned on a written request, a 60 day-wait, or the absence of a recent prior account.

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§13.19 c. Statute of Limitations

Before Prob C §§16062 and 16460 were enacted (requiring a trustee to account at specified times, and providing a statute of limitations for breaches of trust), a line of cases held that a trustee's unperformed duty to account was a continuing duty that would not be barred by a statute of limitations, absent an unequivocal repudiation of the trust brought home to the beneficiary. *Estate of De Laveaga* (1958) 50 C2d 480, 487, 326 P2d 129; *Estate of Clary* (1928) 203 C 335, 340, 264 P 242; *Elizalde v Murphy* (1912) 163 C 681, 685, 126 P 978; *Estate of Schneider* (1979) 95 CA3d 55, 60, 156 CR 838. An argument is now available that a beneficiary who is aware of the existence of an express trust and of facts that would trigger the trustee's duty to account under Prob C §16062, may be barred by Prob C §16460 from demanding the account after the lapse of 3 years.

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§13.20 2. Notice

Notice of petitions to compel an account, whether based on Prob C §17200(b)(7) or §17200(b)(12), is governed generally by Prob C §§1200-1265, 15800-15805, 17100, and 17203-17205. See Cal Rules of Ct 7.51. Generally, 30 days' notice of the hearing must be given to all trustees and beneficiaries, and to the attorney general in some cases. On notice in probate litigation proceedings, see chap 9 and California Trust Administration §7.67 (2d ed Cal CEB 2001).

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.21 3. Form: Petition to Compel Trustee to Account

§13.21 3. Form: Petition to Compel Trustee to Account

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[*Title of court*]

In re _ _[*name*]_ _ Trust, Established _ _[*date*]_ _	)	**No. _ _ _ _ _ _**
	)	
	)	**PETITION TO COMPEL TRUSTEE TO ACCOUNT (PROBATE CODE §17200(b)(7))**
	)	**Hearing: _ _[*date*; *time*]_ _**
	)	**Dep't: _ _ _ _**
_____	)	

Petitioner, _ _[*name*]_ _, alleges:

1. Petitioner is _ _[*an/the*]_ _ income beneficiary of the _ _[*name*]_ _ Trust, executed by _ _[*name*]_ _ on _ _[*date*]_ _, a copy of which is attached as Exhibit A and incorporated by reference.

[*Add one of the following alternatives*]

[*Alternative 1: If venue is based on place of administration of the trust*]

2. _ _[*Name of trustor*]_ _ died on _ _[*date*]_ _. Since _ _[*date*]_ _, _ _[*name of trustee*]_ _ has been and currently is the trustee of the _ _[*name*]_ _ Trust. _ _[*Name of trustee*]_ _ is a resident of _ _ _ _ _ _ County, California, which is the principal place of administration of the trust.

[*Alternative 2: If venue is based on the county where the estate is being administered*]

2. _ _[*Name of trustor*]_ _ died on _ _[*date*]_ _. _ _[*Name of trustor*]_ _'s estate is being administered in _ _ _ _ _ _ County, California.

[*Continue*]

3. The trustee has _ _[*never provided petitioner with an account/not provided petitioner with an account of the Trust since _ _[date]_ _]_ _. On _ _[date]_ _, petitioner demanded that the trustee provide petitioner with an account. A copy of the letter demanding an account is attached as Exhibit B and incorporated by reference. To date, the trustee has failed to prepare and provide petitioner with an account.

[*Add if appropriate*]

4. The names and last known post office addresses of the other beneficiaries of the trust, as far as known to petitioner, are: _ _[*List names and addresses.*]_ _

[*Add one of the following alternatives*]

[*Alternative 1*]

[5.] No one has filed a request for special notice in this proceeding.

[*Alternative 2*]

[5.] The following have filed request(s) for special notice in this proceeding: _ _[*List name(s).*]_ _

[*Continue*]

WHEREFORE, petitioner requests that:

1. _ _[*Name of trustee*]_ _ be instructed to prepare and file with this court an account of the _ _[*name*]_ _ Trust since _ _[*date*]_ _.

2. _ _[*Name of trustee*]_ _ be instructed to petition this court for the settlement of the account and give notice of the hearing on the petition.

3. The court order such attorney fees and costs as may be allowable by law.

4. The court order such other and further relief as it may deem proper.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Petitioner

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Petitioner

VERIFICATION

I, _ _[*name of petitioner*]_ _, declare that:

I have read the foregoing petition and know its contents. It is true of my own knowledge except as to matters that are stated in it on information and belief, and as to those matters I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (filed with court with proof of service); copies for notice (one for each person who has requested special notice); office copies; copy for probate department.

Comment: For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.22 4. Opposition to Petition

§13.22 4. Opposition to Petition

The grounds for opposition to an account, which may be raised by the trustee or by other beneficiaries, include:

- Lack of standing;
- Trust provision waiving accounts;
- Failure to meet the Prob C §17200(b)(7) threefold requirement of a written request, a 60-day wait, and no prior account within the last 6 months (see §13.17); or
- Privacy concerns (which perhaps could be addressed by sealed proceedings).

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.23 5. Form: Order Compelling Trustee to Account

§13.23 5. Form: Order Compelling Trustee to Account

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[*Title of court*]

In re _ _[*name*]_ _ Trust,	**)**	**No. _ _ _ _ _ _**
Established _ _[*date*]_ _	**)**	
	)	**ORDER COMPELLING**
	)	**TRUSTEE TO ACCOUNT**
	)	**(PROBATE CODE**
_____	**)**	**§17200(b)(7))**

The petition of _ _[*name*]_ _, a beneficiary of the _ _[*name*]_ _ Trust, was regularly heard on _ _[*date*]_ _. _ _[*Name*]_ _ appeared as attorney for petitioner, and _ _[*no one/_ _[name]_ _, as attorney for _ _[party]_ _]_ _ appeared in opposition. After hearing the petition and hearing the evidence, the court finds that all notices of the hearing have been given as required by law, that petitioner presented to the trustee _ _[*his/her*]_ _ request for an account on _ _[*date*]_ _; that no account has been made _ _[*since _ _[date]_ _]_ _, nor has an account been made since the request. Good cause appearing,

IT IS ORDERED that:

1. _ _[*Name of trustee*]_ _, as trustee of the _ _[*name*]_ _ Trust, file with _ _[*petitioner/this court*]_ _ an account of _ _[*his/her*]_ _ administration of the trust within _ _[*number*]_ _ days of this order.

2. _ _[*Name of trustee*]_ _ petition this court for settlement of the account, set the petition for hearing, and give notice of the hearing.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Judge/Commissioner*]_ _ **of the** _ _[*title of court*]_ _

Copies: Original for filing; service copies; office copies; copy for probate department.

Comment: For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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§13.24 6. Remedies if Trustee Fails to Comply With Order Compelling Trustee to Account

If a trustee fails to file an account by the time set in the court's order, the court has broad discretion and power to fashion an appropriate remedy under Prob C §§800 (court in proceedings under Probate Code is court of general jurisdiction with full powers of superior court), 1000 (applicability of rules of practice of civil actions generally), 17001 (court in trust proceedings is court of general jurisdiction with full powers of superior court), and 17206 (general discretion to make necessary and proper orders). The remedies available include contempt, removal of trustee, transfer of the records and the trust to a successor trustee, and surcharge of the trustee or its surety, if any.

On removal of the trustee, see chap 14. On recovery against the surety, see §13.60.

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II. PERSONAL REPRESENTATIVE'S DUTY TO ACCOUNT AND REPORT

§13.25 A. Scope of Duty

If an estate is not closed within 1 year, or within 18 months if a federal estate tax return is involved, the personal representative of the estate must render a status report. The report must show the status of the estate and the reasons that the estate cannot be distributed and closed. Prob C §§12200-12201. There is a presumption of unreasonable delay if an estate is not distributed and closed within the time specified in these sections. *Estate of Justesen* (1999) 77 CA4th 352, 91 CR2d 574.

When the estate is in a condition to be closed, the personal representative must file a final account and petition for final distribution. Prob C §10951.

The court has discretion to order an account at any time on its own motion or on the petition of an interested person, and *must* order an account on the petition of an interested person if more than 1 year has elapsed since issuance of letters or since the last account. Prob C §10950.

A personal representative who resigns, is removed, or whose authority is otherwise terminated must account within 60 days after the resignation, removal, or termination of authority, unless the court extends the time. Prob C §10952.

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§13.26 B. Effect of Beneficiary Waiver of Account

The personal representative is not required to account if each person entitled to distribution from the estate files a written waiver of account or a written acknowledgment that the person's interest has been satisfied (Prob C §10954(a)(1)), unless a creditor whose interest has not been satisfied convinces the court to require an account (Prob C §10954(c)(2)). For the technical requirements of a valid waiver, see Prob C §10954(b).

Even when the beneficiaries have waived an account, the personal representative must still file a final report of administration, including the basis for and amount of compensation to the personal representative and the attorney. Prob C §10954(c)(1).

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C. Estate Account to Court

§13.27 1. Contents, Format, and Notice

The contents and format of an estate account are governed by Prob C §§1060-1064 and 10900. An estate account must include both a financial statement and a report of administration, including a detailed report on the status of creditor claims. Prob C §10900(a)-(b). Notice of the hearing is governed by Prob C §§1220 and 11000. For a detailed treatment of estate accounts, see California Decedent Estate Practice, chap 24 (2d ed Cal CEB 2009).

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§13.28 2. Court Review and Res Judicata; Limitations

As with trustee accounts submitted for court approval, the personal representative's account is reviewed carefully by the court and the probate department staff, even if no interested person files objections (see §13.12). Indeed, the court has an independent duty to protect the interests of the nonappearing interested parties. *Estate of Bennett* (1939) 13 C2d 354, 368, 90 P2d 84.

If the court approves the account, the order generally constitutes res judicata and releases the personal representative and sureties from all claims based on any act or omission directly authorized, approved, or confirmed in the order, even though no beneficiary appeared in the proceeding. Prob C §7250. Three limitations to this general rule deserve note. See §§13.29-13.31.

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§13.29 a. Matter Must Have Been Raised and Passed on

The court's approval of the account and release of the personal representative applies to acts or omissions only if they were "directly authorized, approved or confirmed" by the order. Prob C §7250(a). This means that the release does not extend to matters that were not raised by the petition and passed on by the order. *Estate of Schneider* (1979) 95 CA3d 55, 156 CR 838.

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§13.30 b. No Material Misrepresentation or Material Omission in Petition, Account, or Judgment

Approval of the account and release of the personal representative does not apply if the order was obtained by material misrepresentation or material omission in the petition or account or in the judgment. Prob C §7250(c). See, *e.g., Estate of Anderson* (1983) 149 CA3d 336, 346, 196 CR 782 (executor failed to disclose material facts concerning sale of real property).

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§13.31 c. No Extrinsic Fraud

The court's approval of the account and release of the personal representative does not apply if the order was obtained by extrinsic fraud or conspiracy. Prob C §7250(c). See, *e.g., Estate of Sanders* (1985) 40 C3d 607, 613, 221 CR 432 (executor assured heir that estate was being properly managed and that there was no need to attend the court hearings); *Estate of Anderson* (1983) 149 CA3d 336, 196 CR 782. See also *Estate of Beard* (1999) 71 CA4th 753, 774, 84 CR2d 276, for a discussion of extrinsic fraud and extrinsic mistake as grounds to set aside a final order approving a settlement agreement.

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D. Compelling Personal Representative to Account

§13.32 1. Standing and Grounds to Compel Account

Any "interested person" may petition the court to order an account. Prob C §10950(a). The court has discretion to order an account at any time and must order an account if more than a year has elapsed since letters were issued or since the last account. Prob C §10950(b). The court will order an account on a showing that:

- The estate is in a condition to be closed (Prob C §10951);
- The personal representative has resigned, has been removed, has died, has become incapacitated, or has absconded (Prob C §10953(a)-(c)); or
- The personal representative's authority has been otherwise terminated (Prob C §10952).

In the case of death or incapacity, the account is required of the personal representative's legal representative (personal representative or conservator), or the personal representative's attorney. In the case of an absconding personal representative, the court may require the attorney to account.

The term "interested person" as it relates to particular persons may vary from time to time depending on the particular purposes and matters involved in a proceeding. Generally, however, it includes any person having a property right in or claim against the estate that might be affected by the proceeding, including creditors. Prob C §48.

The duty of a fiduciary to account is a continuing one, and therefore the right to compel an account is not barred by a statute of limitations. *Estate of Schneider* (1979) 95 CA3d 55, 60, 156 CR 838.

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.33 2. Procedure and Notice

§13.33 2. Procedure and Notice

The procedure to compel an account starts with a petition for a court order requiring an account, with proper notice of hearing. For provisions concerning petitions generally, see Prob C §§1020-1023, and for provisions concerning notice generally, see Prob C §§1200-1265 and Cal Rules of Ct 7.51.

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.34 3. Form: Petition for Order Compelling Personal Representative or Other Named Person to Account

§13.34 3. Form: Petition for Order Compelling Personal Representative or Other Named Person to Account

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[*Title of court*]

Estate of _ _[*name*]_ _**,** **Deceased**	**No.** _ _ _ _ _ _
	PETITION FOR ORDER COMPELLING _ _[*PERSONAL REPRESENTATIVE/*_ _[*NAME OF OTHER PERSON BEING COMPELLED TO ACCOUNT*]_ _]_ _ **TO ACCOUNT (PROBATE CODE §**_ _[*10950/10951/10952/10953*]_ _**)**

Petitioner, _ _[*name*]_ _**, alleges:**

1. Petitioner has standing to file this petition as a person interested in the estate of _ _[*name of decedent*]_ _**, in that** _ _[*state interest in estate, e.g. as heir, beneficiary, creditor*]_ _**.**

2. _ _[*Name of personal representative or other person to be compelled to account*]_ _ **is the qualified and acting** _ _[*state capacity, e.g. personal representative*]_ _ **of the above-named decedent.**

[*State grounds for court to require account, e.g.:*]

3. Letters _ _[*testamentary/of administration*]_ _ **were issued on** _ _[*date*]_ _**. More than one year has elapsed since the** _ _[*last account/issuance of letters to the above-named personal representative*]_ _ **and** _ _[*name of personal representative or other person to be compelled to account*]_ _ **has not filed an account or report.**

[*Continue*]

4. The names and last known mailing address of all persons entitled to notice of the hearing of this petition, so far as is known to petitioner, are: _ _[*List names and addresses*]_ _**.**

WHEREFORE, petitioner requests that

1. The court order _ _[*name of personal representative or other person to be compelled to account*]_ _ **to file an account of the administration of the above-named estate for the period from** _ _[*starting date*]_ _ **to** _ _[*ending date*]_ _ **in a form that satisfies the requirements of Probate Code §10900.**

2. The court specify in the order a reasonable time within which the account must be filed, which petitioner suggests should be no later than _ _[*specify suggested date*]_ _**.**

3. Petitioner be awarded the costs of this proceeding.

4. Such other relief as the court deems proper.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Petitioner

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Petitioner

[*Verification; see §13.21*]

Copies: Original for filing; service copies; office copies; copy for probate department.

Comment: For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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§13.35 4. Opposition to Petition

The primary grounds for opposing a petition to require an account are lack of standing or lack of facts to support the statutory grounds to require an account. Because the court has discretion to require an account at any time, the court is likely to act if there is any reasonable basis.

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.36 5. Form: Order Compelling Personal Representative or Other Named Person to Account

§13.36 5. Form: Order Compelling Personal Representative or Other Named Person to Account

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[*Title of court*]

Estate of _ _[*name*]_ _, **Deceased**	**No.** _ _ _ _ _ _
	ORDER COMPELLING _ _[*PERSONAL REPRESENTATIVE/*_ _[*NAME OF OTHER PERSON BEING COMPELLED TO ACCOUNT*]_ _]_ _ **TO ACCOUNT (PROBATE CODE §**_ _[*10950/10951/10952/10953*]_ _**)**

The petition of _ _[*name*]_ _**, a person interested in the above-named estate, for an order compelling** _ _[*name*]_ _ **to account, filed on** _ _[*date*]_ _**, was regularly heard on** _ _[*date*]_ _**.** _ _[*Name*]_ _ **appeared as attorney for petitioner, and** _ _[*no one/*_ _[*name*]_ _*, as attorney for* _ _[*party*]_ _]_ _ **appeared in opposition. After hearing the petition and hearing the evidence, the court finds that notice of the hearing has been given as required by law. The court further finds that** _ _[*specify the factual grounds that support the requirement to account*]_ _**. Good cause appearing,**

IT IS ORDERED that:

1. _ _[*Name*]_ _ **file with this court an account of the administration of the above-named estate for the period from** _ _[*starting date*]_ _ **to** _ _[*ending date*]_ _ **in a form that satisfies the requirements of Probate Code §10900.**

2. _ _[*Name*]_ _ **file the account on or before** _ _[*date*]_ _**.**

3. Petitioner, _ _[*name of petitioner*]_ _**, recover from** _ _[*name of person being compelled to account*]_ _ **the sum of** _ _[*dollar amount*]_ _ **as costs of this proceeding.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Judge/Commissioner*]_ _
of the _ _[*title of court*]_ _

Copies: Original for filing; service copies; office copies; copy for probate department.

Comment: For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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§13.37 6. Remedies if Personal Representative Fails to Comply With Order Compelling Personal Representative to Account

A personal representative who fails to comply with an order to account faces punishment for contempt and removal from office. Prob C §§11050, 11052. (Note that, although §11050 states the court "shall" compel the account by punishment for contempt, §11052 states the personal representative "may" be punished for contempt or removed from office, or both, in the "discretion" of the court.)

Disobedience of a lawful order is contempt. CCP §1209(a)(5). To establish disobedience, it is crucial to establish that the personal representative had knowledge of the order. Thus, the petitioner should attempt to have the order served on the personal representative personally.

If the personal representative disobeys the order, the petitioner (or other interested person) should request the court to issue a citation requiring the personal representative to appear and show cause why he or she should not be punished for contempt. Prob C §11051(a). Prob Code §11051 does not expressly require a court order authorizing that the citation be issued. Therefore, it appears that the clerk may issue a citation in this situation without an authorizing court order. See Prob C §1240 (clerk may issue citation without court order except when order is expressly required). Nonetheless, in light of the gravity of the relief sought, the form in §13.38 envisions express court approval.

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.38 7. Form: Petition for Issuance of Citation Requiring Personal Representative to Appear and Show Cause Why He or She Should Not Be Punished for Contempt

§13.38 7. Form: Petition for Issuance of Citation Requiring Personal Representative to Appear and Show Cause Why He or She Should Not Be Punished for Contempt

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Estate of _ _[*name*]_ _,	)	**No. _ _ _ _ _ _**
Deceased	)	
	)	**PETITION FOR ISSUANCE OF**
	)	**CITATION REQUIRING**
	)	**PERSONAL**
	)	**REPRESENTATIVE TO**
	)	**APPEAR AND SHOW CAUSE**
	)	**WHY _ _[*HE/ SHE*]_ _**
	)	**SHOULD NOT BE PUNISHED**
	)	**FOR CONTEMPT (PROBATE**
_____	)	**CODE §11051)**

Petitioner, _ _[*name*]_ _, alleges:

1. Petitioner has standing to file this petition as a person interested in the estate of _ _[*name of decedent*]_ _, in that _ _[*state interest in estate, e.g. as heir, beneficiary, creditor*]_ _.

2. _ _[*Name*]_ _ is the qualified and acting _ _[*personal representative*]_ _ of the above-named decedent.

3. On _ _[*date*]_ _, this court entered an order requiring _ _[*name*]_ _ to file an account of the administration of the above-named estate for the period from _ _[*starting date*]_ _ to _ _[*ending date*]_ _ in a form that satisfies the requirements of Probate Code §10900, and that _ _[*name*]_ _ file the account on or before _ _[*date*]_ _.

4. _ _[*Name*]_ _ has not filed the required account. The deadline for filing the account has passed.

WHEREFORE, petitioner requests that the court issue a citation directed to _ _[*name*]_ _, as personal representative of the above-named estate, requiring _ _[*him/her*]_ _ to appear and show cause why _ _[*he/she*]_ _ should not be punished for contempt of the court's order.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Petitioner

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Petitioner

[*Verification; see §13.21*]

Let the citation issue.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Judge/Commissioner*]_ _
of the _ _[*title of court*]_ _

Copies: Original for filing; service copies; office copies; copy for probate department.

Comment: The petition should be accompanied by Judicial Council Form DE-122 (Citation-Probate), which includes proof of service. A copy of the citation should be served on the personal representative personally, and the original with

proof of service attached should be filed with the clerk before the hearing.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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III. OBJECTIONS TO ACCOUNT AND REQUEST FOR SURCHARGE OF FIDUCIARY AND OTHER REMEDIES

§13.39 A. Res Judicata Effect of Failure to Object

When a trustee or personal representative submits an account for court approval, an order settling and approving the account generally has the effect of res judicata, even though no interested party appeared to object. Res judicata does not apply, however, to matters that were not raised in the account or passed on by the order, nor to orders obtained by material misrepresentation, material omission, extrinsic fraud, or conspiracy. See §§13.12 (trusts) and 13.28, 13.31 (estates).

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B. Standing to Object

§13.40 1. Trusts

Any person who has standing to seek a court order compelling a trustee to account (see §§13.17-13.19) has the associated right to object to a trustee's account. Furthermore, because an objection to an account is likely to involve a claimed breach of trust, and because almost any beneficiary (even one who might not have a right to compel an account) has standing to seek redress of a breach of trust under Prob C §17200(b)(12), it would appear that every beneficiary has standing to object. There is one exception, however: A beneficiary who is not the holder of a power to revoke a revocable trust does not have standing to seek redress of a breach of trust under Prob C §17200(b)(12) and thus probably has no standing to object. See Prob C §§15800, 17200(a). Under the circumstances of a particular case, there might be "interested persons" other than beneficiaries who might have standing to object under the general provisions of Prob C §1043.

If the trustee has provided an account to beneficiaries but not petitioned for court approval (see §13.6), the vehicle for objecting to the account is a petition filed by the objecting party under Prob C §17200(b)(5), (12), and any other subdivision applicable to the particular case or the relief sought.

Due to the nature of trusts, the beneficiary class often includes minors, persons yet unborn, or incapacitated persons. In a contested matter, in order to achieve fairness and finality, the court as well as all interested persons should be sensitive to the potential need to have a guardian ad litem appointed to represent the interests of such persons if the representation of their interests otherwise would be inadequate. Prob C §1003. Of course, the appointment of a guardian ad litem may involve extra expense. The court has discretion to determine the amount of the guardian ad litem's compensation and the attorney fees, and to order them paid by the trust, the petitioner, or any other source the court considers proper. Prob C §1003(c).

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§13.41 2. Estates

Any person who is entitled to notice of the hearing on a petition to approve an estate account has standing to object to the account. This includes all persons who have requested special notice (Prob C §§1220(a)(2)(B), 11000(a)(1)), each known heir or devisee whose interest in the estate is affected by the account (Prob C §1100(a)(2)-(3)), the Attorney General in certain cases (Prob C §11000(a)(4)), and certain creditors if the estate is insolvent (Prob C §11000(a)(5)). In light of Prob C §1043, probably any other "interested person" (see Prob C §48) also has standing to object.

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C. Scope of Objection

§13.42 1. Plenary Review of Fiduciary's Acts or Omissions

A person objecting to a fiduciary's account is not limited to the financial account. Quite the contrary, virtually all the fiduciary's acts and omissions are open for review, unless the claim is barred by:

- Res judicata, *e.g.,* a proper prior final order (see Prob C §7250);
- A statute of limitations, *e.g.,* a claim based on facts disclosed in a trustee's account received by the objector more than 3 years before (see Prob C §16460(a)(1)); or
- Some other bar, *e.g.,* actions taken by the personal representative after notice of proposed action under the Independent Administration of Estates Act (IAEA) (Prob C §§10590(a)(1), 11001(c)).

On additional limitations and defenses that apply to trusts, some of which also apply to estates, see §§21.53-21.62.

The fact that the scope of the review encompasses all of the fiduciary's acts and omissions is a result supported by both statutory analysis and case law and is consistent with judicial economy. As for statutory analysis regarding trusts, the proceeding to settle an account arises under Prob C §17200(b)(5), and the responding or objecting party is entitled to raise any other matter concerning the internal affairs of the trust under Prob C §17200(b), including, "but not limited to," any of its other subdivisions. As for statutory analysis regarding estates, an "account" must include a "report" of the administration of the estate (Prob C §§1064, 10900(a)), and a contest of the account may involve any matter relating to the account or report, including but not limited to actions taken by the personal representative not previously authorized or approved by the court (except specified IAEA actions). Prob C §11001(c). For case analysis, see *Estate of Howard* (1976) 58 CA3d 250, 257, 129 CR 836; *Coberly v Superior Court* (1965) 231 CA2d 685, 42 CR 64. Obviously, judicial economy is promoted by the efficiency of bringing all controversies to the court in a single proceeding, rather than splitting them across multiple proceedings. Indeed, the failure of a beneficiary to raise issues of a trustee's neglect of duty or breach of trust at the time of the court account might preclude a subsequent challenge. 231 CA2d at 688.

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§13.43 2. Breach of Trustee's Duties

In a trust proceeding, the objections to the account may raise claims of breach of trust, and the objector may seek appropriate redress. The objector may raise claims that the trustee breached the duty to comply with the trust terms, to avoid conflicts of interest, to avoid self-dealing, to be impartial, to keep trust assets separate from personal assets, to enforce claims, to administer the trust with reasonable care, skill, and caution, to comply with the prudent investor rule regarding trust investments, and to make discretionary decisions in good faith. For a detailed treatment of breach of trust and the remedies available, see chap 21.

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.44 3. Breach of Personal Representative's Duties

§13.44 3. Breach of Personal Representative's Duties

In an estate proceeding, the objections to the account (referred to in Prob C §11001 as a "contest" of the account) may raise claims of breach of the personal representative's duties, and the objector may seek appropriate redress. For example, the claims of breach may include:

- Breach of the duty to account for all of the decedent's estate coming into the possession of the personal representative, and all of the income, issues, and profits of the estate. See Prob C §§1061-1063. See, *e.g., Estate of Pardue* (1943) 57 CA2d 918, 135 P2d 394 (surcharge for failure to rent or sell estate realty).
- Breach of the duty to use ordinary care and diligence in controlling, managing, protecting, and preserving the assets and collecting the rents, issues, and profits. See Prob C §§9600 (duty to use ordinary care and diligence in management and control of estate), 9650 (duty to take possession and control of estate property, and to receive rents, issues, and profits from estate property). See, *e.g., Estate of Bonaccorsi* (1999) 69 CA4th 462, 81 CR2d 604; *Estate of Massaglia* (1974) 38 CA3d 767, 113 CR 751; *Estate of Spirtos* (1973) 34 CA3d 479, 487, 109 CR 919; *Estate of Guiol* (1972) 28 CA3d 818, 105 CR 35.
- Breach of other specific statutory duties. See, *e.g.,* Prob C §§8804(c) (damages from failure to file timely inventory and appraisal) 12205 (reduction in compensation for failure to complete administration of the estate in timely manner); *Estate of Spirtos* (1973) 34 CA3d 479, 109 CR 919 (selling decedent's business without required court approval).
- Breach of the duty to file timely tax returns. See, *e.g., Estate of Harvey* (1964) 224 CA2d 555, 36 CR 788.
- Failure to obtain favorable tax treatment and failure to make a timely claim for tax refund. See, *e.g., Estate of Gerber* (1977) 73 CA3d 96, 140 CR 577.
- Failure to timely liquidate assets for the payment of taxes, debts, and costs of administration. See, *e.g., Estate of Gerber* (1977) 73 CA3d 96, 140 CR 577.
- Breach of the duty to exercise ordinary care and diligence in pursuing claims for the benefit of the estate. See Prob C §9820(a). See also Comment to Prob C §9820(a) (personal representative may decline to bring action "where the cost of collection is likely to exceed the amount likely to be collected").
- Breach of the duty to exercise ordinary care and diligence in defending claims against the estate. See Prob C §9820(b). See, *e.g., Estate of McSweeney* (1954) 123 CA2d 787, 268 P2 107 (executor surcharged for allowing third party to take estate property through consent judgment, when estate had valid defense).
- Breach of general fiduciary duties, such as the duty not to commingle estate funds with personal funds or the duty to avoid conflicts of interest. See, *e.g., Estate of Bonaccorsi* (1999) 69 CA4th 462, 468, 81 CR2d 604; *Estate of Harvey* (1964) 224 CA2d 555, 36 CR 788.

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D. Measure of Liability for Breach of Duties

§13.45 1. Compensatory Damages

The statutory measure of liability for breach of fiduciary duties is the same for personal representatives (see Prob C §9601) as for trustees (see Prob C §16440). In each situation, the fiduciary is chargeable with any of the following that is appropriate under the circumstances:

- Any loss or depreciation in value of the estate or trust resulting from the breach of duty, with interest.
- Any profit made by the fiduciary through breach of duty, with interest.
- Any profit that would have accrued to the estate or trust if the loss of profit is the result of the breach of duty.

In each situation, if the fiduciary is liable for interest, the interest is the greater of the amount that accrues at the legal rate or the amount actually received. Prob C §§9602, 16441.

In each case, however, the court has discretion to excuse the fiduciary from liability in whole or in part (including liability for interest) if the fiduciary acted reasonably and in good faith under the circumstances as known to the fiduciary and if it would be equitable to do so. See Prob C §§9601(b), 9602(b), 16440(b), 16441(b).

On the statutory measures of liability, see §§21.66-21.68.

In addition to the above measures of liability, any other appropriate remedies under the statutory or common law are available against the fiduciary. Prob C §§9603, 16442.

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§13.46 2. Punitive Damages

The traditional reluctance of courts to award punitive damages against trustees may have dissipated. In *Werschkull v United Cal. Bank* (1978) 85 CA3d 981, 1004, 149 CR 829, and *Vale v Union Bank* (1979) 88 CA3d 330, 339, 151 CR 784, punitive damages were permitted against trustees of pension funds. In *Werschkull,* the trustee was guilty of concealment and diversion of assets. In *Vale,* the trustee had breached the duty of loyalty. A portion of the analysis in both cases relies on cases involving actions at law. It is unclear whether the analysis has been affected by the subsequent enactment of Prob C §16421, stating that the remedies of a beneficiary against the trustee are exclusively in equity. For a more detailed discussion of punitive damages, see §§21.69-21.70.

In one particular circumstance, there is specific statutory allowance for punitive damages against a personal representative. If a personal representative fraudulently sells estate real property contrary to or otherwise than under the Probate Code provisions for sale of real property, a beneficiary who would have been entitled to distribution of the real property *may* recover from the personal representative an amount equal to double the fair market value of the real property on the date of sale. Prob C §10381.

Furthermore, any person who, in bad faith, has wrongfully taken, concealed, or disposed of property in the estate of the decedent is liable for twice the value of the property. Prob C §859. If the person taking, concealing, or disposing of the property is the personal representative, acting in his or her personal interest rather than as representative of the estate, he or she faces double damages.

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§13.47 E. Surcharge and Other Remedies

If a fiduciary breaches a duty, the court has broad power to fashion an appropriate remedy. See Prob C §§800 (probate court is a court of general jurisdiction with full power of the superior court regarding all matters under Probate Code), 1000 (applicability of rules of practice of civil actions generally to probate proceedings), 17001 (probate court is court of general jurisdiction with full powers of superior court regarding trust matters), and 17206 (probate court has general discretion to make necessary and proper orders in trust matters). The remedies available include the following:

Reduce fiduciary compensation. Monetary liability arising from a fiduciary's breach of duty may be charged against the fiduciary's compensation. Even if the breach does not generate monetary liability, the failure of the fiduciary to perform properly may be a basis to reduce or deny compensation. See Prob C §12205 for the specific rule as to personal representatives when there has been an unnecessary delay in administration of the estate. See Prob C §16420(a)(7) for the general rule as to trustees.

Charge fiduciary's beneficial interest in estate or trust. If a fiduciary's breach results in monetary liability, the liability may be charged against the fiduciary's beneficial interest in the estate or trust.

Surcharge of fiduciary. If the fiduciary's breach results in monetary liability, the liability may be charged against the fiduciary personally. Prob C §16420(a)(3).

Removal of fiduciary. Whether or not a breach involves monetary liability, the court may decide that it needs to remove the fiduciary in order to protect the estate or trust. On grounds for removal of a fiduciary, see chap 14.

Contempt. If a fiduciary disobeys a lawful court order, the fiduciary may be punished for contempt. CCP 1209(a)(5). On contempt of an order requiring a personal representative to account, see §13.24.

Costs. The probate court and the court of appeal are expressly granted discretion to award costs against a party or from the trust or estate, "as justice may require." Prob C §1002. This provision takes precedence over the general provisions of CCP §1032. *Hollaway v Edwards* (1998) 68 CA4th 94, 99, 80 CR2d 166.

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F. Attorney Fee Shifting

§13.48 1. Fees Incurred by Fiduciary

The attorney for a personal representative who successfully defends an account usually is entitled to fees from the estate for extraordinary services in an amount considered reasonable and set by the court. Prob C §10811; Cal Rules of Ct 7.703.

A trustee who incurs attorney fees to successfully defend an account normally is entitled to recover those fees from the trust. Prob C §§15684, 16243, 16247. See also *Hollaway v Edwards* (1998) 68 CA4th 94, 80 CR2d 166.

If the fiduciary's defense is successful, and the court also determines that the objections ("contest") to the fiduciary's account were without reasonable cause *and* in bad faith, then the court *may* award against the contestant the attorney fees incurred by the fiduciary to defend the account. Prob C §§11003(a), 17211(a). (Note that the court may also award against the contestant the compensation of the fiduciary arising from the extra time and effort the fiduciary spent to defend the account.)

If the fiduciary is unsuccessful in defending the account, the fiduciary generally has to bear his or her attorney fees incurred in the defense. *Estate of Gump* (1991) 1 CA4th 582, 605, 2 CR2d 269.

Trustees generally have authority to pay attorney fees without a prior court order (Prob C §§15684, 16243, 16247), although personal representatives do not (Prob C §10501(a)(2), 10830-10832). Nevertheless, there are at least two reasons why a trustee may prefer to advance the fees out of personal funds and wait for successful resolution of the dispute before seeking reimbursement from the trust estate. First, this will maximize the likelihood that the trustee's confidential communications with counsel will be protected from disclosure. Under *Moeller v Superior Court* (1997) 16 C4th 1124, 1134, 69 CR2d 317, a trustee might be protected only if the trustee hired separate counsel and paid for the representation with personal funds. See §21.51. Second, the trustee can avoid the possibility that the trustee will have to repay the trust with interest if trust funds are used for an unsuccessful defense.

For more on attorney fees incurred by the fiduciary, see §§21.76-21.78.

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§13.49 2. Fees Incurred by Contestant

A contestant who successfully attacks an account of a fiduciary generally is not entitled to recover his or her attorney fees from the estate or trust or from the fiduciary. There are two main exceptions to this general rule:

First, a contestant who is successful, and also convinces the court that the fiduciary's opposition to the contest was without reasonable cause *and* in bad faith, may be awarded attorney fees against the fiduciary. Prob C §§11003(b), 17211(b). See *Estate of Bonaccorsi* (1999) 69 CA4th 462, 81 CR2d 604 (reversing fee award against personal representative when part of defense was meritorious and fee award was not apportioned).

Second, a contestant who succeeds in creating a common fund for the benefit of himself or herself and other beneficiaries similarly situated may be entitled to recover attorney fees from the common fund in order to prevent the other beneficiaries from getting a free ride. *Estate of Reade* (1948) 31 C2d 669, 672, 191 P2d 745.

For additional discussion of attorney fees incurred by contestant, see §§21.72-21.75.

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G. Procedure

§13.50 1. When to File Objections

When a fiduciary has filed an account and seeks court approval, a response or objection can be made in writing at or before the hearing, or orally at the hearing. Prob C §1043(a)-(b). Although the statute allows objections to be made as late as the day of the hearing, basic notions of courtesy to court and counsel, standards of effective advocacy, and deference to local rules of court suggest that written objections should be filed and served at least a week in advance of the hearing if at all possible, and that an endorsed filed courtesy copy be delivered directly to the probate department at the time of filing.

If the court grants a continuance to allow a written objection to be made and the objection is not timely filed and served, the court may deem it waived. Cal Rules of Ct 7.801. Furthermore, a beneficiary does not have the right to conduct discovery before filing written objections, not even discovery intended to help the beneficiary evaluate whether or not to make objections. *Forthmann v Boyer* (2002) 97 CA4th 977, 985, 118 CR2d 715. However, a beneficiary who has filed formal objections may conduct discovery relevant to those objections. *Mota v Superior Court* (2007) 156 CA4th 351, 67 CR3d 303.

On local rules and procedures in probate litigation, see chap 10.

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§13.51 2. Content, Format, and Notice to Surety

The objection ("contest") should contain factual allegations showing the standing of the contestant to object to the account, identify the contested issues, and establish the breach of a duty or other grounds for objection. If monetary remedies are requested, factual allegations should be included that show the measure of liability. The objection must be verified. Prob C §1021(a)(2). A copy of the objection should be served on all persons who were entitled to the notice of hearing. Furthermore, a notice of hearing must be served on the surety who filed the bond. Prob C §1213(a).

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.52 H. Form: Objections to Account and Request for Surcharge of Fiduciary and Other Remedies

§13.52 H. Form: Objections to Account and Request for Surcharge of Fiduciary and Other Remedies

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[*Title of court*]

In re _ _[*name*]_ _ **Trust, Established** _ _[*date*]_ _	)	**No.** _ _ _ _ _ _
[*or*]	)	**OBJECTIONS TO FIDUCIARY'S ACCOUNT AND REQUEST FOR SURCHARGE OF FIDUCIARY AND OTHER REMEDIES (PROBATE CODE §_ _[*11001/17200(b)(5) and (12)*]_ _)**
Estate of _ _[*name*]_ _, **Deceased**	)	

Contestant, _ _[*name*]_ _ **, alleges:**

1. Contestant has standing to file these objections as a person interested in the above-named _ _[*trust/estate*]_ _ **because** _ _[*state contestant's interest in estate, e.g., as heir, beneficiary, creditor*]_ _**.**

2. Contestant objects to the account filed herein on _ _[*date*]_ _ **by** _ _[*name of fiduciary*]_ _ **on each of the following grounds:** _ _[*Using headings to identify the nature of each separate ground of objection, set forth the factual allegations supporting each objection, including facts to establish the amount of monetary liability applicable to each ground of objection.*]_ _

WHEREFORE, contestant requests that: _ _[*Set forth the remedies sought, e.g., that the fiduciary be determined liable in the amount of* _ _[*dollar amount*]_ _ *together with interest in the amount of* _ _[*dollar amount*]_ _ *as a result of the first grounds of objection, that the liability be charged against the fiduciary's compensation, or beneficial interest, or be recovered from the fiduciary personally, that the fiduciary be removed, and that contestant recover costs and attorney fees (based on the common fund doctrine) from the trust, or from the fiduciary if the court determines that the fiduciary opposes the contest without reasonable cause and in bad faith*]_ _**.**

[_ _]. Such other relief as the court deems proper.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Contestant

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Contestant

[*Verification; see §13.21*]

Copies: Original for filing; service copies; office copies; copy for probate department.

Comment: For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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I. Hearing on Objections

§13.53 1. No Jury Trial

There is no jury trial for objections to an account and proceedings to surcharge a fiduciary. Prob C §§825, 17006. If the contested issues involve a complex account, the court may appoint a referee to examine the account and make a report, subject to confirmation by the court. See Prob C §§11002 (estates), 17001 (trusts); Prob C §1000 (reference to CCP), CCP §639(a)(1)-(2) (court-appointed referees).

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§13.54 2. Timing

Petitions for settlement of estate accounts require a minimum of 15 days' notice, whereas trust accounts require a minimum of 30 days' notice. Prob C §§1220, 17203. If the parties do not need discovery and are willing to submit the dispute to the court based on the verified pleadings and declarations, there may be no need for a continuance. Frequently the contestant will want discovery, however; in this instance, the probate court may continue the hearing based on an expected discovery schedule, and may also set an intervening status conference so that the court can monitor the readiness of the case for hearing. If any party demands an evidentiary hearing (because the party is unwilling to submit the matter on verified pleadings and declarations; see *Estate of Nicholas* (1986) 177 CA3d 1071, 1088, 1092, 223 CR 410), the court is likely to set the matter specially for hearing at a time other than the routine daily probate calendar.

In larger counties, the burden of the daily probate calendar is so heavy that the probate department is not in a position to preside over multiday evidentiary hearings. If the parties report that a multiday evidentiary hearing will be required, the matter is likely to be referred to a referee (see §13.53) or transferred to the general civil master calendar department for assignment to a trial department. In the course of deciding whether to demand an evidentiary hearing, and how long an evidentiary hearing to demand, each party should evaluate the potential impact on his or her case if the matter is assigned for hearing from the civil master calendar department (where the identity of the trial judge may not be known until the day of assignment and he or she may not be familiar with probate matters), rather than being heard in the probate department (where the identity of the judge is known in advance and he or she is familiar with probate matters).

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§13.55 3. Evidence

A contested probate hearing often seems like a hybrid between law and motion practice, in which virtually all evidence is submitted in the form of written declarations, and general civil trial practice, in which witness testimony rather than written declaration is the main mode of introducing evidence. Probate hearings often involve some of both. This is a matter of convenience and efficiency for the court and the parties. Verified pleadings, affidavits, and even statements of fact in unsworn, unverified memorandums can be properly considered as evidence in the absence of objections. *Evangelho v Presoto* (1998) 67 CA4th 615, 620, 79 CR2d 146. See §10.39. However, parties are entitled to require observance of the formal rules of evidence and a full evidentiary hearing. *Estate of Lensch* (2009) 177 CA4th 667, 99 CR3d 246; *Estate of Bennett* (2008) 163 CA4th 1303, 78 CR3d 435; *Estate of Nicholas* (1986) 177 CA3d 1071, 1088, 223 CR 410. In the event of a full hearing, the production of evidence will take on the flavor of general civil trial practice because written declarations generally are not admissible as evidence in the face of objection. Prob C §§1000, 1022. See *Evangelho v Presoto, supra* ("when challenged in the lower court, affidavits and verified petitions may not be considered as evidence at a contested probate hearing").

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§13.56 4. Burden of Proof

A beneficiary who objects to an account based on a claim of breach of duty generally has the burden of proving the existence of the duty, the fiduciary's breach, and the amount of monetary liability. *Van de Kamp v Bank of America* (1988) 204 CA3d 819, 853, 251 CR 530. If the trustee obtains an advantage from the beneficiary in a transaction between the trustee and the beneficiary, the burden of proof shifts to the trustee under the presumption of Prob C §16004(c). For a more detailed discussion of burden of proof issues, see §§21.47-21.48.

When a beneficiary contests a financial account, the fiduciary has the duty of proving by satisfactory evidence the correctness of each charge and credit. *Purdy v Johnson* (1917) 174 C 521, 163 P 893. If the fiduciary is unable to produce records to support the charges and credits, a presumption may arise against the fiduciary. *Blackmon v Hale* (1970) 1 C3d 548, 560, 83 CR 194 (rebuttable presumption of fraud against trustee who fails to maintain proper accounts); *Purdy v Johnson, supra*.

The fiduciary's duty to produce "satisfactory evidence" does not necessarily require a contemporaneous receipt, voucher, or account document in every case. In *Estate of McCabe* (1948) 87 CA2d 430, 197 P2d 35, a trustee who had commingled trust funds with personal funds kept no books of account and presented no vouchers at trial. The only proof of the challenged trust expenditures was the trustee's testimony that sums had been paid for the beneficiary's travel and education and evidence that the beneficiary had made the trips and attended the schools. Applying the substantial evidence standard, the court allowed these credits. The court did not, however, allow the trustee's estimate of average monthly expenses for the beneficiary's clothing, spending money, and minor medical expenses, which amounted to "mere guess or conjecture." 87 CA2d at 434.

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§13.57 J. Order

As a general rule (*Conservatorship of Pelton* (1982) 132 CA3d 496, 502 n3, 183 CR 188):

> Where contested issues in a probate proceeding necessitate underlying factual determinations, those determinations must be stated in writing. [Citations.] Although the court's factual findings need not be contained in a document separate from the order in the underlying proceedings [citation], they must be sufficient to allow meaningful appellate review by indicating "the precise facts found by the court" and specifying "the exact grounds on which the judgment rests."

A line of cases, springing from *Estate of Levinson* (1895) 108 C 450, 42 P 479, appears to carve out an exception to this general rule by holding that findings are unnecessary on settlement of objections to an account, based on the notion that issues of fact are not joined by the pleadings. See *Estate of Franklin* (1901) 133 C 584, 585, 65 P 1081, quoting *Estate of Sanderson* (1887) 74 C 199, 290, 15 P 753 ("exceptions to an account do not create 'issues of fact joined' "); *Estate of Tretheway* (1939) 32 CA2d 287, 294, 89 P2d 679 ("the contestant does not join issues of fact but merely raises objections to certain items in the account, which ground does not require him to set forth any allegations of fact"). See also *Conservatorship of Oliver* (1962) 203 CA2d 678, 685, 22 CR 111.

Given the broad scope of matters that may be raised in the context of a contest to an account, however (see §13.42), and the likelihood that a contest of an account will involve disputed factual issues, the *Levinson* line of cases should not be relied on, and findings of fact on disputed factual issues should be included in the order.

When the court resolves disputed factual issues, other general rules of civil procedure also may apply. See Prob C §1000. See, *e.g., Estate of Rosland* (1946) 76 CA2d 709, 710, 173 P2 830. Thus, in appropriate circumstances, a party may need to make a timely request for a statement of decision (CCP §632; Cal Rules of Ct 3.1590, 3.1591) in order to protect against adverse factual presumptions on appeal (*Marriage of Ditto* (1988) 206 CA3d 643, 649, 253 CR 770).

The parties also should consider carefully whether a challenge to the order should take the form of a motion to vacate judgment or a motion for new trial (in estate proceedings, new trial is limited by Prob C §7220), rather than a motion for reconsideration. See *Conservatorship of Coombs* (1998) 67 CA4th 1395, 79 CR2d 799 (postjudgment motion for reconsideration does not extend time for appeal). But see *Passavanti v Williams* (1990) 225 CA3d 1602, 1606, 275 CR 887 (motion for reconsideration construed as motion for new trial, and time for appeal therefore extended). See also *Sole Energy Co. v Petrominerals Corp.* (2005) 128 CA4th 187, 26 CR3d 790 (trial court had discretion to treat motion for reconsideration as motion for new trial because nature of motion is determined by nature of relief sought not by label attached to it). On time to appeal, see §13.59.

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K. Appeal

§13.58 1. Appealable Order

Appeals may be taken from the court's making, or refusing to make, orders settling a fiduciary's account, surcharging or removing a fiduciary, or setting the compensation of a fiduciary or attorney. Prob C §1300(b), (e)-(g).

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Source: Estate Planning/California Trust and Probate Litigation/13 Accountings and Surcharge/§13.59 2. Time to Appeal

§13.59 2. Time to Appeal

The deadline for filing a notice of appeal is on or before the earliest of (1) 60 days after the court clerk serves the appealing party with notice of entry of judgment or a file-stamped copy of the judgment, showing the date either was served, (2) 60 days after the appealing party serves or is served by a party with notice of entry of judgment or a file-stamped copy of the judgment, accompanied by proof of service, or (3) 180 days after entry of the judgment. Cal Rules of Ct 8.104(a)(1)-(3). Service that triggers the 60-day period may be by any method permitted by the Code of Civil Procedure, including electronic service when permitted under CCP §1010.6 and Cal Rules of Ct 2.250-2.261. Cal Rules of Ct 8.104(a)(4).

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§13.60 L. Recovery Against Surety

An order surcharging the fiduciary is binding on the surety. *Estate of Davis* (1990) 219 CA3d 663, 669, 268 CR 384; *Conservatorship of O'Connor* (1996) 48 CA4th 1076, 1095, 56 CR2d 386. Because the surety and the fiduciary are jointly and severally liable, the surcharge order can be enforced directly against the surety itself. CCP §996.460. Furthermore, if the surety refuses to pay on demand after the representative's liability is established, the surety will be liable for interest from the time of the demand, as well as for the attorney fees and costs incurred in obtaining a judgment against it. The surety is liable for these sums even if they increase the surety's total liability beyond the limits of the bond. CCP §996.480(a)(2).

Once the order surcharging the representative is final, the claimant can proceed against the surety in one of two ways.

First, the claimant can bring a motion to enforce liability on the bond. The notice of motion must give 30 days' notice and must state the amount of the claim, and the claimant must support the motion with affidavits setting forth the facts on which the claim is based. CCP §996.440(c). The motion should be brought in the probate court. See CCP §996.440(a) (authorizing motion in court that heard underlying action or proceeding). A final surcharge order is a final judgment for the purposes of enforcement, and is thus a final judgment for the purposes of a motion under CCP §996.440(a). See Prob C §1049; CCP §680.230. The statute of limitations for a motion to enforce liability on bond is 1 year after the surcharge order becomes final. CCP §996.440(b).

In the alternative, the claimant can file a separate action against the surety. The action must be filed in the probate court that presided over the underlying matter. CCP §996.430(b). The complaint should allege the existence of the bond, its due execution, and a breach of the bond's condition on the grounds that the surety has not paid the amount due even though the surcharge order is final. See California Decedent Estate Practice, chap 9 (2d ed Cal CEB 2009).

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14

Fiduciary Resignation or Removal

Thomas W. Latham

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.1 I. TRUSTEE RESIGNATION

§14.1 I. TRUSTEE RESIGNATION

Although from a distance a trustee's position may seem like a sedate line of work, in reality it often becomes a raucous, risky, and undercompensated affair. When this happens, the trustee may wish to resign. A trustee has a statutory right to resign (see Prob C §15640), although the situations that may motivate a corporate trustee to resign are sometimes different from those affecting a beneficiary-trustee. In either case, the trustee may structure the resignation process to limit the downside exposure and to obtain a release or discharge from liability. Unfortunately, the reasons that lead a current trustee to resign may also dissuade any potential successor from taking on the position. In such situations, the court will have to appoint a receiver, because it has no power to force a successor trustee to serve. In an extreme situation, the difficulty in finding a successor may be a signal that it is time to terminate the trust. Sections 14.6-14.12 address these and related issues.

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.2 A. Methods of Resignation

§14.2 A. Methods of Resignation

There are four ways for a trustee to resign (Prob C §15640):

- As provided by the trust instrument;
- In the case of a revocable trust, with the consent of the person holding the power to revoke;
- In the case of an irrevocable trust, with the consent of all adult beneficiaries who (1) are receiving income, (2) are entitled to receive income, or (3) are entitled to receive a distribution of principal if the trust were terminated; and
- Under court order obtained on petition by the trustee under Prob C §17200.

The first three methods are self-evident, and one of them usually suffices when the trustee is not leaving due to problems with the trust. If the trust has become a problem, however, and no one is willing to take on the challenge by accepting the position of successor trustee, then it may be necessary to use the fourth method—a petition for a court order.

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§14.3 1. By Terms of Trust

Trusts often contain an express provision concerning trustee resignation. Generally, such a provision requires the resigning trustee to give written notice of the resignation, and an accounting, to income beneficiaries. See California Will Drafting §§28.18-28.19 (3d ed Cal CEB 1992) (testamentary trusts); Drafting California Revocable Trusts §16.33 (4th ed Cal CEB 2003) (inter vivos trusts). For many trusts, a trustee resignation triggers a statutory duty of the successor trustee to give notice to all beneficiaries (Prob C §16061.7(a)(2)) and to give an account to beneficiaries to whom income or principal is required or authorized to be currently distributed in the trustee's discretion (Prob C §16062(a)).

If the trust specifically prohibits or waives notice of the resignation to other beneficiaries, the general rule of Prob C §16000 comes into effect, which requires adherence to statutory duties "except to the extent the trust instrument provides otherwise." For other exceptions to the statutory duty to account, see chap 13.

If the trust requires notice to income beneficiaries but is silent about notice to other beneficiaries, however, it is arguable that the statutory requirements are not inconsistent with the trust provisions and thus still apply. In either event, because notice and an accounting will start a 3-year statute of limitations running for the benefit of the resigning trustee (see Prob C §16460(a)), it is often good practice for the resigning trustee to give notice and an accounting to all beneficiaries (except as made unnecessary by the provisions of Prob C §§15800, 15802-15804 for notice to beneficiaries of revocable trusts and notice involving future interests).

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.4 2. By Consent of Holder of Power to Revoke

§14.4 2. By Consent of Holder of Power to Revoke

When a trust is revocable, the trustee may resign with the consent of the holder of the power to revoke. Prob C §15640(b). Although the statute does not require written consent, good practice suggests that the resigning trustee obtain the consent in writing. In this situation, it is unnecessary, and perhaps even improper, for a trustee to give notice of the resignation to other beneficiaries, in light of Prob C §15802, which provides that a notice concerning a revocable trust must be given to the person holding the power to revoke and must not be given to the beneficiary.

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§14.5 3. By Consent of Certain Beneficiaries

If a trust is irrevocable, resignation may be based on the consent of the income beneficiaries and of those beneficiaries who would receive principal if the trust were then terminated. Prob C §15640(c). As with the consent of a holder of a power to revoke (see §14.4), good practice suggests that the resigning trustee obtain the beneficiaries' consents in writing. In addition, the resigning trustee's duty to keep the beneficiaries reasonably informed (see Prob C §16060), and to account to certain beneficiaries on a change of trustees (see Prob C §16062)—unless the trust waives this duty (see Prob C §16064(a))—may require the resigning trustee to give notice of the resignation to those beneficiaries whose consent was not needed. A resigning trustee may wish to start a 3-year statute of limitations under Prob C §16460(a) by giving notice and an account to all beneficiaries (except perhaps those exempted from notice under Prob C §15804, which concerns notice involving future interests) even though the statutory duty to serve notification of a change of trustees is imposed on the successor trustee. See Prob C §16061.7(a)(2). On the statute of limitations, see §13.7.

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.6 4. By Court Order When Trustee Needs to Invoke Statutory Right to Resign

§14.6 4. By Court Order When Trustee Needs to Invoke Statutory Right to Resign

The trustee may find it necessary to invoke his or her statutory right to resign when:

- There is lack of beneficiary consent; or
- No successor is willing to serve.

Under either of these circumstances, the trustee may seek a court order permitting him or her to resign by bringing a petition under Prob C §17200. Prob C §15640(d).

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§14.7 a. Lack of Beneficiary Consent

Resignation is not always a smooth affair. In some cases, the beneficiaries may refuse to consent to the trustee's proposed resignation. They may have come to realize, now that the trust is having problems, that the fees of the corporate fiduciary, which drew their bitter complaints only a short time before when the trust seemed to be operating effectively, are a small price to pay for the benefit of securing a potential deep-pocket defendant.

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§14.8 b. No Successor Willing to Serve

In some cases, no one is willing to serve as successor trustee. In *McCarthy v Poulsen* (1985) 173 CA3d 1212, 219 CR 375, the primary asset of the trust was land located in the mountainous part of Squaw Valley, a portion of which slid downhill into a residential area during a mudslide. When the trustee resigned, no one else was willing to take over due to concern about potential personal liability arising out of future mudslides.

There are many situations that can create abnormal burdens or risks to make a particular trust unattractive. The trust may involve a challenging asset that demands special attention, *e.g.,* real property that is susceptible to uninsurable earthquake damage or that has operations involving risks from hazardous waste or toxic materials. There may be recurring litigation sponsored by contentious beneficiaries from a dysfunctional family, or even beneficiary threats of physical violence to the trustee linked to the beneficiary's emotional instability or drug abuse. Less dramatically, the trust may be unable to provide adequate compensation to the trustee because of illiquidity or because the value of the trust has been reduced (as in the last few years of a trust that by its terms is to be completely distributed in annual installments by the end of a 10-year period).

If the trust faces such daunting problems that no one is willing to step forward to serve as successor trustee, then a resignation under the trust instrument or under beneficiary consent will be ineffectual. Despite the resignation, without a successor the trustee has no one to whom to transfer the trust assets, and the trustee therefore continues to hold them in a fiduciary capacity. In theory, the duties of a resigning trustee during the postresignation, pretransfer period may be less extensive than the duties before the resignation. A trustee who has resigned remains responsible for the trust property and has the powers "reasonably necessary under the circumstances to preserve the trust property" until it is delivered to the successor trustee. Prob C §15644. As a practical matter, however, the resigning trustee will still have to perform most of the ordinary trustee functions, *i.e.,* managing the real property or the securities portfolio, collecting income, paying expenses, making periodic distributions, keeping accounts, and protecting the assets against risk. The resigning trustee should be entitled to reasonable compensation for performing these functions. Until the resigning trustee has someone to whom to deliver the assets, little will change.

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c. Problems Involved With Exercising Right to Resign

§14.9 (1) What to Do With Trust Assets

When no one wants to be the successor trustee, the trustee may encounter substantial problems in asking the court to accept his or her resignation. If the court accepts the resignation, what does it order the resigning trustee to do with the assets? The court does not have power to force someone to serve as successor trustee against his or her will. *McCarthy v Poulsen* (1985) 173 CA3d 1212, 1217, 219 CR 375 ("[i]t is… the universal rule in this country that a person may not be forced to be a trustee without his consent"). Although the public guardian is a potential successor trustee of last resort (see Prob C §15660.5, permitting the court to appoint a public guardian on finding that no other qualified person is willing to act, but only if the trust is to be distributed outright or the public guardian consents after notice), the public guardian cannot be forced to be a trustee.

The remaining alternative is appointment of a receiver. See Prob C §15640(d). A receiver faces less risk of exposure to liability than a trustee. 173 CA3d at 1219. There may be concern, however, that the trust assets will not support payment of the receiver's fees, in which case perhaps no one may be willing to volunteer to serve even as a receiver. In that situation, the court will have to turn to a public officer or court official, such as the court administrator, the court investigator, or the public administrator, to act as receiver. 173 CA3d at 1220 n3.

How does this all work in real life? At the hearing on the resigning trustee's petition, the harried probate judge turns to the harried public administrator to inquire whether the public administrator wants to be appointed trustee or receiver for this orphaned trust. When the public administrator declines, the court is sorely tempted to sidestep the statute by continuing the matter for a few weeks and instructing the resigning trustee and the beneficiaries to work harder at locating someone willing to serve as successor trustee.

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.10 (2) Search for Successor Trustee or Receiver

§14.10 (2) Search for Successor Trustee or Receiver

Out of self-interest, the resigning trustee has a motive to help search for a successor. Precisely because of that self-interest, the search presents its own set of issues. Does the resigning trustee owe a legal duty to potential successors to direct their attention to the factors that have lead the resigning trustee to decide to bail out? If the trustee is not required to do so, is the trustee at least affirmatively required to disclose all material facts (from which the potential successor can come to his or her own conclusions)? Or is the offering of a successor trusteeship governed by the rule of "buyer beware?" Are the rules any different if the cause of the problem is a beneficiary threat of violence against the trustee? What disclosure does the resigning trustee owe to potential successors on that issue? If the resigning trustee does not affirmatively disclose all material facts before the successor takes office, won't the facts be disclosed when the successor demands that all of the resigning trustee's administrative files be turned over, as "property" of the trust? See *Strauss v Superior Court* (1950) 36 C2d 396, 402, 224 P2d 726 (trustee's records concerning administration of trust are considered part of trust estate). See also *Moeller v Superior Court* (1997) 16 C4th 1124, 1129, 69 CR2d 317 (successor trustee becomes holder of attorney-client privilege as to confidential communications regarding trust administration between predecessor and his or her attorney). Neither the Trust Law, the Probate Code, nor case law provide direct answers to these practical dilemmas.

In the search for a successor trustee, there are three general candidate pools:

- **Corporate fiduciaries.** A comprehensive listing of bank trust departments is found in Directory of Trust Banking (published annually), American Bankers Association, 1120 Connecticut Ave., N.W., Washington, DC 20036, available from Accuity, 4709 West Golf Road, Suite 600, Skokie, IL 60076-1253, telephone 1-800-321-3373, http://www.accuitysolutions.com. Over the last 2 decades, corporate trustees have become increasingly proactive in screening out troubled trusts during the intake process.
- **Professional private trustees.** Leads to these candidates can come from references by trust officers at corporate fiduciaries (some of the private trustees are former trust officers), from references by active probate and trust counsel, and from the Professional Fiduciary Association of California, One Capitol Mall, Suite 320, Sacramento, CA 95814, telephone 1-866-886-7322, http://www.pfac-pro.org. Membership in this association does not, however, guarantee that a candidate has the education, training, experience, and personal traits appropriate for the particular trust. Private fiduciaries are more likely to have flexible intake standards than corporate fiduciaries.
- **Family members or beneficiaries of the particular trust.** Although these candidates may be both more willing (out of self-interest) and less qualified (due to lack of training) to serve as successor trustees, no California case has yet held that a resigning trustee has a duty to oppose court appointment of a particular candidate because of possible conflicts of interest or lack of qualifications.

Beneficiaries and their counsel should take an interest in the selection of a successor trustee. They should seek insights about a particular corporate or professional candidate from active probate and trust counsel, local fiduciary bonding companies, and perhaps the local probate department or probate examiners. They should inquire into the education, training, experience, and integrity of a prospective professional fiduciary or corporate trust officer who would be responsible for the file.

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§14.11 (3) Termination When Search for Successor Trustee or Receiver Is Unsuccessful

If the trust faces such problems that no one will voluntarily serve as successor trustee or receiver, and the court is unwilling to appoint a public official or court officer as receiver, then it is probably time for the resigning trustee to petition for termination of the trust. The petition to terminate can be based on the grounds that either:

- The purposes of the trust cannot be accomplished owing to changed circumstances (see Prob C §15409); or
- The principal has become so low in relation to the costs of administration that continuation would defeat the purposes of the trust (see Prob C §15408).

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.12 (4) Liability for Bad Faith Exercise of Right to Resign

§14.12 (4) Liability for Bad Faith Exercise of Right to Resign

Although a trustee enjoys a statutory right to resign, and may also have a right to resign arising out of the specific terms of the trust instrument, a trustee who exercises this right in bad faith may incur liability. In *Vale v Union Bank* (1979) 88 CA3d 330, 151 CR 784, the trust instrument of a pension plan required the trustee to make investments on instruction of the employer's administrative committee, without any evaluation of the propriety of the investment, and absolved the trustee from liability for following the committee's instructions. The trustee demanded that the administrative committee direct all investments to the trustee's common funds and threatened to resign if the demand was not met. The demand was not met, the trustee resigned, and the resignation triggered a loss on the sale of the common fund investments. The trustee's conduct was not in good faith and gave rise to liability for the loss. 88 CA3d at 337.

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.13 d. Form: Petition for Order Accepting Resignation of Trustee and for Appointment of Successor Trustee or Receiver

§14.13 d. Form: Petition for Order Accepting Resignation of Trustee and for Appointment of Successor Trustee or Receiver

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[*Title of court*]

In re _ _[*name*]_ _ Trust, Established _ _[*date*]_ _	)	**No. _ _ _ _ _ _**
	)	
	)	**PETITION FOR ORDER ACCEPTING RESIGNATION OF TRUSTEE AND FOR APPOINTMENT OF**
	)	**_ _[*SUCCESSOR TRUSTEE/RECEIVER*]_ _**
	)	**(PROBATE CODE §15640)**

Petitioner, _ _[*name*]_ _, alleges:

[*Add one of the following alternatives*]

[*Alternative 1: Petitioner was appointed trustee*]

1. Petitioner was appointed trustee of the _ _[*name*]_ _ Trust under the will of _ _[*name*]_ _ by order of court dated _ _[*date*]_ _, and has been trustee since that date.

[*Alternative 2: Petitioner accepted trusteeship*]

1. Petitioner accepted trusteeship of the _ _[*name*]_ _ Trust created by the trust agreement dated _ _[*date*]_ _, and has been trustee since that date.

[*Continue*]

2. Petitioner hereby resigns as trustee of the _ _[*name*]_ _ Trust.

[*Add one of the following alternatives*]

[*Alternative 1: Trust names person as successor*]

3. _ _[*Name*]_ _ is named as successor trustee of this trust under Paragraph _ _ of the trust instrument. Attached as Exhibit A and incorporated by reference is _ _[*his/her*]_ _ consent to appointment as successor trustee of this trust. _ _[*He/She*]_ _ is a resident of the State of _ _[*state*]_ _ and is over the age of 18 years.

[*Alternative 2: Trust names institution as successor*]

3. _ _[*Name*]_ _ is named as successor trustee of this trust under Paragraph _ _ of the trust instrument. Attached as Exhibit A and incorporated by reference is the consent of _ _[*name*]_ _ as _ _[*title*]_ _ and on behalf of _ _[*name of institution*]_ _. _ _[*Name of* institution]_ _ is _ _[*e.g., a trust company doing business in California*]_ _.

[*Alternative 3: Successor has been nominated under trust provision*]

3. Paragraph _ _ of the trust instrument grants _ _[*petitioner/name*]_ _ the power to nominate a successor trustee and _ _[*he/she/it*]_ _ has nominated _ _[*name*]_ _. Petitioner alleges on information and belief that this nomination and nominee's acceptance will be filed with the court by the time of the hearing on this petition for resignation.

[*Alternative 4: Beneficiaries have nominated successor*]

3. There is no provision in the trust instrument for appointment of a successor trustee. Petitioner alleges on information and belief that the beneficiaries of the trust will file a nomination and acceptance of nominee with the court by the time of the hearing on this petition for resignation.

[*Alternative 5: Petitioner unable to locate successor*]

3. Petitioner has been unable, after a diligent search, to locate a person or entity willing to serve as successor trustee.

[*Continue*]

[*Add one of the following alternatives*]

[*Alternative 1: Allegation that court should accept resignation and appoint successor*]

4. Under Probate Code §§15640(d) and 17200(b)(11), petitioner alleges that this court has jurisdiction to and must under the statute accept petitioner's resignation as trustee. Therefore, petitioner requests that petitioner's resignation be accepted and that _ _[*name*]_ _ be appointed as successor trustee.

[*Alternative 2: Allegation that court should appoint receiver*]

4. Under Probate Code §§15640(d) and 17200(b)(11), petitioner alleges that this court has jurisdiction to and must accept petitioner's resignation as trustee. Petitioner has searched diligently, but without success, for a person or entity willing to serve as successor trustee. There is no realistic likelihood that a willing successor trustee can be found, and therefore the court should appoint a receiver for the trust under Probate Code §15640(d). Petitioner has searched diligently, but without success, for a person or entity willing to serve as receiver. Therefore, petitioner requests that the court appoint a public officer or court official, such as the court administrator, court investigator, or the public guardian, to act as receiver. See *McCarthy v Poulsen* (1985) 173 CA3d 1212, 1220 n3, 219 CR 375.

[*Continue*]

5. No bond should be required because the trust instrument does not require a bond.

6. The names and last known post office addresses of the beneficiaries of the trust, as far as known to petitioner, are: _ _[*List names and addresses.*]_ _

[*Add one of the following alternatives*]

[*Alternative 1: No requests for special notice filed*]

7. No one has filed a request for special notice in this proceeding.

[*Alternative 2: Requests for special notice filed*]

7. The following have filed request(s) for special notice in this proceeding: _ _[*List name(s).*]_ _

[*Continue*]

[*Add one of the following alternatives*]

[*Alternative 1: Account filed with petition*]

8. Attached as Exhibit B and incorporated by reference is the accounting of petitioner's acts as trustee from _ _[*date*]_ _ through _ _[*date*]_ _.

[*Alternative 2: Account will be filed after appointment of successor*]

8. Petitioner will file a final accounting through the date of petitioner's resignation after the appointment of the _ _[*successor trustee/receiver*]_ _ and transfer of the assets.

[*Alternative 3: No account will be filed*]

8. Petitioner, as trustee, has faithfully managed and conducted the trust since _ _[*his/her/its*]_ _ appointment as trustee in strict accordance with the terms of the trust. Although petitioner has periodically presented the income _ _[*and remainder beneficiary(ies)*]_ _ with statements of account, no formal accounting has been filed. Petitioner believes the expense of preparing such an accounting would not be in the best interests of the trust

or of the beneficiaries.

[*Continue*]

[*If applicable, add one or more of the following options*]

[*Option 1: Waiver is attached*]

9. Attached as Exhibit C and incorporated by reference is a waiver of accounting signed by _ _[*name(s)*]_ _.

[*Option 2: Trust is court-supervised and petitioner seeks compensation*]

[10.] Petitioner has rendered services described as follows: _ _[*Provide description of services*]_ _. Petitioner asks for _ _[*dollar amount*]_ _ as reasonable compensation for such services, to be charged _ _[*dollar amount*]_ _ to principal and _ _[*dollar amount*]_ _ to income _ _[*, of which _ _[dollar amount*]_ _ *has already been paid*]_ _.

[*Option 3: Trust is court-supervised and petitioner seeks costs of transfer*]

[11.] Petitioner will incur reasonable costs and expenses in delivering the trust assets to the _ _[*successor trustee/receiver*]_ _ and asks that these expenses be allowed in an amount not to exceed _ _[*dollar amount*]_ _, to be charged _ _[*dollar amount*]_ _ to principal and _ _[*dollar amount*]_ _ to income.

[*Option 4: Trust is court-supervised and petitioner seeks attorney fees*]

[12.] Petitioner's attorney, _ _[*name*]_ _, has rendered services to petitioner described as follows: _ _[*Provide description of services*]_ _. Petitioner has paid the attorney no compensation for _ _[*his/ her*]_ _ services and requests that petitioner be authorized to pay the attorney reasonable fees in the sum of _ _[*dollar amount*]_ _ for these services, to be charged _ _[*dollar amount*]_ _ to principal and _ _[*dollar amount*]_ _ to income.

[*Continue*]

[13.] Petitioner requests the court to authorize petitioner to distribute the assets of the trust remaining on hand to the _ _[*successor trustee/receiver*]_ _ when the latter has been appointed.

[*Add if trust is unsupervised*]

[14.] A copy of the trust instrument dated _ _[*date*]_ _ is attached as Exhibit _ _ and incorporated by reference.

[*Continue*]

WHEREFORE, petitioner requests that:

1. The court accept petitioner's tender of resignation.

[*If applicable, add one or more of the following options*]

[*Option 1: Trust is court-supervised and prayer requests compensation*]

2. The court approve payment to trustee in the amount of _ _[*dollar amount*]_ _ for services rendered in the administration of the trust, to be charged _ _[*dollar amount*]_ _ to principal and _ _[*dollar amount*]_ _ to income.

[*Option 2: Trust is court-supervised and prayer requests costs of transfer*]

[3.] The court allow petitioner _ _[*his/her/its*]_ _ reasonable costs and expenses not to exceed _ _[*dollar amount*]_ _ to be incurred in the delivery and transfer of the trust assets to the _ _[*successor trustee/receiver*]_ _, to be charged _ _[*dollar amount*]_ _ to principal and _ _[*dollar amount*]_ _ to income.

[*Option 3: Trust is court-supervised and prayer requests attorney fees*]

[4.] The court authorize and direct petitioner to pay fees in the amount of _ _[*dollar amount*]_ _ to _ _[*his/her/its*]_ _ attorney(s), for the services set forth above.

[*Continue*]

[*Add one of the following alternatives*]

[*Alternative 1: Trust is court-supervised and petitioner seeks discharge*]

[5.] The court _ _[*settle, allow, and approve petitioner's account, and*]_ _ **discharge and release petitioner as trustee on delivery and transfer of all the trust assets to the** _ _[*successor trustee/receiver*]_ _ **and the filing of a** _ _[*receipt/final accounting*]_ _ **with the court.**

[*Alternative 2: Trust is unsupervised and petitioner seeks distribution to successor*]

[5.] The court direct petitioner to distribute the remaining trust assets, after payment of trustee's and attorneys' fees and costs, to _ _[*name*]_ _**, as** _ _[*successor trustee/receiver*]_ _**.**

[Continue]

[6.] The court appoint _ _[*name*]_ _ **as** _ _[*successor trustee/receiver*]_ _ **to serve without bond.**

[7.] The court make all further and proper orders, including any order it may deem necessary for the preservation of the trust.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Petitioner

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Petitioner

VERIFICATION

I, _ _[*name of petitioner*]_ _**, declare that:**

I have read the foregoing petition and know its contents. It is true of my own knowledge except as to matters that are stated in it on information and belief, and as to those matters I believe it to be true. _ _[*The accounting attached as Exhibit B contains a full and true statement of all charges against the trustee and of all credits to which the trustee is entitled.*]_ _

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (filed with court with proof of service); copies for notice (one for each beneficiary and person who has requested special notice); office copies; copy for probate department.

Comment: There is no statutory requirement to ask for trustee or attorney fees in the petition if the trust is nonsupervised. On the other hand, some practitioners believe the approval of fees will protect the trustee from later attacks by beneficiaries or the successor trustee or receiver. If there appear to be potential problems, it may be prudent to seek approval in the petition. Local rules should also be consulted.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.14 e. Form: Order Accepting Resignation of Trustee and for Appointment of Successor Trustee or Receiver

§14.14 e. Form: Order Accepting Resignation of Trustee and for Appointment of Successor Trustee or Receiver

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[*Title of court*]

In re _ _[*name*]_ _ Trust, Established _ _[*date*]_ _	)	**No. _ _ _ _ _ _**
	)	
	)	**ORDER ACCEPTING RESIGNATION OF TRUSTEE AND APPOINTING**
	)	**_ _[*SUCCESSOR TRUSTEE/RECEIVER*]_ _**
_____	)	

The verified petition of _ _[*name*]_ _, as trustee of the _ _[*name*]_ _ Trust dated _ _[*date*]_ _, for Order Accepting Resignation of Trustee and for Appointment of _ _[*Successor Trustee/Receiver*]_ _ _ _[*and for approval of trustee's and attorneys' fees and costs,*]_ _ came on regularly for hearing on _ _[*date*]_ _.

On proof made to the satisfaction of the court, the court finds:

1. That all notices of hearing have been given as required by law and that all allegations in the petition are true;

[*If applicable, add one or more of the following options*]

[*Option 1: Trust is court-supervised and court finds compensation is allowed*]

2. The trustee's compensation requested in the petition is reasonable and is allowed in the amount ordered;

[*Option 2: Trust is court-supervised and court finds costs of transfer are allowed*]

[3.] **The costs and expenses in delivering the trust assets to the _ _[*successor trustee/receiver*]_ _ are allowed in the amount ordered;**

[*Option 3: Trust is court-supervised and court finds attorney fees are allowed*]

[4.] The attorney fees for the services of _ _[*name*]_ _ requested in the petition are reasonable and are allowed in the amount ordered.

[*Continue*]

Good cause appearing,

IT IS ORDERED that:

1. Petitioner's tender of resignation is accepted.

[*Add one of the following alternatives*]

[*Alternative 1: Trust is court-supervised and account filed with petition is approved*]

2. Petitioner's accounting for the period from _ _[*date*]_ _ to _ _[*date*]_ _ is approved.

[*Alternative 2: Trust is court-supervised and account is waived*]

2. Waivers of accounting for the period from _ _[*date*]_ _ to _ _[*date*]_ _ from all the beneficiaries have been filed with the court, and no accounting need be filed.

[*Continue*]

[*If applicable, add one or more of the following options*]

[*Option 1: Trust is court-supervised and compensation is awarded*]

3. Petitioner is entitled to compensation for services in the amount of _ _[*dollar amount*]_ _ for services rendered during the period of the account, to be charged _ _[*dollar amount*]_ _ to principal and _ _[*dollar amount*]_ _ to income, and for reimbursement for costs in the amount of _ _[*dollar amount*]_ _, to be charged _ _[*dollar amount*]_ _ to principal and _ _[*dollar amount*]_ _ to income. Petitioner is ordered to make these payments.

[*Option 2: Trust is court-supervised and costs of transfer are awarded*]

[4.] Petitioner is entitled to reasonable compensation, costs, and expenses in the amount of _ _[*dollar amount*]_ _, to be charged _ _[*dollar amount*]_ _ to principal and _ _[*dollar amount*]_ _ to income, for services to be rendered and costs to be incurred for the delivery and transfer of the trust assets to the _ _[*successor trustee/receiver*]_ _. Petitioner is ordered to make these payments to _ _[*himself/herself/itself*]_ _.

[*Option 3: Trust is court-supervised and attorney fees are awarded*]

[5.] Petitioner is authorized to pay _ _[*his/her/its*]_ _ attorney(s), _ _[*name(s) of attorney(s)*]_ _, for services rendered during the period of the account the sum of _ _[*dollar amount*]_ _, to be charged _ _[*dollar amount*]_ _ to principal and _ _[*dollar amount*]_ _ to income, as reasonable attorney fees for the services described in the petition for resignation. Petitioner is ordered to make these payments.

[*Continue*]

[6.] _ _[*Name*]_ _ is hereby appointed _ _[*successor trustee/receiver*]_ _ of the _ _[*name*]_ _ Trust to serve without bond.

[7.] Petitioner's discharge is to be effective when all remaining assets of the _ _[*name*]_ _ Trust have been transferred to _ _[*name*]_ _ as _ _[*successor trustee/receiver*]_ _ and proper receipts have been filed with this court. Petitioner is ordered to transfer the remaining assets of the trust to _ _[*name*]_ _ as _ _[*successor trustee/receiver*]_ _ and to file receipts with this court.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Judge/Commissioner*]_ _
of the _ _[*title of court*]_ _

Comment: The findings of fact provided for in this order are optional. If any parties or attorneys appear at the hearing, the first paragraph of the order usually is modified to show the appearances and the name of the judge. See form in §14.37.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.15 B. Obtaining Release or Discharge

§14.15 B. Obtaining Release or Discharge

A resignation does not release or affect a resigning trustee's liability. Prob C §15641. The resigning trustee has at least three alternatives for closing out liability:

- A court accounting;
- A private accounting and request for release by beneficiaries; or
- A private accounting and reliance on the statute of limitations.

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§14.16 1. Court Accounting

Whether or not a trust has been subject to continuing court jurisdiction, the trustee has the option of petitioning the court under Prob C §17200(b)(5) for approval of the trustee's accounting through the time of his or her resignation and transfer of trust assets. The disadvantage of this approach is the burden and delay of preparing an accounting that satisfies the format of court accountings. See Prob C §§1060-1064. On the other hand, if the petition for approval of accounting is brought simultaneously with the petition for acceptance of the resignation, everything will be wrapped up at once, and fees for a successful defense of the account will be awarded from the trust corpus before the assets are transferred to the successor.

On formal accounts, see chap 13.

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§14.17 2. Private Accounting and Request for Release

Unless the trust instrument expressly waives a report and account (see Prob C §16064(a)), when a change of trustees occurs, the resigning trustee generally has a duty to provide an account to each beneficiary who is currently entitled to a distribution or to whom the trustee has discretion to make a distribution. Prob C §16062(a). If in a given case the trustee is required to account to the specified beneficiaries, there is little additional burden in providing the account to all beneficiaries and requesting all beneficiaries to provide a written release that meets the requirements for an effective discharge of the trustee's liability under Prob C §16464. If any beneficiaries are unwilling to give the release, then the trustee may decide whether or not to petition the court for approval of the account.

On the duty to account and exceptions to it, see chap 13. On requirements for release of a trustee's liability, see §§13.9, 21.54.

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§14.18 3. Private Accounting and Reliance on Statute of Limitations

Whether or not a private accounting is required, a trustee has the option of providing an accounting in order to start a 3-year statute of limitations running for purposes of any claim against the trustee. See Prob C §16460(a)(1). The trustee can then wait for the 3-year period to run, instead of forcing a current resolution by either asking for beneficiary releases or petitioning the court for approval of the accounting.

Waiting for the statute to run has some disadvantages, however. First, because any claimant has 3 years to come forward, the resigning trustee is likely to have transferred all of the trust assets to a successor, and the successor may even have distributed all of the trust assets to beneficiaries, before the litigation begins. A resigning trustee who then successfully defends his or her actions may have no practical means to recover costs (including attorney fees) from the already-transferred and distributed trust corpus. Second, because sometimes a breach is less apparent initially than after the lapse of time, it may be safer for the trustee to petition for court approval immediately on resignation. On the other hand, less immediate expense may be involved by giving an account and then waiting, rather than petitioning for court approval immediately.

On the statute of limitations for claims against a trustee, see §§21.56-21.58.

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.19 4. Warning Against Self-Help Holdback

§14.19 4. Warning Against Self-Help Holdback

A resigning trustee who expects litigation over his or her stewardship may be tempted to hold back a portion of the trust corpus as a source to pay attorney fees for the anticipated defense. The trustee, however, should resist the temptation of a self-help holdback. Under Prob C §15644, the resigning trustee must deliver the trust property to the successor trustee. In addition, psychologically, a self-help holdback amounts to a virtual taunt to the beneficiaries to bring their claims. A resigning trustee who is confident in his or her defense and wants to protect his or her ultimate right to reimbursement from the trust corpus should promptly seek a court order allowing the resigning trustee to hold back a reserve or requiring the successor trustee to hold back from distribution an amount reasonably adequate to secure the costs of the resigning trustee's defense.

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§14.20 C. Timing Resignation

The fact that the resigning trustee will be handing over the files and the assets to a successor may affect the timing of the resignation. For example, if the resigning trustee strongly expects beneficiary litigation claiming breach of trust, the trustee may prefer to stay in control of the files, assets, and attorney-client privilege as to past communications concerning trust administration (see *Moeller v Superior Court* (1997) 16 C4th 1124, 69 CR2d 317) until the litigation is over. Handing over the files, assets, and attorney-client privilege to a successor who may see it as his or her duty to join the beneficiaries in attacking the predecessor is hardly the best vantage point from which to begin the battle. On the other hand, if a beneficiary appears only mildly displeased and asks a trustee to resign, the trustee may be able to defuse the situation by a quick and courteous departure. If the reason for resignation is the trustee's perception that the trust is becoming a problem trust, an early resignation may be advantageous, before the difficulties have become so pronounced that no one is willing to become a successor.

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II. TRUSTEE REMOVAL

§14.21 A. Removal in Accordance With Trust Instrument

A trustee may be removed in accordance with the terms of a trust instrument. Prob C §15642. Trust instruments often grant one or more persons the power to remove an incumbent trustee, sometimes for specified reasons or on specified contingencies, and sometimes for no reason at all. The power is often linked to a power to appoint a successor. If the trust instrument provides a removal power without limitation, the power generally is exercisable at will. An unlimited power held by someone other than the sole beneficiary, however, may be held in a fiduciary capacity (so that the holder is not permitted to pervert the administration of the trust to favor himself or herself to the detriment of other beneficiaries). Bogert, The Law of Trusts and Trustees §520 (rev 2d ed 1993).

The holder of an unlimited power probably would not be able to use the power with impunity to collude with or bribe a successor because, even though the holder might not be a fiduciary, he or she becomes jointly liable with the disloyal successor fiduciary by reason of the collusive participation in causing a breach of fiduciary duty. *St. James Armenian Church of Los Angeles v Kurkjian* (1975) 47 CA3d 547, 552, 121 CR 214; Restatement (Second) of Trusts §326 (1959); Restatement of Restitution §138 (1937); Restatement (Second) of Torts §876 (1965). For examples of trust provisions that deal with removal powers, see Drafting California Revocable Trusts §16.39 (4th ed Cal CEB 2003).

Beneficiaries who hold an unrestricted power to remove a trustee may attempt to use that power to bend the trustee to their will. The trustee should not acquiesce to beneficiary demands that are contrary to the terms of the trust, that would amount to an impermissible delegation of decision-making authority to beneficiaries (Prob C §16012), or that would impermissibly favor some beneficiaries over others in breach of the duty of impartiality (Prob C §16003). See *Martin v Bank of America Nat'l Trust & Sav. Ass'n* (1935) 4 CA2d 431, 41 P2d 200.

A removal based on a power in the trust instrument must, of course, be carried out in compliance with the terms of the trust. Restatement (Second) of Trusts §107, Comment h. If an incumbent trustee concludes that an attempted removal does not comply with the terms of the trust, it is arguably a breach of fiduciary duty to fail to object. Thus, the trustee should consider objecting, or, in the alternative, resigning, if he or she no longer finds the position attractive because of the hostility of the person attempting to remove the trustee.

One outcome of the decisions in *Wells Fargo Bank v Superior Court* (2000) 22 C4th 201, 91 CR2d 716, and *Moeller v Superior Court* (1997) 16 C4th 1124, 69 CR2d 317, is likely to be intensified efforts by beneficiaries to obtain interim removal of a trustee during breach of trust litigation to allow access to the trustee's attorney-client communications concerning trust administration. Under *Wells Fargo,* beneficiaries may not compel disclosure of the trustee's privileged attorney-client communications. *Moeller,* however, holds that a successor trustee generally becomes holder of the privilege as to "those confidential communications that occurred when the predecessor, in its fiduciary capacity, sought the attorney's advice for guidance in administering the trust." 16 C4th at 1134. As a result, in most situations the only way that beneficiaries can compel disclosure of a trustee's confidential attorney-client communications is to seek removal or resignation of the trustee, appointment of a successor, and voluntary waiver of the privilege by the successor. See §21.50A.

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.22 B. Removal by Court

§14.22 B. Removal by Court

The court has power to remove a trustee on its own motion. In addition, a settlor, cotrustee, or beneficiary may initiate a removal action by filing a petition under Prob C §17200. Prob C §15642(a).

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.23 1. Grounds

§14.23 1. Grounds

Grounds for removal of a trustee include (Prob C §15642(b)):

- Breach of trust;
- Insolvency of the trustee or other unfitness to administer the trust;
- Hostility among cotrustees that impairs administration;
- The trustee's failure to act or declining to act;
- Excessive compensation;
- The fact that the sole trustee is a disqualified person (Prob C §21350(a)), unless certain exceptions apply (see §§6.32, 14.28, and chap 6A);
- Substantial inability to manage the trust's resources or properly execute the duties of the office, due to lack of mental capacity;
- Substantial inability to resist fraud or undue influence; and
- Other good cause.

Probate Code §15642(b) states that the grounds for removal "include" the nine enumerated grounds, but the statute does not *limit* the court to those grounds. For this reason, and because the last ground, "other good cause," is a flexible catch-all, the discretionary power of a court to remove a trustee is very broad.

A trustee may also be removed for failing to register with the Statewide Registry maintained by the Department of Justice as required by Prob C §2850. Prob C §17200(c). The court may, on its own motion, set and give notice of an order to show cause why a trustee should not be removed for failing to register.

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a. Breach of Trust

§14.24 (1) Removal Is Only One of Several Remedies

A breach of trust means a violation of any duty that the trustee owes the beneficiary. Prob C §16400. See §§21.1-21.26. The court may remove a trustee who has committed a breach of trust (Prob C §§15642(b)(1), 16420(a)(5)), but removal is not the only remedy for breach of trust. The court may also:

- Reduce the trustee's fees (Prob C §16420(a)(7)) or
- Surcharge the trustee for damages or lost profits (Prob C §§16420(a)(3), 16440; see also §§21.63-21.68).

In some cases involving fraud, malice, or oppression combined with the breach of trust, an award of punitive damages against the trustee might be available (see Prob C §16420(b); see also §21.69).

Preliminary remedies that are available pending a full hearing on a trustee's petition for approval of an account include either full or partial suspension of the trustee. In *Schwartz v Labow* (2008) 164 CA4th 417, 78 CR3d 838, the probate court suspended a trustee who, without first seeking court approval, used trust funds to pay $1.3 million in fees to litigate a claim netting only a partially collectible judgment of approximately $700,000. The court had first suspended all powers of the trustee except completion of the fee matter and then suspended him entirely for failing to provide his successor with trust records and files. With a Prob C §17200 petition for approval of the account pending, the court had inherent equitable power to suspend the trustee even in the absence of a removal petition. See 164 CA4th at 427. See also Prob C §15642(e) (power to suspend while removal petition pending).

In a given instance, removal may not be the most appropriate remedy for breach of trust. When an otherwise good trustee inadvertently slips into a single breach, fee reduction or damages may be preferable to removal as a remedy. Beneficiaries who expect that there will be no future recurrences will not need to remove the trustee, and the otherwise good performance of the trustee will continue. On the other hand, a pattern of conscious ongoing breaches may justify removal as the only practical way to protect the beneficiaries from future breaches. See, *e.g., Dennis v Rhode Island Hosp. Trust Nat'l Bank* (D RI 1983) 571 F Supp 623, 639.

On surcharging the trustee, see chap 13. On the various other remedies available and the measure of damages for breach of trust, see §§21.63-21.71.

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§14.25 (2) Breach From Conflict of Interest

A common focal point for removal actions is the trustee's duty to avoid conflicts of interest. Prob C §§16004-16005. See, *e.g., Claypool v Wilson* (1992) 4 CA4th 646, 6 CR2d 77; *Getty v Getty* (1988) 205 CA3d 134, 252 CR 342. Generally, a mere potential conflict unaccompanied by adverse actions does not support removal (*Estate of Wemyss* (1975) 49 CA3d 53, 61, 122 CR 134), particularly when the settlor who named a trustee was aware of possible conflicts inherent in the appointment. *Estate of Gilliland* (1977) 73 CA3d 515, 528, 140 CR 795. See *Estate of Keyston* (1951) 102 CA2d 223, 227 P2d 17, overruled on other grounds in *Estate of Schloss* (1961) 56 C2d 248, 14 CR 643; *Copley v Copley* (1981) 126 CA3d 248, 178 CR 842.

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§14.26 b. Trustee Insolvent or Unfit

A trustee who is insolvent or otherwise unfit to administer the trust may be removed by court order. Prob C §15642(b)(2).

The term "insolvent" includes bankruptcy. Accordingly, an automatic vacancy in the trusteeship is triggered when the trustee becomes the subject of an order for relief in bankruptcy. Prob C §15643(f). Even in the absence of a bankruptcy order, proof of insolvency will support the removal of the trustee. Prob C §15642(b)(2).

In addition to the grounds for removal of an "otherwise unfit" trustee, the statute specifically provides for removal if the trustee is substantially unable to manage financial resources or execute the duties of office due to lack of mental capacity, or is substantially unable to resist fraud or undue influence. Prob C §15642(b)(7)-(8). See §14.28A. A vacancy in the office of trustee occurs automatically if a conservator or guardian of the person or estate of an individual trustee is appointed. Prob C §15643(e).

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.27 c. Hostility Among Cotrustees That Impairs Administration

§14.27 c. Hostility Among Cotrustees That Impairs Administration

Unless a trust instrument provides otherwise, decisions by the cotrustees must be unanimous. Prob C §15620. A single impasse can be resolved by an interested person filing a petition for instructions with the court under Prob C §17200(b)(10). When courteous agreements to disagree turn into hostile name calling, failures to communicate, and extended deadlocks, however, then repetitive petitions under Prob C §17200 will not provide a practical means of administering the trust. The court has power under Prob C §15642(b)(3) to cure the problem by replacing as many cotrustees as seems appropriate.

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.28 d. Sole Trustee Is Disqualified Person Under Prob C §21350(a)

§14.28 d. Sole Trustee Is Disqualified Person Under Prob C §21350(a)

Probate Code §15642(b)(6) establishes express grounds for removing a sole trustee who is a disqualified person under Prob C §21350(a), unless certain exceptions apply. Generally, these individuals are disqualified from being the sole trustee of a trust:

- The drafter of a trust instrument (Prob C §§21350(a)(1));
- Someone related to the drafter by blood or marriage (Prob C §§21350(a)(2));
- The domestic partner of the drafter (Prob C §§21350(a)(2));
- Someone who cohabits with the drafter (Prob C §§21350(a)(2));
- Someone employed by the drafter (Prob C §§21350(a)(4)); or
- A person who transcribes the trust, or causes it to be transcribed while in a fiduciary relationship with the settlor (Prob C §21350(a)(4)). See *Estate of Swetmann* (2000) 85 CA4th 807, 102 CR2d 457 (conservator who found company that produced will, arranged for appointments, introduced agent to decedent, and paid for legal services in capacity as conservator did not "cause" instruments to be transcribed).

Removal of a sole trustee is not warranted, however, if any of the following exceptions apply:

Settlor's intent. The court finds that it is consistent with the settlor's intent that the trustee continue to serve and that this intent was not the product of fraud, menace, duress, or undue influence. Prob C §15642(b)(6). The sole trustee carries the burden of proof to establish both the settlor's intent and the lack of fraud, menace, duress, or undue influence.

Related to settlor. The settlor was related by blood or marriage to the sole trustee, the drafter, or the transcriber. Prob C §15642(b)(6)(A).

Independent review. An independent attorney reviews the trust instrument, advises the settlor, and delivers to the settlor and the designated trustee a certificate stating the attorney's conclusion that the settlor clearly intends the designation, and that the intent is not the product of fraud, menace, duress, or undue influence. Prob C §15642(b)(6)(B). The form of the certificate is specified by the Probate Code. See Prob C §15642(b)(6)(B).

Conservatorship proceedings. The trust instrument is approved by the court under the substituted judgment procedures of conservatorship proceedings (see Prob C §§2100-2808) after full disclosure to the court of the relationships of the persons involved.

For further discussion of sole trustees, see chap 6.

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.28A e. Inability to Manage Financial Resources, Execute Duties of Office, or Resist Fraud or Undue Influence

§14.28A e. Inability to Manage Financial Resources, Execute Duties of Office, or Resist Fraud or Undue Influence

A trustee may be removed under Prob C §15642 if:

- As determined under Prob C §§810-813 (regarding mental incapacity), the trustee is substantially unable to manage the trust's financial resources or is otherwise substantially unable to properly execute the duties of office (Prob C §15642(b)(7)); or
- The trustee is substantially unable to resist fraud or undue influence (Prob C §15642(b)(8)).

A vacancy in the office of trustee occurs automatically if a conservator or guardian of the person or estate of an individual trustee is appointed. Prob C §15643(e).

When the trustee holds the power to revoke the trust, substantial inability to manage the trust's financial resources, execute the duties of office, or resist fraud or undue influence may not be proven solely by isolated incidents of negligence or improvidence. Prob C §15642(b)(7)-(8).

Unfitness due to senility is likely to become an increasingly common issue as a result of the dramatic shift to inter vivos trusts as estate planning vehicles. A typical inter vivos trust appoints the surviving spouse to serve as sole trustee on the death of the first spouse. Many of those surviving spouses are now approaching an age when declining physical and mental energy may leave them unfit to administer the trust. Just as some elderly people refuse to give up the freedom of driving a car long past the time that their driving skills have waned, so also an elderly surviving spouse may refuse to give up the control of being trustee long after his or her administrative abilities have declined. Although the trust instrument itself may provide a noncourt mechanism for determining mental incapacity (see Drafting California Revocable Trusts §16.38A (4th ed Cal CEB 2003)), these mechanisms are not self-executing. Family members may have to wrest control of the trust away from an elderly parent just as they wrest the car keys from him or her.

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f. Other Good Cause

§14.29 (1) Hostility Between Trustee and Beneficiary That Impairs Administration

Hostility between the trustee and the beneficiaries that impairs the administration of the trust may provide good cause for removal. *Estate of Gilmaker* (1962) 57 C2d 627, 21 CR 585; *Overell v Overell* (1926) 78 CA 251, 248 P 310; *Brown v Memorial Nat'l Home Found.* (1958) 162 CA2d 513, 534, 329 P2d 118. The hostility must actively affect administration of the trust. See *Copley v Copley* (1981) 126 CA3d 248, 178 CR 842 (hostility anticipated by testator was not ground for removal when administration of trust was not impaired); *Estate of Brown* (1937) 22 CA2d 480, 485, 71 P2d 345; *Goto v Goto* (1960) 187 CA2d 603, 10 CR 20 (no removal on hostility grounds when there was no wrongdoing and no effect on active trust administration). Removal cannot be based solely on hostility engendered by the beneficiary's demand for the trustee's removal. *IFS Indus. v Stephens* (1984) 159 CA3d 740, 754, 205 CR 915.

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§14.30 (2) Transfer of Trust From One Corporate Fiduciary to Another

When a trust is transferred from one corporate fiduciary to another, the transfer is good cause for removal, whether the transfer was triggered by transfer of an individual trust or by sale of a trust department. Fin C §4842.

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.31 (3) Transfer of Irrevocable Trust to Trust Company on Request of Current Beneficiaries

§14.31 (3) Transfer of Irrevocable Trust to Trust Company on Request of Current Beneficiaries

Probate Code §15645 permits a court to order that the trustee pay the costs and reasonable attorney fees of a petitioner who obtains court removal of the trustee after he or she refuses to resign in favor of a successor trust company on request of the current income and principal beneficiaries. By implication, therefore, a request by the beneficiaries for transfer of the trust to a trust company may provide good cause for removal.

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2. Attorney Fees

§14.32 a. Successful Trustee

A trustee who successfully defends himself or herself from a removal action is entitled to reasonable attorney fees from the trust under Prob C §15684(a), which permits repayment of the trustee's expenses out of trust property for "expenditures that were properly incurred in the administration of the trust." In addition, Prob C §15642(d) provides that the petitioner may be ordered to bear the costs of the proceeding, including reasonable attorney fees, if the court finds that the petition was filed in bad faith and removal would be contrary to the settlor's intent. The provision in Prob C §15642(d) for payment of attorney fees presumably includes the attorney fees of the successful trustee.

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§14.33 b. Unsuccessful Trustee

A trustee who loses a removal petition based on breach of trust bears his or her own attorney fees. Prob C §15684; *Estate of Gilmaker* (1964) 226 CA2d 658, 663, 38 CR 270; *Estate of Vokal* (1953) 121 CA2d 252, 263 P2d 64. A trustee who loses a removal petition because he or she is a disqualified person under Prob C §15642(b)(6) (see §14.26) bears "all costs of the proceeding, including reasonable attorney's fees." Prob C §15642(c). This statutory provision presumably encompasses not only the attorney fees of the unsuccessful trustee but also the attorney fees of the petitioner. A trustee of an irrevocable trust who refuses to transfer administration of the trust to a successor trust company on request of the current beneficiaries (see §14.31) and loses the ensuing removal action presumably bears his or her own attorney fees because, under Prob C §15645, the court may order the trustee to bear the successful petitioner's fees.

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§14.34 c. Successful Petitioner

A petitioner who succeeds in removing a disqualified person (see Prob C §15642(b)(6)) on a court finding that the designation of the trustee was not consistent with the intent of the settlor or was the product of fraud, menace, duress, or undue influence (see §14.24) is entitled to recover reasonable attorney fees from the removed trustee. A petitioner who succeeds in removing a trustee who refused to transfer an irrevocable trust to a successor trust company on request of the current income and principal beneficiaries (see §14.31) may be entitled to attorney fees from either the removed trustee or the trust, at the discretion of the court. Prob C §15645. Although there is no additional statutory authority for the successful petitioner to recover attorney fees, in a given case a petitioner might succeed in arguing that he or she should be paid attorney fees from the trust for having conferred an economic benefit on the trust, *i.e.,* the removal of a trustee who was causing damage. See, *e.g., Hutchinson v Gertsch* (1979) 97 CA3d 605, 159 CR 40.

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.35 d. Unsuccessful Petitioner

§14.35 d. Unsuccessful Petitioner

A petitioner who brings an unsuccessful action to remove a trustee bears his or her own attorney fees. In addition, the petitioner may have to pay the trustee's attorney fees, at the court's discretion, if the court finds that the petition was filed in bad faith and that removal would be contrary to the settlor's intent. Prob C §15642(d).

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3. Petition for Removal

§14.36 a. Procedure

A petition for removal may be filed by the settlor, a cotrustee, or a beneficiary. Generally venue is proper in the court where the principal place of administration of the trust is located. For testamentary trusts, venue is also proper where the estate was administered. Prob C §17005. Notice must be given at least 30 days before the hearing of the petition. Prob C §17203. Persons entitled to notice include all trustees, all beneficiaries entitled to notice under Prob C §§15802-15804, and beneficiaries who have requested special notice under Prob C §17204. The court may grant interim relief pending a hearing on the petition by ordering that trust assets be surrendered to a cotrustee, temporary trustee, or receiver appointed by the court. Prob C §§15642(e), 17206.

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.37 b. Form: Petition for Removal of Trustee

§14.37 b. Form: Petition for Removal of Trustee

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[*Title of court*]

In re _ _[*name*]_ _ Trust,	**)**	**No. _ _ _ _ _ _**
Established _ _[*date*]_ _	**)**	
	)	**PETITION TO REMOVE**
	)	**TRUSTEE AND TO APPOINT**
_____	**)**	**SUCCESSOR TRUSTEE**

Petitioner, _ _[n*ame*]_ _, alleges:

1. Petitioner is _ _[*state interest in trust*]_ _.

[*Add one of the following alternatives*]

[*Alternative 1: Trustee was appointed*]

2. _ _[*Name*]_ _ was appointed trustee of the _ _[*name*]_ _ Trust under the will of _ _[*name*]_ _ by order of court dated _ _[*date*]_ _, and ever since has been and now is the trustee.

[*Alternative 2: Trustee accepted trusteeship*]

2. _ _[*Name*]_ _ accepted trusteeship of the _ _[*name*]_ _ Trust by the trust agreement dated _ _[*date*]_ _, and has been acting as trustee since that date.

[*Continue*]

3. Petitioner requests the court to remove _ _[*name*]_ _ as trustee pursuant to its authority under Probate Code §15642 because _ _[*state reason, e.g., trustee is unfit*]_ _.

[*Add one of the following alternatives*]

[*Alternative 1: Successor trustee designated in trust should be appointed*]

4. Petitioner requests that the court appoint _ _[*name*]_ _ as successor trustee in accordance with paragraph _ _ of the decree of distribution creating the trust. Petitioner further requests that the court appoint the successor trustee _ _[*with bond/with minimum bond in the amount of _ _[dollar amount*]_ _*/without bond*]_ _.

[*Alternative 2: Successor designated in trust declines and another trustee should be appointed*]

4. Paragraph _ _ of the trust instrument appoints _ _[*name*]_ _ as successor trustee. _ _[*Name*]_ _ has declined to serve and _ _[*his/her/its*]_ _ declination is attached as Exhibit A. Petitioner requests that the court appoint _ _[*name*]_ _ as successor trustee. _ _[*Name*]_ _'s consent to serve is attached as Exhibit B. Petitioner further requests that the court appoint the successor trustee _ _[*with bond/with minimum bond in the amount of _ _[dollar amount*]_ _*/without bond*]_ _.

[*Alternative 3: No successor designated in trust*]

4. The trust instrument does not appoint a successor trustee. Petitioner requests that the court appoint _ _[*name*]_ _ as successor trustee. _ _[*Name*]_ _'s consent to serve is attached as Exhibit A. Petitioner further requests that the court appoint the successor trustee _ _[*with bond/with minimum bond in the amount of _ _[dollar amount*]_ _*/without bond*]_ _.

Petitioner believes that _ _[*name*]_ _'s appointment as successor trustee is in the best interests of the trust and of those persons interested in the trust estate for the following reasons: _ _[*State reasons.*]_ _

[*Continue*]

5. Petitioner requests that the court order _ _[*name*]_ _ to file an accounting with the court detailing _ _[*his/her/its*]_ _ acts as trustee.

6. Petitioner believes that compensation in the amount of _ _[*dollar amount*]_ _ is reasonable for _ _[*his/her/its*]_ _ attorney fees for this petition and that this amount should be charged as an expense of the trust and paid directly to the attorneys. Petitioner also believes that this amount should be charged _ _[*dollar amount*]_ _ to principal and _ _[*dollar amount*]_ _ to income.

WHEREFORE, petitioner requests that:

1. The court remove _ _[*name*]_ _ as trustee of the _ _[*name*]_ _ Trust and appoint _ _[*name*]_ _ as successor trustee to serve _ _[*with bond/with minimum bond in the amount of _ _[dollar amount*]_ _*/without bond*]_ _.

2. The court order _ _[*name*]_ _ to file an accounting with the court detailing _ _[*his/her/its*]_ _ acts as trustee.

3. The court authorize and direct the trustee to pay petitioner's attorney fees in the amount of _ _[*dollar amount*]_ _ to be paid to the attorneys directly from the trust, and order that this amount be charged _ _[*dollar amount*]_ _ to principal and _ _[*dollar amount*]_ _ to income.

4. The court make all further and proper orders.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Petitioner

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Petitioner

[*Verification; see §14.13*]

Copies: Original for filing; service copies; office copies; copy for probate department.

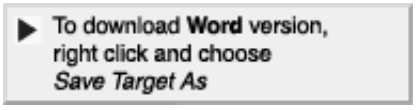
Comment: See §14.34 for grounds for award of attorney fees to petitioner. As an alternative to including a request for attorney fees in this form, a later, separate petition claiming fees may be filed instead.

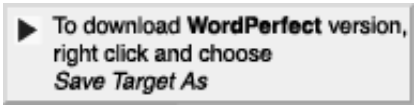
For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.38 c. Form: Order for Removal of Trustee

§14.38 c. Form: Order for Removal of Trustee





[*Title of court*]

In re _ _[*name*]_ _ **Trust,**)
Established _ _[*date*]_ _)
_____)

No. _ _ _ _ _ _

ORDER REMOVING TRUSTEE

The petition of _ _[*name*]_ _**, as** _ _[*state interest in estate*]_ _**, for removal of** _ _[*name*]_ _ **as trustee, for appointment of successor trustee, and for payment of attorney fees was regularly heard on** _ _[*date*]_ _. _ _[*Name*]_ _ **appeared as attorney for petitioner, and** _ _[*no one/*_ _[*name*]_ _ *as attorney for* _ _[*party*]_ _]_ _ **appeared in opposition. After hearing the petition and hearing the evidence, the court finds that all notices of hearing have been given as required by law, that all allegations of the petition are true, that good cause, namely** _ _[*specify grounds for removal*]_ _**, exists for the removal of** _ _[*name of trustee*]_ _**, and that attorneys for petitioner are entitled to compensation for services in the amount of** _ _[*dollar amount*]_ _ **to be paid directly from the trust. Good cause appearing,**

IT IS ORDERED that:

1. _ _[*Name*]_ _**, trustee of the** _ _[*name*]_ _ **Trust, is removed.**

2. _ _[*Name*]_ _ **render an accounting to the court within** _ _[*number*]_ _ **days of the date of this order.**

3. _ _[*Name*]_ _ **is appointed as successor trustee of the** _ _[*name*]_ _ **Trust to serve** _ _[*with bond in the amount of* _ _[*dollar amount*]_ _*/without bond*]_ _**.**

4. _ _[*Name*]_ _ **is ordered to turn over all assets and books and records of the** _ _[*name*]_ _ **Trust to** _ _[*name*]_ _**, as successor trustee, no later than** _ _[*date*]_ _**.**

5. _ _[*Names*]_ _**, attorneys for the beneficiaries, are entitled to compensation in the amount of** _ _[*dollar amount*]_ _ **to be paid from the trust,** _ _[*dollar amount*]_ _ **from principal and** _ _[*dollar amount*]_ _ **from income.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Judge/Commissioner*]_ _
of the _ _[*title of court*]_ _

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Comment: For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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III. REMOVAL OF PERSONAL REPRESENTATIVE

§14.39 A. Statutory Grounds

Under Prob C §8502, a personal representative may be removed when he or she:

- Has wasted, embezzled, or mismanaged the estate property, or committed a fraud on the estate or is about to do so;
- Is incapable of properly executing his or her duties, or is unqualified for appointment;
- Has wrongfully neglected the estate;
- Has long neglected to perform any acts as representative;
- Must be removed to protect the estate or interested persons; or
- Is subject to removal for any other cause provided by statute (see, *e.g.,* Cal Rules of Ct 7.700(b), allowing the court to remove a personal representative who paid or received fees in advance of a court order authorizing payment).

A representative who fails to file the inventory and appraisal within the prescribed time (Prob C §8804), fails to give security as ordered by the court (Prob C §8480), or fails to render an account when required by the court (Prob C §11052) may also be removed.

Further, when a representative has been declared in contempt of court, his or her letters may be summarily revoked. Prob C §8505. Letters of administration may also be revoked at the instance of one having a prior right to letters. See Prob C §8503. If a later will is admitted to probate, a prior grant of letters must be revoked. Prob C §8504.

Honest mistakes, in the absence of fraud, gross negligence, or indifference to fiduciary duty, are not grounds for the representative's removal. *Estate of Buchman* (1954) 123 CA2d 546, 556, 267 P2d 73.

In *Estate of Effron* (1981) 117 CA3d 915, 928, 173 CR 93, the court held that an executor does not violate its fiduciary duty in failing to discharge the attorneys for the estate at the beneficiaries' request. The court found that there is no policy to justify giving the beneficiaries, in effect, power to administer or control the estate.

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§14.40 B. Discretionary Removal Power

In addition to the statutory grounds (see §14.39), a probate court has the inherent power to remove a representative when necessary to protect the estate. *Luckey v Superior Court* (1930) 209 C 360, 370, 287 P 450. Because this remedy is severe, it will not be exercised for trivial causes. *Estate of Bell* (1901) 135 C 194, 67 P 123. The court may remove a representative who takes a position that conflicts with his or her fiduciary duties towards the estate. See *Estate of Effron* (1981) 117 CA3d 915, 173 CR 93; *Estate of Guzzetta* (1950) 97 CA2d 169, 217 P2d 460 (major conflict of interest).

The courts generally will not remove an executor if the estate may be protected by a less radical remedy. See *Estate of Feeney* (1983) 139 CA3d 812, 820, 189 CR 84 (executor refused to sign petition for sale of property; rather than remove her, trial court should have ordered her to sell property).

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§14.41 C. Suspension of Powers and Special Administration

The court has the power pending the investigation to suspend the representative's powers. Prob C §8500(b). The court may even revoke the representative's letters if his or her current account shows mismanagement, wrongdoing, or waste. *Estate of Richardson* (1946) 74 CA2d 350, 168 P2d 774. See Prob C §8502(a).

If the court suspends the representative's powers, there is a hiatus until the matter of removal or additional bond can be determined. If the continuation of some powers is needed to protect the estate, the court may suspend only some powers or appoint a special administrator during the period of suspension. Prob C §§8500(b), 8540. If the letters are revoked, a permanent administrator may be appointed, or a special administrator may be appointed until a permanent appointment can be made. Prob C §§8500, 8522, 8540; *Barrett v Superior Court* (1896) 111 C 154, 43 P 519.

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D. Petition for Removal

§14.42 1. Procedure

Any person interested in the estate may initiate removal proceedings by petition under Prob C §8500. The court on its own motion may cite a representative to show cause why his or her letters should not be revoked or to suspend his or her authority (*Estate of Gainfort* (1938) 11 C2d 298, 79 P2d 97), or may, by an order stating the facts, remove a personal representative from office without further showing or notice if the representative has been held in contempt for disobeying a court order. Prob C §8505.

The required "interest" to seek removal under Prob C §8500 is liberally construed. *Estate of Kovacs* (1964) 227 CA2d 308, 38 CR 612. The petitioner need not even be a California resident. *Estate of Richardson* (1946) 74 CA2d 350, 168 P2d 774. A citation is issued to the representative to appear and show cause why his or her letters should not be revoked. The representative's powers may be suspended pending the hearing. Prob C §8500(b). Absconding and concealed representatives may also be removed from office under Prob C §8505(b) if they are found to have disobeyed a court order, or a "nonresident" (as defined in Prob C §8570) may be removed for failure to keep the court informed of his or her address (as required by Prob C §8573). Prob C §8577. Other statutes providing for removal of representatives are silent on the procedure to be employed, although in one instance notice to the representative is specifically required. See Prob C §8804 (failure to file inventory). Probate Code §8500(c) provides for the removal hearing procedure. The court may compel the representative's attendance at the hearing. Prob C §8500(c).

The written charges filed by the party seeking removal and the representative's answer constitute the pleadings on which issue is joined. The accusation must be specific, and demurrer is appropriate when a petition for removal contains only general allegations of waste or mismanagement. *Estate of Wacholder* (1946) 76 CA2d 452, 455, 173 P2d 359.

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.43 2. Form: Petition for Removal of Representative

§14.43 2. Form: Petition for Removal of Representative

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[*Title of court*]

Estate of _ _[*name*]_ _, **Deceased**	**No.** _ _ _ _ _ _
	PETITION FOR _ _[*SUSPENSION OF POWERS AND*]_ _ **REMOVAL OF REPRESENTATIVE**

Petitioner, _ _[*name*]_ _**, alleges:**

1. Petitioner is _ _[*state interest in the estate*]_ _**.**

2. _ _[*Name of representative*]_ _ **is the** _ _[*executor/administrator*]_ _ **of the** _ _[*will/estate*]_ _ **of the above-named decedent.**

3. _ _[*Name of representative*]_ _ **should be removed as** _ _[*executor/administrator*]_ _ **of decedent's** _ _[*will/estate*]_ _ _ _[*and, pending investigation of the charges, the representative's powers as such should be suspended*]_ _ **on each of the following grounds:** _ _[*List grounds separately, giving details of mismanagement*]_ _**.**

WHEREFORE, petitioner requests that:

[*Add if appropriate*]

1. The court issue a citation directed to _ _[*name of representative*]_ _ **as** _ _[*executor/administrator*]_ _ **of the decedent's** _ _[*will/estate*]_ _ **requiring** _ _[*him/her*]_ _ **to appear and show cause why** _ _[*he/she*]_ _ **should not be removed and** _ _[*his/her*]_ _ **letters** _ _[*testamentary/of administration*]_ _ **revoked.**

[*Continue*]

[2.] The court remove and revoke the letters _ _[*testamentary/of administration)*]_ _ **of** _ _[*name of representative*]_ _**.**

[*Add if appropriate*]

[3.] The court forthwith suspend the powers of _ _[*name of representative*]_ _ **as** _ _[*executor/administrator*]_ _ **of the decedent's** _ _[*will/estate*]_ _ **pending investigation of the charges made against** _ _[*him/her*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Petitioner

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Petitioner

[*Verification; see §14.13*]

Copies: Original for filing; service copies; office copies; copy for probate department.

Comment: When the petition is filed not for the purpose of obtaining issuance of a citation but to remove the

representative based on allegations connected with a previously noticed hearing, then only the second paragraph of the prayer should be used.

Many attorneys include a statement about suspension of the representative's powers because courts may act quickly on the suspension, but the hearing on removal may take several months to resolve if the representative contests removal. The third paragraph in the prayer may be used to request suspension of the representative's powers. See Prob C §9614 (on petition of interested person the court may suspend in whole or in part representative's powers pending hearing).

When the petition is filed to obtain issuance of a citation, the petition should be accompanied by an order for issuance of citation, as set forth in §14.44, as well as Judicial Council Form DE-122 (Citation-Probate), which includes proof of service. The original citation with proof of service attached should be filed with the clerk in advance of the hearing.

A petitioner seeking to suspend or remove the representative must mail notice to a surety who has filed a court bond for the representative. Prob C §1213.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/14 Fiduciary Resignation or Removal/§14.44 3. Form: Order for Issuance of Citation

§14.44 3. Form: Order for Issuance of Citation

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[*Title of court*]

Estate of _ _[*name*]_ _, **Deceased**	)	**No.** _ _ _ _ _ _
	)	
	)	**ORDER FOR ISSUANCE OF**
	)	**CITATION FOR HEARING ON**
	)	**PETITION FOR REMOVAL OF**
	)	**REPRESENTATIVE** _ _[*AND*
	)	*ORDER SUSPENDING*
	)	*POWERS OF*
_____	)	*REPRESENTATIVE*]_ _

The court having considered the petition of _ _[*name*]_ _ **seeking an order for issuance of citation requiring** _ _[*name of representative*]_ _ **to appear and show cause why** _ _[*he/she*]_ _ **should not be removed as** _ _[*executor/administrator*]_ _ **of the** _ _[*will/estate*]_ _ **of the above-named decedent** _ _[*and an order suspending* _ _[*his/her*]_ _ *powers*]_ _**, and the court being fully advised and good cause appearing,**

IT IS ORDERED that:

The clerk of the court issue a citation requiring _ _[*name of representative*]_ _ **to appear and show cause why** _ _[*he/she*]_ _ **should not be removed as** _ _[*executor/administrator*]_ _ **of the** _ _[*will/estate*]_ _ **of the above-named decedent and** _ _[*his/her*]_ _ **letters** _ _[*testamentary/of administration*]_ _ **revoked.**

[*Add if appropriate*]

The powers of _ _[*name of representative*]_ _ **as** _ _[*executor/administrator*]_ _ **of the** _ _[*will/estate*]_ _ **of the above-named decedent are suspended pending investigation of the charges made against** _ _[*him/her*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Judge/Commissioner*]_ _
of the _ _[*title of court*]_ _

Copies: Original for filing; service copies; office copies; copy for probate department.

Comment: For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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§14.45 4. Form: Order Removing Representative

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[*Title of court*]

Estate of _ _[*name*]_ _, **Deceased**	**No.** _ _ _ _ _ _
	ORDER REMOVING REPRESENTATIVE

The petition of _ _[*name*]_ _, _ _[*state interest in estate*]_ _**, for removal of** _ _[*name of executor/administrator*]_ _ **was regularly heard on** _ _[*date*]_ _**.** _ _[*Name*]_ _ **appeared as attorney for petitioner, and** _ _[*no one/*_ _[*name*]_ _*, as attorney for* _ _[*party*]_ _]_ _ **appeared in opposition. After hearing the petition and hearing the evidence, the court finds that all notices of the hearing have been given as required by law, that all allegations of the petition are true, that good cause, namely** _ _[*specify grounds for removal*]_ _**, exists for the removal of** _ _[*name of executor/administrator*]_ _**, and grants the petition. Good cause appearing,**

IT IS ORDERED that:

1. The letters _ _[*testamentary/of administration*]_ _ **of** _ _[*name of representative*]_ _ **are revoked.**

2. _ _[*Name of representative*]_ _**, as** _ _[*executor/administrator*]_ _ **of the decedent's** _ _[*will/estate*]_ _**, file within** _ _[*number*]_ _ **days after the entry of this order an accounting of** _ _[*his/her*]_ _ **acts as** _ _[*executor/administrator*]_ _ **since the period covered by the** _ _[*number*]_ _ **accounting filed on** _ _[*date*]_ _**.**

3. _ _[*Name of representative*]_ _ **petition this court for settlement of the account, set the petition for hearing, and give notice of the hearing.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Judge/Commissioner*]_ _
of the _ _[*title of court*]_ _

Copies: Original for filing; service copies; office copies; copy for probate department.

Comment: The order should require the removed representative to account within a definite period of time.

See *Estate of Dow* (1949) 91 CA2d 420, 423, 205 P2d 698, 700, on the necessity for specifying the grounds for removal when findings are essential. There is no final judgment until findings are signed and filed.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/15 Actions by and Against Personal Representative/Chapter Outline

15

Actions by and Against Personal Representative

Thomas W. Latham

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§15.1 I. ROLE OF REPRESENTATIVE AS LITIGANT

Estate administration presents abundant opportunities for a personal representative to become a litigant. At the outset, there may be a dispute over who should serve as personal representative (see chap 16) or a will contest (see chap 17). Once appointed, a personal representative may become a litigant in order to discover or recover assets of the estate, pursue claims on behalf of the estate, defend the estate from creditors' claims or adverse claims to property, determine the rights of people to take from the estate under family protection statutes, determine distribution rights, defend his or her own conduct and accounts, and obtain compensation.

NOTE: If the heirs or beneficiaries believe that the personal representative should be taking action but are unable to convince him or her directly, they may petition the court for an order under Prob C §9613 compelling the personal representative to act. The petitioner must show that the estate will suffer great or irreparable injury if the petition is not granted.

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§15.2 A. Conflicts of Interest

A personal representative sometimes has other interests in the estate he or she is to administer, *e.g.,* as a creditor, co-owner of property, business partner of the decedent, or beneficiary. Despite these interests, the duty of a personal representative is to advance the interests of the probate estate, not his or her individual interests. A personal representative who advances his or her own interests to the disadvantage of the estate may be removed. *Estate of Hammer* (1993) 19 CA4th 1621, 1639, 24 CR2d 190; *Gross v Needham* (1960) 184 CA2d 446, 462, 7 CR 664; *Estate of Guzzetta* (1950) 97 CA2d 169, 217 P2d 460.

Furthermore, the personal representative is generally prohibited from purchasing, directly or indirectly, estate property without consent of the beneficiary and a court order authorizing the sale based on a showing that the sale is to the advantage of the estate. Prob C §§9880-9881. See, *e.g., Estate of Martin* (1999) 72 CA4th 1438, 86 CR2d 37 (unauthorized sale voidable at election of beneficiary; corporate redemption of estate's shares in closely held corporation engineered by executor who was director, officer, and individually owned shares of corporation was indirect purchase within meaning of Prob C §9880(a)).

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§15.3 B. Duty of Impartiality

Even when the issue involves only the interests of others and not the individual interests of the personal representative, the personal representative has a duty to be impartial. For example, with respect to distribution disputes, under prior law (former CC §1664; former Prob C §1080) it was generally recognized that executors and administrators could not litigate the conflicting claims of heirs or legatees at the expense of the estate. *Estate of Kessler* (1948) 32 C2d 367, 369, 196 P2d 559; *Estate of Friedman* (1917) 176 C 226, 228, 168 P 21. Under current law, however, this does not mean that the personal representative has a duty to be absolutely silent. See, *e.g.,* Prob C §11704(b), which allows the personal representative to participate in an heirship proceeding to assist the court and to set forth his or her theory of distribution. The line between impartial assistance to the court and biased advocacy of an interested person's position may not be easy to draw in some cases.

Particularly when interested parties are unrepresented, it might be helpful (although not required) for the personal representative to assist the court in its duty to distribute property in accordance with the will. In *Estate of Torrance* (1957) 154 CA2d 350, 358, 316 P2d 94, an heirship proceeding, one heir apparently settled and withdrew his statement of interest on the day of hearing, leaving other heirs similarly situated who had not filed their own statements of interest unrepresented at the hearing (because, they later alleged, they had been relying on the settling heir). The unrepresented heirs appealed the resulting adverse heirship order. On appeal, the court held that the petition and other documents contained sufficient information to put the probate court on notice that there was a property characterization issue, that the probate judge had a duty to protect the heirs, and that the probate court should have required evidence on the issue to support its ruling. In situations such as this, a probate judge should welcome, rather than disapprove, some impartial help from the personal representative in protecting the interests of unrepresented persons.

Indeed, in a different context, the personal representative may even be considered to represent nonappearing interested persons. See *Bodine v Superior Court* (1962) 209 CA2d 354, 360, 26 CR 260, involving the issue of jury trial waiver under former law: "When the personal representative is petitioner for determination of heirship he represents all parties in interest [citations], at least those who do not appear and assert their own interest." See also *Estate of Barber* (1957) 49 C2d 112, 119, 315 P2d 317.

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§15.4 C. Personal Representative Is Litigant on Behalf of Estate

An estate is not a legal entity that can sue, be sued, or hold title to property in that name. "Estate" is merely the name to indicate the sum total of assets and liabilities of a decedent. *Dorland v Dorland* (1960) 178 CA2d 664, 669, 3 CR 262; *Estate of Bright v Western Air Lines, Inc.* (1951) 104 CA2d 827, 828, 232 P2d 523. Thus, a suit in favor of or against the estate is brought or defended in the name of the personal representative, on behalf of the estate. Prob C §9820. However, a personal representative who is not an attorney cannot file or prosecute a civil action in propria persona. *Hansen v Hansen* (2003) 114 CA4th 618, 7 CR3d 688. See §9.12.

PRACTICE TIP: Claims against a decedent that are covered by insurance are an exception to this general rule. If the decedent's liability is protected by insurance, the action may be commenced or continued, as the case may be, without joining or substituting as a party the decedent's personal representative or successor in interest (Prob C §550). See §15.29.

Although the heirs and beneficiaries are neither necessary nor indispensable parties to litigation of claims for or against the estate (see, *e.g., Jay v Dollarhide* (1970) 3 CA3d 1001, 1031, 84 CR 538, disapproved on other grounds in 29 CA3d at 930), they may, by themselves or jointly with the personal representative, maintain some types of action, *e.g.,* for possession of property or to quiet title (Prob C §9654).

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§15.5 D. Prior Court Approval to Engage in Litigation Not Required But Advisable

A personal representative is not required to obtain prior court approval to bring or defend an action on behalf of the estate. Prob C §§9610, 9820. However, the personal representative must exercise ordinary care and diligence in determining whether to bring or defend an action, and in conducting the litigation. Prob C §9600. For example, the personal representative may decline to pursue a claim when the estimated cost of collection will exceed the amount likely to be collected. Comment to Prob C §9820. Probate Code §9600(b) provides that a personal representative "shall not exercise a power" to the extent ordinary care and diligence require that the power not be exercised.

Although a personal representative is not required to obtain advance court approval to prosecute or defend an action, there are at least two good reasons why it is advisable to do so:

- To protect the personal representative from hindsight complaints (see §15.6); and
- To obtain court authority to pay litigation counsel from estate assets on a current basis (see §15.7).

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§15.6 1. Protection Against Hindsight Complaints

If the court gives advance approval and the litigation goes badly, the personal representative will be protected from hindsight complaints that the decision to litigate was ill-advised in the first place. Particularly if the personal representative is in doubt, he or she should seek advance court approval by a petition for instructions under Prob C §9611.

The court, however, is not required to give instructions. See, *e.g., Estate of Denton* (1971) 17 CA3d 1070, 1076, 95 CR 347. As a practical matter, it would be harsh for a court to refuse to give guidance to a personal representative in advance on a close call, thus forcing the personal representative to take on exposure for a difficult discretionary decision. If, as a matter of policy, a probate judge prefers not to give guidance in advance, then the probate judge ought to be reasonably willing to uphold the personal representative's discretionary decisions from subsequent attacks, absent a showing of bad faith, conflict of interest, or other wrongful conduct.

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§15.7 2. Payment of Attorney Fees and Costs on Current Basis

Even if the personal representative is not in doubt about whether to bring or defend an action, without prior court approval the personal representative is without authority to pay his or her litigation counsel from estate assets. Prob C §§10501(a)(2), 10830-10832; Cal Rules of Ct 7.700. Litigation counsel may not be willing to litigate for an indefinite period of time without being paid. Probate Code §10832(a) provides statutory authority for the court to allow periodic payment of litigation fees on account from estate assets.

The court is not required to give advance approval to pay litigation costs from the assets of the estate. See, *e.g., Estate of Sidebotham* (1956) 138 CA2d 412, 418, 291 P2d 965. As a practical matter, a personal representative should have reasonable latitude to select litigation counsel, and, if the selected counsel is not willing to work without being paid reasonable fees on a current basis, then the court indirectly obstructs the personal representative's choice of counsel if it refuses to allow periodic payment of litigation counsel's reasonable fees and costs.

The court may approve an estimated litigation budget in advance and allow the personal representative to pay litigation counsel's fees at specified hourly rates as they are incurred without further delay or court order. For large-scale litigation, however, courts are typically unwilling to give the personal representative blanket advance approval. Rather, courts are likely to grant authority in stages (*e.g.,* starting with an estimated budget for the first four months of litigation), and require the personal representative to return to the court with a status report in order to obtain approval of fees for the next stage after showing that continuation of the litigation is justified.

As an alternative to court approval of a budget in advance, the court may require the personal representative to file periodic (*e.g.,* monthly) petitions for approval of fees and costs already incurred. This approach has the disadvantage of causing delay and requiring multiple petitions, which adds extra expense to the process. It has the additional disadvantage that, if the court expects counsel to file detailed time records in support of the request for fees, counsel will need to ensure that the materials filed with the court do not disclose attorney-client confidences or attorney work product that would reveal tactics or otherwise give an advantage to the adversary in the litigation.

If litigation counsel intends to work under a contingency fee agreement, prior court approval should be sought under Prob C §§10811-10812.

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II. SELECTED PROBATE ADMINISTRATION ISSUES

§15.8 A. Disputes Concerning Bonds

In probate matters, disputes may arise about whether a bond is required, whether the amount of the bond can be changed, and the extent to which the surety is liable (see §§15.19-15.21). A personal representative's bond, governed by Prob C §§8480-8488 (see also CCP §§995.010-996.560) and Cal Rules of Ct 7.201-7.206, protects interested parties by ensuring that payment is available if the personal representative breaches a duty in the administration of the estate. See California Decedent Estate Practice, chap 9 (2d ed Cal CEB 2009).

A bond is not required (1) if it is waived by the will or (2) if all of the beneficiaries waive the bond in writing and the written waivers are attached to the petition for appointment of a personal representative, although a waiver of this sort is invalid if the will itself requires a bond. Prob C §8481(a). Notwithstanding a waiver, the court may require a bond if the proposed personal representative resides outside of California or for other good cause, either before or after the issuance of letters. Prob C §8481(b); Cal Rules of Ct 7.201(b).

PRACTICE TIP: Local probate rules should also be consulted because they often contain provisions relating to bonds, *e.g.,* requiring bond from special administrators even if the will and beneficiaries waive bond, or requiring bond from a nonresident executor even if the will waives bond.

To protect the estate and interested parties, the court has the authority to increase or reduce the amount of the bond. Prob C §§8482(d), 8484; CCP §§996.010, 996.030. If facts occur that make it necessary to increase the amount of the bond, the personal representative, guardian, or conservator of the estate must make an ex parte application to increase it. Cal Rules of Ct 7.204(a). The attorney for the personal representative, guardian, or conservator of the estate is required to make the application immediately on learning of the need to increase the bond if the personal representative, guardian, or conservator of the estate has not already done so. Cal Rules of Ct 7.204(b). The court can order an increase in the bond either on its own motion or on the motion of an interested party. CCP §996.010(b). A petition for reduction of bond must include an affidavit setting forth the condition of the estate, and notice must be given under Prob C §1220. Prob C §8484.

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B. Litigation Concerning Inventory and Appraisal

§15.9 1. Representative's Failure to File Inventory and Appraisal

The personal representative must file an inventory and appraisal within 4 months after the issuance of letters, though the court may grant an extension if it is reasonable under the circumstances. Prob C §8800(b). A representative's failure to file the inventory and appraisal in a timely manner is grounds for removal. Prob C §8804(b). However, in most cases, removal is appropriate only if the delay or refusal caused loss to the estate. *Estate of Hammer* (1993) 19 CA4th 1621, 1636, 24 CR2d 190. The court may also hold the representative personally liable for any damages to the estate or an interested person that result directly from the failure to file the inventory and appraisal, including attorney fees, with such damages being a liability on the representative's bond. Prob C §8804(c).

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§15.10 2. Challenges to Inventory

The form of relief available for a successful challenge to the inventory depends on what aspect of the inventory a party seeks to challenge. When a party claims, *e.g.,* that he or she owns or has an interest in a listed asset or, conversely, that the estate owns or has an interest in an asset that does not appear on the inventory, the proper step is for that party to petition for relief under Prob C §850(a)(2) (conveyance or transfer of property claimed to belong to decedent or other person). See chap 19.

If there is more than one personal representative and they are unable to agree on the property to be included in the inventory, any personal representative may petition the court for an order determining whether property is to be administered in the decedent's estate. Prob C §8852(b). The determination will be made under the provisions of Prob C §850(a)(2), or, if there is an issue of property belonging to or passing to the surviving spouse, under the provisions of Prob C §13650 (spousal property petition). Prob C §8852(b).

NOTE: Although the personal representative has a duty to inventory only the property "to be administered in the decedent's estate" (Prob C §8800(a)), the personal representative may nonetheless have a duty to protect out-of-state assets. *Estate of Ortiz* (1890) 86 C 306, 24 P 1034. See *Conservatorship of Hume* (2006) 139 CA4th 393, 400, 42 CR3d 796 (conservator had duty to account for all of conservatee's property, including out-of-state real property).

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§15.11 3. Challenges to Appraisal

A personal representative or interested party who disagrees with the "appraisal" (*i.e.,* the valuation of estate assets) may file a written objection at any time before the hearing on a petition for final distribution. Prob C §8906(a). The objecting party has the burden of proving that the appraisal is inadequate. Prob C §8906(d).

NOTE: When an account is filed, the value of property for the purposes of distribution can also be challenged by contesting the representative's account. Prob C §11001(b).

Furthermore, there are procedures by which a party can safeguard the integrity of the appraisal process. It is possible to waive an appraisal by the probate referee, to obtain an appraisal by an independent expert, to disqualify the probate referee, to remove the probate referee, and to have the probate referee cited for failing to complete the appraisal in a timely manner. Prob C §§8903-8904, 8923-8924, 8941.

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§15.12 C. Disputes Involving Claims by Family Members, Putative Spouses, and Former Spouses

Disputes during probate administration often involve the decedent's spouse or someone claiming under the decedent's spouse. Usually a surviving spouse is a primary beneficiary of the decedent; thus, he or she is often a target for other less favored beneficiaries, would-be beneficiaries, and creditors. If the surviving spouse is not a favored beneficiary, that in itself can foster resentment and lead to litigation.

When decedents fail to provide for spouses or children in wills (or fail to provide for them "adequately"), fail to specifically provide for anyone because they die intestate, leave a legacy of debts to third parties, or leave children born to others beside their spouses, disputes may arise. Each of these situations is likely to draw the personal representative into a dispute if litigation ensues. If the personal representative is the surviving spouse or surviving child, he or she is likely to wear multiple hats and be subject to the potential conflicts discussed in §15.2. Even if the personal representative is a more neutral third party, he or she may quickly be drawn into a heated, emotional dispute, responsible to all and distrusted by all, with little likelihood of any acknowledgment for a job well done.

There may be disputes about the nature of property owned by the spouses (see §15.13), the decedent spouse's management or disposition of marital property (see §15.14), and allocation of debts between the estate and the surviving spouse (§15.15). Other areas of potential litigation are disputes about support rights, family allowance, probate homestead, spousal or child support agreements or orders, paternity, marital or family status, and rights of stepchildren and foster children. See California Decedent Estate Practice, chap 17 (2d ed Cal CEB 2009).

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§15.13 1. Disputes Concerning Community/Separate Property

There may be a dispute over the community property or separate property nature of the assets. For example, if the decedent owned the family residence in his or her name alone before marriage and never changed title after marriage, but community earnings were used to pay down the loan and make improvements during the marriage, the extent of the community property interest in the residence may be disputed. See, *e.g., Marriage of Moore* (1980) 28 C3d 366, 168 CR 662; *Marriage of Marsden* (1982) 130 CA3d 426, 437, 181 CR 910. If the decedent was the sole shareholder of a small corporate business before marriage that increased greatly in value during the marriage, the extent of the community property interest in the shares of stock may be subject to dispute. See, *e.g., Pereira v Pereira* (1909) 156 C 1, 103 P 488; *Van Camp v Van Camp* (1921) 53 CA 17, 199 P 885; *Beam v Bank of America* (1971) 6 C3d 12, 98 CR 137; *Marriage of Dekker* (1993) 17 CA4th 842, 21 CR2d 642. Finally, there may have been extensive commingling of community and separate property accounts during the marriage. See, *e.g., See v See* (1966) 64 C2d 778, 51 CR 888.

If the surviving spouse claims that all or part of the decedent spouse's estate is property passing outright to him or her and does not want to subject that property to probate administration, the surviving spouse may file a spousal property petition under Prob C §§13650-13660 to test the extent of the community or separate property interest of specific assets passing to him or her.

However, disputes about the extent of the community property versus separate property interests in assets often arise in situations in which the decedent's interests do not pass outright to the surviving spouse, *e.g.,* the will leaves some property to a third person, or to a trust for the benefit of the surviving spouse. For example, there may be a dispute concerning the effect of a will that leaves the decedent's separate property to the children of a prior marriage and the decedent's community property to a trust for the lifetime benefit of the spouse. The spouse, seeking to maximize the value of the trust, may want to advocate as large a community property share in specific assets as possible. Because none of the property passes outright to the surviving spouse, the spousal property petition is not a basis for litigating the community/separate property character of specific assets. In this situation, a probate should be initiated and the surviving spouse should file a petition under Prob C §850(a)(2) to contest the characterization of property set forth in the inventory and appraisal (see Comment to Prob C §8906, referring to the predecessor of Prob C §850, *i.e.*, former Prob C §9860).

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§15.14 2. Claims for Spouse's Breach of Fiduciary Duty

Spouses must act with respect to each other in the management and control of the community assets and liabilities in accordance with the general rules governing fiduciary relationships (Fam C §§721(b), 1100(e)), and a spouse has a claim against the other for any breach of fiduciary duty that impairs the claimant spouse's half interest in the community estate (Fam C §1101(a)). The surviving spouse may have discovered the breach only after the decedent's death, but, even if he or she knew about the transaction involving the breach and suffered in silence for a long time during the marriage, an action may be commenced on the death of a spouse (Fam C §1101(d)(2)). In addition, a court may order an accounting of the property and obligations of the spouses and determine their ownership rights (Fam C §1101(b)).

A spouse who claims breach of fiduciary duty may have to overcome presumptions that favor the other spouse on the characterization of assets. See §§18.42-18.43. When there is a conflict, however, the presumption arising from the spouses' fiduciary duty will control. For example, when the presumption of undue influence under Fam C §721(b) conflicts with the presumption of valid title and the presumption that property acquired in joint form is community property, the presumption of undue influence controls. *Marriage of Delaney* (2003) 111 CA4th 991, 4 CR3d 378.

Remedies include an award of 50 percent of an asset or its value if the asset was transferred in breach of the fiduciary duty, together with attorney fees and costs (Fam C §1101(g)), or 100 percent of an asset or its value in cases involving oppression, fraud, or malice (Fam C §1101(h)). Case law has not yet established which procedural vehicle or vehicles should or must be used to assert these claims under varying fact situations (*e.g.,* creditor's claim under Prob C §9002, spousal property petition under Prob C §13650, ownership petition under Prob C §850(a)(2), or petition for entitlement to distribution under Prob C §11700). Nor has case law yet given clear answers on the applicable statute of limitations for these claims.

The nonconsenting spouse, however, does not need to seek damages and can instead try to set aside the breaching spouse's transfer of community assets under Prob C §5021. Thus, as to his or her share of an asset, the nonconsenting spouse can set aside a nonprobate transfer of community property that the other spouse made at death, even if it results in the nonconsenting spouse's receiving more than one-half of the total community estate. Prob C §5021. *Estate of Miramontes-Najera* (2004) 118 CA4th 750, 760, 13 CR3d 240 (decedent's wife was entitled to one-half of community property interest in each of pay-on-death accounts decedent established with community property regardless of her previous receipt of more than one-half of community estate).

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§15.15 3. Liability for Spousal Debts

Death, like dissolution, terminates a marital relationship for purpose of allocating debts as well as assets. The Probate Code has statutory provisions that govern the allocation of the decedent's debts between the estate and the surviving spouse. See Prob C §§11440-11446. The personal representative of the estate and the surviving spouse can agree to an allocation of debts of the decedent, subject to probate court determination that the agreement adequately protects the rights of interested persons. Prob C §11444(a). In the absence of an agreement, Prob C §11444(b) provides that each debt subject to allocation shall first be characterized as separate or community. The court shall then allocate the separate property debts of each spouse to that spouse's separate property assets, and the community debts shall be allocated to the spouses' community property assets. If the net value of a spouse's separate property is less than the spouse's unsecured separate debts, the court shall allocate the unsatisfied portion of the debt to that spouse's one-half share of the community assets. Prob C §11444(b)(3). If the net value of the spouse's one-half share of the community property is less than the spouse's unsatisfied, unsecured separate debts, the court shall allocate the remaining unsatisfied portion of the debt to the net value of the other spouse's one-half share of the community property. Prob C §11444(b)(3). See Prob C §11444(b) for additional allocation rules. The court may deviate from the statutory rules if it finds that a different allocation would be "equitable under the circumstances." Prob C §11444(d).

In the absence of a judicial debt allocation under Prob C §11440, however, the deceased spouse's share of the community property will remain liable for a community debt, as long as the claim is brought in a timely manner. *Dawes v Rich* (1997) 60 CA4th 24, 31, 70 CR2d 72.

PRACTICE TIP: Case law concerning the allocation of spousal debts incurred during marriage often arises in the dissolution context. Probate litigation counsel should be aware of this body of law, whether they represent the personal representative, the surviving spouse, or a creditor of either. See, *e.g.*, *Marriage of Feldner* (1995) 40 CA4th 617, 47 CR2d 312 (issue of whether spousal debts arose during marriage or postseparation); *Marriage of Bell* (1996) 49 CA4th 300, 56 CR2d 623 (issue of whether one spouse is liable for damages resulting from intentional or negligent torts committed by other spouse); *Marriage of Braendle* (1996) 46 CA4th 1037, 54 CR2d 397 (issue of extent of rights of creditors of one spouse to assets held by other spouse).

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§15.16 D. Proration of Taxes

The proration of taxes in California is governed by a detailed statutory scheme (Prob C §§20100-20225), as well as several federal statutes (see, *e.g.,* IRC §2207A). Although any interested person can initiate a proration proceeding by filing a petition to prorate taxes under Prob C §20120, the dispute is often triggered by the personal representative's filing of the proration petition.

The general rule is that estate taxes are "equitably prorated among the persons interested in the estate," except to the extent that the "inter vivos or testamentary instrument disposing of property specifically directs" some other allocation method besides that set forth in the statute. Prob C §20110.

Payment of taxes other than by equitable proration is authorized "only when there is a clear and unambiguous direction to the contrary" in the governing instrument. *Estate of Carley* (1979) 90 CA3d 582, 586, 153 CR 528. See also *Estate of Armstrong* (1961) 56 C2d 796, 800, 17 CR 138.

Whether a will or other instrument "specifically directs" a method of payment of taxes other than the equitable proration method is a question of interpretation of a written instrument. Even though a written direction contrary to equitable proration must be "clear and unambiguous," extrinsic evidence has been admitted to support interpretations of directions not to prorate taxes. *Estate of Wathen* (1997) 56 CA4th 48, 64 CR2d 805. See also *Creighton Univ. v Kleinfeld* (ED Cal 1995) 919 F Supp 1421 (applying California law). But see *Estate of Hendricks* (1970) 11 CA3d 204, 206, 89 CR 748 (extrinsic evidence not admissible to establish that will containing no explicit tax provision should be interpreted as evidencing intent not to prorate taxes).

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E. Surcharge of Personal Representative for Breach of Fiduciary Duties

§15.17 1. Negligence in Managing and Controlling Estate

The representative has a duty to use "ordinary care and diligence" in managing and controlling the estate. Prob C §9600(a). The statutory standard is intended to be consistent with prior law. Comment to Prob C §9600(a). The prior requirement, found in case law, was that a personal representative act with that degree of prudence and diligence that a person of ordinary judgment would be expected to use in his or her own affairs of a like nature. See *Estate of Barbikas* (1959) 171 CA2d 452, 457, 341 P2d 32. What constitutes "ordinary" care and diligence is determined by all the circumstances of the particular estate. For example, a layperson representative's diligence in selecting an attorney to represent him or her as the personal representative in matters concerning the estate may insulate him or her from liability for the attorney's embezzlement of estate funds. 171 CA2d at 459. An executor or administrator, however, may be surcharged for losses sustained by the estate as a consequence of the personal representative's failure to promptly sell sufficient shares to satisfy estimated taxes, debts, and costs of administration. *Estate of Gerber* (1977) 73 CA3d 96, 108, 140 CR 577.

The standard for "ordinary" care and diligence of a professional representative is higher than the standard for a layperson, due to the professional representative's expertise. Comment to Prob C §9600. See *Estate of Beach* (1975) 15 C3d 623, 635, 125 CR 570; *Coberly v Superior Court* (1965) 231 CA2d 685, 689, 42 CR 64. In *Coberly,* the court commented that a "banker, a doctor, a lawyer, may not gain business as a specialist and defend mistakes as a layman."

See chap 13 for surcharge of personal representative.

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§15.18 2. Negligence Concerning Payment of Taxes

The personal representative of the estate "has the duty to preserve the estate's property by paying taxes legally imposed when there is sufficient money on hand for that purpose." *Estate of Harvey* (1964) 224 CA2d 555, 557, 36 CR 788. This is true whether the taxes in question are income taxes (224 CA2d at 557), estate taxes (*Estate of Gerber* (1977) 73 CA3d 96, 140 CR 577), or gift taxes (*Estate of Lock* (1981) 122 CA3d 892, 176 CR 358).

Failure to fulfill this responsibility is usually remedied by means of a surcharge petition. For a sample petition in the context of accountings, see §13.52. If the loss is due to the personal representative's negligence, he or she may be liable for all damages to the estate proximately caused by that negligence. *Estate of Macmillan* (1954) 43 C2d 437, 447, 274 P2d 662. This may include interest charges and penalties imposed by the taxing authority due to the nonpayment, delayed payment, or underpayment of taxes (*Estate of Lock* (1981) 122 CA3d 892, 903, 176 CR 358), the loss of a tax refund due to the personal representative's failure to claim it (*Estate of Gerber* (1977) 73 CA3d 96, 115, 140 CR 577), or the loss of a statutory discount due to the failure to promptly pay taxes (73 CA3d at 114).

The personal representative can also be surcharged for negligent overpayment of taxes due to his or her negligence. In *Estate of Gerber, supra,* the personal representative was surcharged because a delay in payment of estate taxes caused the estate to lose the opportunity to use an alternative valuation date for valuing estate assets for tax purposes, which resulted in a significant overpayment of taxes.

PRACTICE TIP: Expert witness testimony may be necessary to prove the personal representative's negligence in fulfilling his or her responsibility to pay taxes. 73 CA3d at 114. However, the fees of the expert witness cannot be included in the amount surcharged the negligent representative; instead, it is generally considered as a cost of litigation to be borne by the interested party. 73 CA3d at 117.

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§15.19 F. Action Against Surety for Acts of Personal Representative

Heirs and beneficiaries injured by the actions of the personal representative can bring an action against the surety. Successor representatives acting on their behalf may also do so. Prob C §9822. Under certain circumstances, a creditor can also sue on the bond. See California Decedent Estate Practice §9.45 (2d ed Cal CEB 2009). An action against the surety is usually undertaken after a representative has been surcharged for breach of fiduciary duty, negligence, or misconduct in a wide variety of contexts in connection with the administration of the estate. The surety must be given notice of the surcharge petition. See §15.20. In most cases, this surcharge liability is determined in the order settling the representative's final account. An order surcharging the representative is binding on the surety. *Conservatorship of O'Connor* (1996) 48 CA4th 1076, 1095, 56 CR2d 386; *Estate of Davis* (1990) 219 CA3d 663, 669, 268 CR 384.

The surety and the representative are jointly and severally liable, and thus the surcharge order can be enforced directly against the surety itself. CCP §996.460. However, the surety's liability is occasionally less than that of the representative. Although the representative is liable for the entire surcharge, the surety's liability is normally limited to the amount of the bond. CCP §996.470(a). Furthermore, the surety is not liable for damages that the representative caused while acting in another capacity. See *Nickals v Stanley* (1905) 146 C 724, 81 P 117. Nor is a surety subject to the double liability that a representative faces under Prob C §859 for wrongfully taking, concealing, or disposing of estate property in bad faith. A surety is liable for actual loss, not for damages that punish a representative for intentional misconduct.

If the judgment does not exhaust the bond, the surety remains open to future claims until the bond is exhausted. CCP §996.460(c). Furthermore, if the surety refuses to pay on demand after the representative's liability is established, the surety will be liable for interest from the time of the demand, as well as for the attorney fees and costs incurred in obtaining a judgment against it. The surety is liable for these sums even if they increase the surety's total liability beyond the limits of the bond. CCP §996.480(a)(2).

NOTE: Inexperienced personal representatives often labor under the misconception that they are not liable for any amount paid by their surety. A personal representative, however, is obligated to reimburse the surety for all payments that the surety makes to satisfy the obligation of the principal, as well as the necessary costs and expenses relating to those payments. CC §2847. The surety also has a right of subrogation but cannot assert that right unless the estate has been made whole. CC §2848; *American Contractors Indem. Co. v Saladino* (2004) 115 CA4th 1262, 9 CR3d 835.

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§15.20 1. Requirements: Notice and Surcharge Order

The surety must receive notice from anyone who files a petition to surcharge, an objection to an account, a petition to suspend or remove the representative, or a motion to withdraw as counsel for the representative. Prob C §1213(a). In addition, the surety must be given notice within 5 days of any order that suspends or removes the representative. Prob C §1213(b).

Under ordinary circumstances, a claimant cannot take action against a surety until the order surcharging the representative has become final. *Estate of Dwyer* (1959) 168 CA2d 264, 268, 335 P2d 718. Exceptions may arise when an accounting and surcharge order are impossible to obtain or when they are unnecessary for the purpose of calculating the surety's liability. *Price v Fireman's Fund Ins. Cos.* (1987) 193 CA3d 1536, 1541, 239 CR 158. See *Alexandrou v Alexander* (1974) 37 CA3d 306, 311, 112 CR 307, in which the court allowed an immediate action against the surety when a surcharge was unnecessary for the purpose of calculating the surety's liability because the administrator had accounted for the estate and then fraudulently distributed the entire estate to himself.

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§15.21 2. Proceeding by Motion or Complaint

The claimant can proceed against the surety by filing a motion in the probate court to enforce liability on the bond. CCP §996.440. The motion should be brought in the probate court. See CCP §996.440(a). A final surcharge order is a final judgment for the purposes of enforcement, and thus it is a final judgment for the purposes of a motion under CCP §996.440(a). See Prob C §1049; CCP §680.230. The statute of limitations for a motion to enforce liability on bond is 1 year after the surcharge order becomes final. CCP §996.440(b).

In the alternative, the claimant can file a separate action against the surety in the probate court. CCP §996.430(b). The complaint should allege the existence of the bond, its due execution, and a breach of the bond's condition in that the surety has not paid the amount due even though the surcharge order is final. See California Decedent Estate Practice §9.47 (2d ed Cal CEB 2009). The statute of limitations for a separate action on a representative's bond is (a) 4 years after the date of the representative's discharge or removal, or (b) 4 years after the date the surcharge order becomes final, whichever is later. Prob C §8488(b). In any case, no action against the surety can be maintained unless it is brought within 6 years after the date of judgment under Prob C §7250 or after the date the later of the orders under §8488(b) becomes final. Prob C §8488(c).

Regardless of what procedural mechanism is used, the claimant should first make written demand on the surety for the amount due. If the surety refuses to pay, it will be liable for attorney fees, costs, and interest under CCP §996.480(a)(2), which the claimant can seek as part of the motion or complaint itself.

Defenses available to the surety in an action on the bond include that the surcharge order was not made, that it was obeyed, or that the surcharge order was obtained by fraud. *Conservatorship of O'Connor* (1996) 48 CA4th 1076, 1095, 56 CR2d 386. A surety may also have a defense if it is not given notice as required by Prob C §1213.

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§15.22 III. CLAIMS OF ESTATE AGAINST THIRD PARTIES

In general, causes of action that a person has against others during his or her life survive his or her death. CCP §377.20. The cause of action passes to the successor in interest. CCP §§377.30-377.31. If an action is pending on a cause of action that survives, then the action is not abated by death. CCP §377.21.

The primary exception to the general rule of survival is an action for dissolution of marriage. Even though a dissolution proceeding is pending at the time of a spouse's death, if a judgment of dissolution has not been granted before the spouse's death, it may not be obtained thereafter, on the rationale that death terminates the marriage, making moot the request for judicial termination of the marriage. *Marriage of Goldberg* (1994) 22 CA4th 265, 271, 27 CR2d 298. If a bifurcated judgment dissolving the marriage and reserving jurisdiction to divide marital property is entered before death, however, the cause of action to settle the marital property rights survives. *Marriage of Hilke* (1992) 4 C4th 215, 221, 14 CR2d 371. Furthermore, a proceeding to annul a marriage, being a proceeding to determine that a legal contract of marriage never came into being, is not made moot by death and survives if it was commenced before death. 22 CA4th at 271.

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§15.23 A. Standing to Pursue Claim

Although a cause of action of the decedent passes to the successor in interest, if there is a personal representative, the personal representative is entitled to commence an action if it is not yet pending (CCP §377.30), or to continue it (on motion) if it is already pending (CCP §377.31). The personal representative is not required to join as a party the beneficiary or other successor in interest. CCP §369(a)(1).

Only if there is no personal representative, either because no probate administration has been opened or because the probate administration has been closed and distribution made, may the successor in interest bring or continue the action directly. Comment to CCP §377.30; CCP §§377.30-377.32; *Parsons v Tickner* (1995) 31 CA4th 1513, 37 CR2d 810. "Successor in interest" means the beneficiary of the decedent's estate or other successor in interest who succeeds to a cause of action or to a particular item of property that is subject to a cause of action. CCP §377.11.

Procedurally, the successor in interest must file a declaration under CCP §377.32 that establishes that the decedent died, that no proceeding is pending for the administration of the estate, and that the declarant is the successor in interest or authorized to act on behalf of the successor in interest.

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§15.24 B. Statute of Limitations

In general, an action may be commenced on a surviving cause of action of the decedent within the period that would have applied if the decedent had not died, or within 6 months after the decedent's death, whichever is later. CCP §366.1. Statutes of limitations that are commonly relevant in probate administration are:

- **Wrongful death.** CCP §§335.1 (within 2 years after death) and 340.5 (1 year after discovery of injury or 3 years after date of injury if action is against health care provider), but a limitations-barred claim for elder abuse will not relate back to a timely filed wrongful death action, because the claims seek redress for different injuries (*Quiroz v Seventh Ave. Ctr.* (2006) 140 CA4th 1256, 45 CR3d 222);
- **Estate planning professional negligence by attorney.** CCP §340.6.

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§15.25 C. Damage Limitations

Damages are allowed for the losses or damages that the decedent sustained or incurred before death, including punitive damages that the decedent would have been entitled to recover had the decedent lived. CCP §377.34. In general, no recovery is allowed for damages for pain, suffering, or disfigurement. CCP §377.34. The disallowance of damages for pain and suffering applies if the plaintiff dies at any time before judgment, even if the matter has been tried and submitted. *Kellogg v Asbestos Corp. Ltd.* (1996) 41 CA4th 1397, 1404, 49 CR2d 256; *Williamson v Plant Insulation Co.* (1994) 23 CA4th 1406, 1417, 28 CR2d 751. But see *Cadlo v Metalclad Insulation Corp.* (2007) 151 CA4th 1311, 61 CR3d 104 (damages for pain and suffering are not barred if valid judgment nunc pro tunc sets date of recovery before plaintiff's death).

A California court hearing a decedent's estate's federal civil rights claim under 42 USC §1983 can apply CCP §377.34 to preclude recovery of damages for pain and suffering. *County of Los Angeles v Superior Court* (1999) 21 C4th 292, 87 CR2d 441. The court in *County of Los Angeles* ruled that the §377.34 limitation on an estate's recovery of the decedent's pain and suffering damages was not inconsistent with the federal civil rights law's goals of compensating persons injured by the deprivation of federal rights and deterring abuses of power. It concluded that a federal court sitting in California hearing a §1983 claim of a deceased plaintiff would apply §377.34 to preclude damages for pain and suffering. See *Robertson v Wegmann* (1978) 436 US 584, 56 L Ed 2d 554, 98 S Ct 1991. Therefore, a California court may apply its survival statute to a §1983 action.

In *Garcia v Whitehead* (CD Cal 1997) 961 F Supp 230, an action brought under 42 USC §1983, the court disapproved *Garcia v Superior Court* (1996) 42 CA4th 177, 49 CR2d 580, and held California's survivorship statute inconsistent with the purposes of §1983 in excluding damages for the pain and suffering of the decedent. See also *Williams v City of Oakland* (ND Cal 1996) 915 F Supp 1074 (California survivorship statutes as provided in CCP §§377.20 and 377.34 govern federal civil rights actions except to limit survivors' recovery of damages for pain and suffering when state statute precluding recovery for pain and suffering is inconsistent with federal civil rights statutes). *County of Los Angeles v Superior Court, supra,* is limited to situations in which the decedent's death was not caused by the alleged constitutional deprivation.

Damages are not allowed for losses or damages sustained or incurred after death. CCP §377.34. Thus, when the plaintiff died after a jury awarded economic damages for future as well as past losses without distinguishing what portion was for past losses and what portion for future losses, and the death was before judgment, a judgment for the full economic damages was improper. *Williamson v Plant Insulation Co.* (1994) 23 CA4th 1406, 1418, 28 CR2d 751.

If judgment has been granted for recovery of pain and suffering damages, however, they will not be lost under CCP §377.34 if the plaintiff dies while the matter is on appeal. *Sullivan v Delta Air Lines, Inc.* (1997) 15 C4th 288, 63 CR2d 74.

As an exception to the general rule on damages, under Welf & I C §15657(b), concerning abuse of elderly or dependent adults, the damage limitations of CCP 377.34 do not apply when it is proven by clear and convincing evidence that the defendant is liable for physical abuse (Welf & I C §15610.63), neglect (§15610.57), or financial abuse (§15610.30), and has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse. See §8.6. The damages recovered, however, may not exceed the CC §3333.2(b) cap on noneconomic damages resulting from the professional negligence of health care providers. Welf & I C §15657(b).

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D. Commencing or Continuing Action

§15.26 1. In General

The personal representative may bring an action without joining those for whose benefit the action is prosecuted. CCP §369(a)(1); *Jay v Dollarhide* (1970) 3 CA3d 1001, 1031, 84 CR 538, disapproved on other grounds in 29 CA3d at 930. Actions that survive the decedent's death may be brought under certain circumstances by the trustee of a living trust created by the decedent. *Osuna v Albertson* (1982) 134 CA3d 71, 184 CR 338.

The personal representative should allege the decedent's death and the representative's appointment, qualification, and entry on the discharge of his or her duties. *Hopkins v Contra Costa County* (1895) 106 C 566, 567, 39 P 933; *Wise v Hogan* (1888) 77 C 184, 189, 19 P 278. See *Coats v K-Mart Corp.* (1989) 215 CA3d 961, 968, 264 CR 12 (though not yet appointed, decedent's mother alleged she was personal representative of son's estate; claim barred because statute of limitations had run by the time mother was appointed). But see *Klopstock v Superior Court* (1941) 17 C2d 13, 108 P2d 906, permitting amendment to complaint to name personal representative as plaintiff.

If the complaint shows that the representative or successor in interest has no capacity to sue, a demurrer will lie on that ground. If, on the other hand, the complaint merely fails to plead affirmatively the representative's or successor's capacity to sue, a denial of such capacity must be raised by answer or the objection is waived. *Bollinger v Bollinger* (1908) 154 C 695, 699, 99 P 196.

If attorney fees are recoverable by contract or statute, a request for reasonable attorney fees should be included.

When the personal representative or, if none, the successor in interest seeks to continue an action brought by the decedent before death and to be substituted in for the decedent, then a motion must be brought under CCP §377.31, and, on a proper showing, the court "shall" allow the substitution and continuation of the action. Comment to CCP §377.31; *Pepper v Superior Court* (1977) 76 CA3d 252, 260, 142 CR 759.

For sample allegations covering various causes of action, see California Civil Litigation Forms Manual, chaps 4, 7 (Cal CEB 1980).

NOTE: A successor in interest acts directly on behalf of his or her own interest. Because the successor's litigation counsel faces no requirement for a court order for payment of fees, a successor in interest does not have to seek prior court approval for bringing or continuing the action when there is no personal representative. If a complaint is brought by a successor in interest, he or she must attach a declaration or affidavit that complies with CCP §377.32(a) and a certified copy of the decedent's death certificate.

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§15.27 2. Form: Complaint in Action by Representative

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[*Title of court*]

_ _[*Name of representative*]_ _) **as** _ _[*executor/administrator*]_ _) **of the** _ _[*will/estate)*]_ _ **of**) _ _[*name*]_ _, **deceased,**) **Plaintiff**)) **vs**)) _ _[*Name(s)*]_ _,) **Defendant(s)**) _____))	**No.** _ _ _ _ _ _ **COMPLAINT FOR** _ _[*TYPE OF ACTION*]_ _

Plaintiff alleges:

1. On _ _[*date*]_ _, _ _[*name of decedent*]_ _**, here referred to as the decedent, died** _ _[*intestate/leaving a will*]_ _**.**

[*If applicable, add the following option*]

[*Option: If decedent died testate*]

2. The decedent's will was admitted to probate by _ _[*the above court/(name court)*]_ _ **on** _ _[*date*]_ _**.**

[*Continue*]

[3.] On _ _[*date*]_ _, _ _[*name of representative*]_ _**, here referred to as the representative, was appointed by** _ _[*the above court/(specify court)*]_ _ **as** _ _[*executor/administrator*]_ _ **of the decedent's** _ _[*will/estate*]_ _**, and the representative qualified by taking the oath of office** _ _[*and giving the bond required by law*]_ _**. On** _ _[*date*]_ _**, letters** _ _[*e.g., testamentary/of administration*]_ _ **were issued to the representative, who has since been, and is, the qualified and acting** _ _[*executor/administrator*]_ _ **of the decedent's** _ _[*will/estate*]_ _**.**

[*If applicable, add the following option*]

[*Option: If wrongful death claim*]

[4.] The decedent left surviving the following heirs, on whose behalf this action is brought: _ _[*List names, addresses, ages, and relationship to decedent.*]_ _

[*Continue*]

[5.] _ _[*Specify cause of action.*]_ _

[6.] On _ _[*date*]_ _**, and after the accrual of the cause of action alleged in the complaint in this action and before expiration of** _ _[*length of statutory period*]_ _ **years from the accrual date of the cause of action,** _ _[*name*]_ _**, the owner of the cause of action, died. This action was begun by plaintiff as the** _ _[*executor/administrator*]_ _ **of the decedent's** _ _[*will/estate*]_ _ **within six months after the decedent's death.**

WHEREFORE, plaintiff requests:

Judgment against the defendant(s), _ _[*name(s)*]_ _**,** _ _[*and each of them*]_ _ **for:**

1. _ _[*State relief sought or demanded*]_ _**;**

2. Plaintiff's costs of suit in this action; and

3. Other relief that the court considers proper.

Date: _ _ _ _ _ _ __[*Signature of representative or successor in interest*]__
_ _[*Typed name*]_ _
Plaintiff

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Plaintiff

Copies: Original for filing; service copies as required; office copies.

Comment: For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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§15.28 IV. WRONGFUL DEATH CLAIMS

A wrongful death cause of action arises in favor of statutorily specified survivors of the decedent only after the decedent's death. The survivors who are entitled to bring a wrongful death claim include the decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if none, the persons who would be entitled to the property of the decedent by intestate succession, and, if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, and parents. CCP §377.60.

NOTE: For a death occurring before January 1, 2002, the definition of domestic partnership in CCP §377.60(f) includes, under certain circumstances, a person who has not filed a declaration of domestic partnership with the secretary of state.

Those who do not fall within the statutory definition are precluded from bringing suit. See *Rosales v Battle* (2003) 113 CA4th 1178, 7 CR3d 13 (mother of decedent's children lacked standing to bring wrongful death action because she was not the decedent's surviving spouse).A complaint in an action for damages resulting from wrongful death that fails to allege that the deceased left heirs surviving the decedent does not state a cause of action. *Webster v Norwegian Mining Co.* (1902) 137 C 399, 70 P 276; *Davis v Southern Arizona Freight Lines, Ltd.* (1938) 30 CA2d 48, 85 P2d 897. See form in §15.27.

The wrongful death claim is based on the damages that the survivors suffer, not damages suffered by the decedent. Comment to CCP §377.60. The court allocates the recovery to the survivors who hold the cause of action according to the amount of their damages (CCP §377.61) based not on an heir's statutory share under intestacy but on the proportion that the heir's personal damage bears to the damage suffered by the others as apportioned by the court. *Kim v Yi* (2006) 139 CA4th 543, 42 CR3d 841 (no right to jury trial on allocation of settlement proceeds after heirs settled wrongful death action); *Smith v Premier Alliance Ins. Co.* (1995) 41 CA4th 691, 698, 48 CR2d 461 (heirs' right to share based on proportion of damage). The court can apportion settlement proceeds as well, at least when the payment is made in a lump sum. *Corder v Corder* (2007) 41 C4th 644, 61 CR3d 660. In wrongful death cases resulting from the professional negligence of health care providers, the damages recovered may not exceed the CC §3333.2(b) cap on noneconomic damages. Welf & I C §15657(b).

NOTE: The proceeds of settlement or of an award at trial are not subject to the decedent's creditors' claims. *Reich v Purcell* (1967) 67 C2d 551, 556, 63 CR 31.

A plaintiff in a wrongful death action is subject to any defenses, such as assumption of risk (*Paralift, Inc. v Superior Court* (1993) 23 CA4th 748, 755, 29 CR2d 177; *Madison v Superior Court* (1988) 203 CA3d 589, 597, 250 CR 299) and comparative negligence (see dicta in *Coates v Newhall Land & Farming, Inc.* (1987) 191 CA3d 1, 10, 236 CR 181), that could have been asserted against the decedent. But see *Fitzhugh v Granada Healthcare & Rehabilitation Ctr.* (2007) 150 CA4th 469, 58 CR3d 585 (arbitration agreement signed by deceased patient's husband in capacity as agent for patient did not extend to husband's wrongful death claim).

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§15.29 A. Joinder of Claims and Claimants

A wrongful death claim and a survival claim may be joined (if both are being commenced after the decedent's death) or consolidated for trial (if the survival action was commenced by the decedent before death), provided that both claims arise out of the same wrongful act or neglect. CCP §377.62.

The personal representative of the decedent's estate may bring a wrongful death action on behalf of all of the survivors who have standing to be claimants. CCP §377.60. If the personal representative brings the action, the survivors need not be joined as parties. CCP §369(a)(1).

A wrongful death action is a "single joint indivisible action." *Smith v Premier Alliance Ins. Co.* (1995) 41 CA4th 691, 696, 48 CR2d 461. Only one action for wrongful death may be brought whether it is instituted by all or only one of the heirs, or by the personal representative of the decedent as statutory trustee for the heirs. *Cross v Pacific Gas & Elec. Co.* (1964) 60 C2d 690, 694, 36 CR 321; *Smith v Premier Alliance Ins. Co.* (1995) 41 CA4th 691, 697, 48 CR2d 461.

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§15.30 B. Statute of Limitations

A wrongful death action generally must be brought within 2 years after the decedent's date of death. CCP §335.1. Code of Civil Procedure §340.5 applies to wrongful death claims against a health care provider for professional negligence. See *Andersen v Barton Mem. Hosp., Inc.* (1985) 166 CA3d 678, 680, 212 CR 626. The statute of limitations is tolled during the minority of a claimant, except for claims against a public entity or public employee, which are subject to the Government Tort Claims Act. CCP §352; *Cross v Pacific Gas & Elec. Co.* (1964) 60 C2d 690, 692, 36 CR 321.

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V. CLAIMS OF THIRD PARTIES AGAINST ESTATE

§15.31 A. Survival of Third Party Claims Against Decedent

In general, causes of action, whether in contract, tort, or otherwise, that a third party has against a person survive that person's death. CCP §377.20. If an action is pending on a cause of action that survives, then the action is not abated by death. CCP §377.21. The plaintiff is entitled to all damages that might have been recovered had the decedent lived, except punitive damages. CCP §377.42; CC §3294.

A cause of action for dissolution of marriage abates on death if a judgment of dissolution has not been granted before the first spouse's death. If a judgment of dissolution has been granted, however, the related cause of action for division of the community property survives. *Stevenson v Superior Court* (1964) 62 C2d 150, 152, 41 CR 466; *Marriage of Goldberg* (1994) 22 CA4th 265, 27 CR2d 298. See *Poon v Poon* (1966) 244 CA2d 746, 53 CR 365, holding that a cause of action of a defrauded spouse to recover property taken by the other spouse survives the death of the defrauded spouse. See §15.14. Furthermore, a proceeding to annul a marriage, being a proceeding to determine that a legal contract of marriage never existed, is not made moot by death. It survives if it was commenced before death (*Marriage of Goldberg* (1994) 22 CA4th 265, 271, 27 CR2d 298) but it may not be initiated after death (*Greene v Williams* (1970) 9 CA3d 559, 88 CR 261).

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§15.31A B. Statute of Limitations

The limitations period for bringing an action on a cause of action against a deceased person is generally 1 year after the date of death. CCP §§366.2, 366.3 (actions to enforce agreements to make a will). See California Decedent Estate Practice §§29.64-29.67 (2d ed Cal CEB 2009). The 1-year deadline under §366.2 applies whether the cause of action has accrued or not. CCP §366.2(a); *Bradley v Breen* (1999) 73 CA4th 798, 86 CR2d 726 (cross-complaint on unaccrued cause of action for equitable indemnity barred by §366.2). Accordingly, the statute of limitations may expire before the plaintiff has a cause of action.

The limitations period of §366.2 does not apply to an attempt to impose a resulting trust over specific estate property rather than to impose a liability that could be enforced against estate assets. *Estate of Yool* (2007) 151 CA4th 867, 60 CR3d 526. Furthermore, the limitations under §366.2 do not apply to actions under Prob C §§550-555 to determine the liability of a decedent that is covered by insurance (see Prob C §551).

The limitations period of CCP §366.2 may be tolled under the provisions regarding creditor claims in the administration of the estate of a decedent, payment of claims, debts, and expenses from a revocable trust of a deceased settlor, and proceedings to determine the applicability of no-contest clauses. CCP §366.2(b). However, the CCP §366.2 limitations period is not tolled for a minor's claim during minority under CCP §352. *Farb v Superior Court* (2009) 174 CA4th 678, 94 CR3d 586. The 1-year limitation of §366.2 may be avoided if the facts of the case support equitable estoppel. See, *e.g., Battuello v Battuello* (1998) 64 CA4th 842, 75 CR2d 548 (mother lulled son into inaction by settlement promise).

Under Prob C §13554, the CCP §366.2 1-year statute applies to suits against a surviving spouse for any debt of decedent. *Collection Bureau of San Jose v Rumsey* (2000) 24 C4th 301, 99 CR2d 792 (action against surviving spouse for decedent's medical bills must be commenced within 1 year of death). But see *Shewry v Begil* (2005) 128 CA4th 639, 27 CR3d 209 (3-year statute of limitations for statutory claims under CCP §338(a) applied to Medi-Cal reimbursement claims by Department of Health Services (DHS); action did not accrue until DHS was give written notice of date of death under Prob C §215).

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§15.32 C. Creditor Claim Procedures

Once a probate administration has been commenced and a personal representative with general powers is appointed, the creditor claim requirements of Prob C §§9000-9399 come into effect. In general, the creditor claim procedures apply to any cause of action for payment for any liability of the decedent, whether arising in contract, tort, or otherwise, or for any liability for taxes incurred before the decedent's death (other than property taxes and assessments secured by real property liens), or for liability of the estate for funeral expenses. Prob C §9000. For a detailed treatment of creditor claims procedures, see California Decedent Estate Practice, chap 14 (2d ed Cal CEB 2009).

If a creditor claim is required, it is a prerequisite to initiating or continuing an action based on the decedent's alleged liability. Once the requirements are satisfied, a cause of action against a decedent that survives death may be asserted against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest. CCP §§377.40-377.41. See forms in §§15.34, 15.36.

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§15.33 D. Personal Representative as Defendant When No Action Pending at Death

If the estate is to be bound by the judgment, the complaint must contain allegations showing that the representative is before the court in his or her official capacity. *Flinn v Gouley* (1903) 139 C 623, 73 P 542. Although the complaint need not allege facts showing how the defendant became invested with his or her representative capacity (*Grisingher v Shaeffer* (1938) 25 CA2d 5, 9, 76 P2d 149), it is insufficient merely to describe the defendant in the title of the complaint as the decedent's representative. *Lyttle v Fickling* (1945) 72 CA2d 383, 389, 164 P2d 842. When the complaint sets forth several separate causes of action, allegations respecting the defendant's representative capacity may be given at the conclusion of the complaint and need not be made in each count. *Moseley v Heney* (1885) 66 C 478, 6 P 134. See form in §15.34.

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§15.34 E. Form: Complaint Against Representative When No Action Pending at Death

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[*Title of court*]

_ _[*Name*]_ _, **Plaintiff** **vs** _ _[*Name of representative*]_ _ **as** _ _[*executor/administrator*]_ _ **of the** _ _[*will/estate*]_ _ **of** _ _[*name*]_ _**, deceased, Defendant**	**No.** _ _ _ _ _ _ **COMPLAINT FOR** _ _[*TYPE OF ACTION*]_ _

Plaintiff alleges:

1. On _ _[*date*]_ _**,** _ _[*name of decedent*]_ _**, here referred to as the decedent, died** _ _[*intestate/leaving a will*]_ _**.**

[*Add one of the following alternatives*]

[*Alternative 1*]

2. The will was admitted to probate by _ _[*the above court/(specify court)*]_ _ **on** _ _[*date*]_ _**.**

[*Alternative 2*]

2. The estate of the decedent, who died intestate, was admitted to probate by _ _[*the above court/(specify court)*]_ _ **on** _ _[*date*]_ _**.**

[*Continue*]

3. Defendant _ _[*name*]_ _ **is the appointed and acting** _ _[*executor/administrator*]_ _ **of the decedent's** _ _[*will/estate*]_ _**.**

[*Add one of the following alternatives*]

[*Alternative 1*]

4. On _ _[*date*]_ _**, plaintiff timely filed its claim against the estate, seeking** _ _[*specify damages or other relief sought*]_ _, **which claim was rejected by the** _ _[*executor/administrator*]_ _ **on** _ _[*date*]_ _**.**

[*Alternative 2*]

4. On _ _[*date*]_ _, **plaintiff timely filed its claim against the estate, seeking** _ _[*specify damages or other relief sought*]_ _**. The claim is considered rejected because the** _ _[*executor/administrator*]_ _ **refused or neglected to act on the claim for 30 days after its filing.**

[*Continue*]

[*If notice of rejection states that plaintiff has 90 days to apply for order for substitution, add the following option*]

[5.] This motion is filed within 90 days of the notice of rejection.

[*Continue*]

[6.] _ _[*Specify cause of action.*]_ _

[7.] On _ _[*date*]_ _**, and after the accrual of the cause of action alleged in the complaint in this action, decedent died in the City of** _ _ _ _ _ _**, County of** _ _ _ _ _ _**, California.**

The period of limitations applying to the cause of action alleged in the complaint expired after the date of the decedent's death. Therefore, the period of limitations is extended under the provisions of California _ _[*Code of Civil Procedure §366.2/366.3*]_ _ _ _[*as further extended by the provisions of California Probate Code §§9350-9399*]_ _ **to** _ _[*date*]_ _**.**

WHEREFORE, plaintiff requests:

Judgment against the _ _[*defendant(s)*]_ _**,** _ _[*name(s)*]_ _**,** _ _[*and each of them*]_ _ **for:**

1. _ _[*State relief sought or demanded*]_ _**;**

2. Plaintiff's costs of suit in this action; and

3. Other relief that the court considers proper.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Plaintiff

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Plaintiff

Copies: Original for filing; service copies; office copies.

Comment: If a creditor claim is rejected and no action is pending, the creditor must commence an action on the rejected claim within 90 days after rejection or, if the claim was not due at the time of rejection, then within 90 days after the claim becomes due. Prob C §§9351, 9353.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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§15.35 F. Personal Representative as Defendant When Action Pending at Death

An action or proceeding against the decedent pending at the time of death cannot be continued unless the plaintiff timely presents a proper claim against the estate (Prob C §9370(a)(1)), the claim is rejected in whole or in part (Prob C §9370(a)(2)), and the plaintiff applies to the court in which the action or proceeding is pending for an order to substitute the personal representative in the action (Prob C §9370(a)(3), which also provides that the time limit applies only if the notice of rejection contains a statement that the plaintiff has 3 months within which to apply for an order for substitution). CCP §377.41.

Substitution of a decedent's personal representative as party defendant in place of the decedent does not obviate the necessity of filing or presenting a formal creditor's claim. *Wood v Brown* (1974) 39 CA3d 232, 237, 114 CR 63. After a claim is presented, the proper procedure is to file a supplemental complaint alleging the defendant's death and due presentation of the claim. 39 CA3d at 240. The plaintiff's failure or inability to prove compliance with the claim requirement is a complete defense to the action against the estate. Prob C §9370(b); *Wood v Brown, supra* (motion for summary judgment granted).

NOTE: Some actions do not require filing a creditor's claim as a prerequisite to continuing a pending action. See §§15.37-15.39.

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Source: Estate Planning/California Trust and Probate Litigation/15 Actions by and Against Personal Representative/ §15.36 G. Form: Notice of Motion and Motion for Order Substituting Personal Representative as Defendant and for Leave to File Supplemental Complaint

§15.36 G. Form: Notice of Motion and Motion for Order Substituting Personal Representative as Defendant and for Leave to File Supplemental Complaint

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[*Title of court*]

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**NOTICE OF MOTION AND MOTION FOR ORDER SUBSTITUTING PERSONAL REPRESENTATIVE FOR DECEASED DEFENDANT AND GRANTING LEAVE TO FILE SUPPLEMENTAL COMPLAINT**
_ _[*Name(s)*]_ _, **Defendant(s)**	**Hearing:** _ _[*date; time*]_ _ **Dep't:** _ _[*number*]_ _ **Hearing judge:** _ _[*if known*]_ _ **Action filed:** _ _[*date*]_ _ **Trial date:** _ _[*if set*]_ _

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that _ _[*name*]_ _, plaintiff, moves the court under Code of Civil Procedure §377.41 for an order substituting _ _[*name*]_ _, as the personal representative, for _ _[*name of deceased defendant*]_ _ as the defendant in this action, and granting leave to file a supplemental complaint, a copy of which is attached. The date, time, and place of hearing on this motion are set forth above.

The court is located at _ _[*address*]_ _.

This motion is made on the ground that this action was commenced on _ _[*date*]_ _, that defendant died on _ _[*date*]_ _, that the action survives, that _ _[*name*]_ _ is the duly appointed, qualified, and acting _ _[*personal representative/executor of defendant's will/administrator of defendant's estate*]_ _ and that the conditions of Probate Code §9370 have been met:

[*Add one of the following alternatives*]

[*Alternative 1*]

On _ _[*date*]_ _, plaintiff timely filed its claim against the estate, seeking _ _[*specify damages or other relief sought*]_ _, which claim was rejected by the _ _[*executor/administrator*]_ _ on _ _[*date*]_ _.

[*Alternative 2*]

On _ _[*date*]_ _, plaintiff timely filed its claim against the estate, seeking _ _[*specify damages or other relief sought*]_ _. The claim is considered rejected because the _ _[*executor/administrator*]_ _ refused or neglected to act on the claim for 30 days after its filing.

[*If notice of rejection states that plaintiff has 3 months to apply for order for substitution, add the following option*]

[*Option*]

This motion is filed within three months of the notice of rejection.

[*Continue*]

This motion is based on this notice of motion, the attached documents and exhibits including _ _[*specify by title or nature and date, e.g., the proposed supplemental complaint, the declaration of _ _*[*name*]*_ _*, *dated _ _*[*date*]*_ _*]*_ _*, **the memorandum in support of the motion served and filed herein, and on all papers filed and records in this action _ _**[*, and on any evidence received at the hearing*]*_ _*.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]*_ _*

Comment: If a creditor claim is rejected when an action is pending against the decedent at the time of death, the creditor must apply to substitute the personal representative as defendant in the pending action within 3 months after notice of rejection is given. Prob C §9370. For a detailed treatment concerning creditor claims, see California Decedent Estate Practice, chap 14 (2d ed Cal CEB 2009).

Some claims may be asserted without being subject to the creditor claim procedures. See §§15.37-15.39.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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§15.37 H. Claims That Do Not Require Creditor Claim

If a creditor claim is required, it is a prerequisite to initiating or continuing an action based on the decedent's alleged liability. See §15.31, 15.34. The following claims, however, do not require the creditor to file a creditor claim before filing suit:

Claims that do not involve demand for payment. Because a creditor "claim" is defined as a demand for "payment" (Prob C §9000(a)), causes of action such as a partition action (Prob C §9823) or an action to impose a constructive trust on specific property, which do not seek "payment," are not within the scope of the creditor claim procedures. However, if an adequate legal remedy exists (*e.g.*, damages), an equitable remedy such as imposition of a constructive trust may not be available, in which case the creditor must file a creditor claim. See *Wilkison v Wiederkehr* (2002) 101 CA4th 822, 124 CR2d 631 (reversing judgment of constructive trust for quasi-specific performance on grounds that creditor had adequate remedy at law but failed to file creditor claim).

Claims of entitlement to distribution. These are not subject to creditor claim procedures. Rather, they are adjudicated on a petition for court determination of the persons entitled to distribution under Prob C §11700, or on a petition for distribution under Prob C §§11600, 11620, and 11640.

Action to enforce lien against property of the estate. This action may generally be commenced without a creditor claim provided that the holder expressly waives recourse against other property of the estate. Prob C §9391.

Claims involving disputes over title or ownership. A creditor "claim" is expressly defined to exclude disputes regarding title of a decedent to specific property alleged to be included in the decedent's estate. Prob C §9000(b). A petition under Prob C §850 is available to adjudicate title disputes with third parties, without the necessity of a prior creditor's claim. If the dispute involves competing claims between the decedent's probate estate and a surviving spouse about the correct characterization of marital property (*e.g.,* community property, separate property, or joint tenancy property), or for an accounting and an adjustment of marital property rights under Fam Code §§1100-1103, it appears that such disputes may be adjudicated in the format of a spousal property petition under Prob C §13650, a title dispute petition under Prob C §850, or a petition to determine persons entitled to distribution under Prob C §11700, depending on the facts of the case and relief sought. *Estate of Baglione* (1966) 65 C2d 192, 53 CR 139; *Estate of Fincher* (1981) 119 CA3d 343, 174 CR 18.

Other claims. For claims covered by insurance, see §15.38. For liability of distributee or successor in interest, see §15.39.

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§15.38 1. Claims Covered by Insurance

If the decedent's liability is protected by insurance, the action may be commenced or continued, as the case may be, without filing a creditor's claim (Prob C §9390(a)) and without joining or substituting as a party the decedent's personal representative or successor in interest (Prob C §550). In a departure from normal procedure, the named defendant in this instance is the "Estate of [name of decedent], Deceased," and the summons is served on the insurer or a person designated by the insurer. Prob C §552(a). Although the proceedings are in the name of the estate, they are to be conducted in the same manner as if the action were against the personal representative. The court, for good cause, may order the appointment or substitution of a personal representative. Prob C §552(b).

However, an insurer defending the action who is seeking reimbursement under the insurance contract for any liability of the decedent must file a creditor claim, and, if the claim is rejected, bring an action against the personal representative. Prob C §9390(c). If the insurer fails to file a creditor claim, the failure constitutes a waiver of reimbursement rights under the insurance contact.

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Source: Estate Planning/California Trust and Probate Litigation/15 Actions by and Against Personal Representative/ §15.39 2. Liability of Distributee or Successor in Interest Under Limited Circumstances

§15.39 2. Liability of Distributee or Successor in Interest Under Limited Circumstances

A person who has received court-ordered distribution from the estate may be liable for the claim of a creditor who has not filed a creditor claim if the following conditions are met (Prob C §9392(a)(3)):

- The identity of the creditor was known to or reasonably ascertainable by the personal representative within 4 months after letters were first issued, and the claim was not merely conjectural;
- Notice of administration of the estate was not given to the creditor and neither the creditor nor the creditor's attorney in the matter had actual knowledge of the administration of the estate before the court order for final distribution was made; and
- The statute of limitations under CCP §366.2 had not expired at the time of the commencement of an action under Prob C §9392.

NOTE: In some situations, a successor in interest who received property of the decedent without probate administration may face personal liability for a claim. See, *e.g.,* Prob C §§13109-13112, 13550-13554. See *Collection Bureau of San Jose v Rumsey* (2000) 24 C4th 301, 99 CR2d 792 (action against surviving spouse under Prob C §13554 must be commenced within one year of death). By way of contrast, the survivor of a joint tenancy generally takes the interest in the entire property free and clear of the decedent's debts, consensual liens, and even judgment liens. See *Tenhet v Boswell* (1976) 18 C3d 150, 133 CR 10; *Grothe v Cortlandt Corp.* (1992) 11 CA4th 1313, 15 CR2d 38.

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16

Contesting Appointment of Personal Representative

Thomas W. Latham

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I. DISPUTES CONCERNING APPOINTMENT OF PERSONAL REPRESENTATIVE

§16.1 A. Strategy

The opening battle in estate administration is often a fight for the right to administer the estate and to take immediate control of estate assets. The goal of the battle is to win, or at a minimum to deprive the adversary from winning, appointment as personal representative.

Generally, a prospective litigant who holds a superior right to appointment will want to assert it. There are many advantages to obtaining appointment. The personal representative enjoys the immediate right to possession of the documents and records of the decedent, while the adversary faces the delays inherent in obtaining information through discovery. The personal representative also has the legal power to (1) prevent adversaries from absconding with the estate's assets, (2) take prompt action to protect estate assets from being wasted, (3) preserve the value of an ongoing business through sale or proper continuation, and (4) control the filing and preparation of tax returns, including making important elections on the tax returns. Furthermore, the personal representative may be entitled to substantial fees in a large estate, and may be able to shift attorney fees to the estate, if the fees are incurred to assist the personal representative in proper administration of the estate. Finally, there may be strong emotional reasons for the prospective litigant's desire to take control of the estate.

Sometimes, however, there are countervailing factors. An estate with problematic or complex assets may pose a major burden or risk. If the duties of managing such an estate will require so much time and attention that they may divert the representative's attention from the litigation, it might be better to leave the job to a capable independent person (other than the adversary). If the estate has an inherently risky asset, such as a volatile business that might suddenly collapse in value leaving the fiduciary exposed to breach of trust claims, or a potential environmental problem that might leave the fiduciary with personal liability, a prospective litigant might be wise to decline taking on such risks.

Another problem arises from the possibility that a personal representative may owe a greater duty to disclose material facts to beneficiaries than a litigant generally does to adversaries. See, *e.g.,* Prob C §7250(c) (personal representative not released from liability when order is obtained by omission of material fact from petition or account).

Another potential disclosure issue is raised by *Moeller v Superior Court* (1997) 16 C4th 1124, 69 CR2d 317. *Moeller* held that a successor trustee generally is entitled to discover confidential communications between a predecessor trustee and an attorney on matters of trust administration, because the successor becomes the holder of the attorney-client privilege as to those communications. As holder of the privilege, the successor trustee can also permit disclosure to others, *e.g.,* trust beneficiaries, by waiving the privilege. Evid C §912. Until a trustee is replaced by a successor, the trustee's attorney-client privilege protects against disclosure to beneficiaries. *Wells Fargo Bank v Superior Court* (2000) 22 C4th 201, 91 CR2d 716. See also *Borissoff v Taylor & Faust* (2004) 33 C4th 523, 15 CR3d 735 (successor personal representative becomes holder of attorney-client privilege for those confidential communications that occurred when the predecessor, in his or her fiduciary capacity, sought the attorney's advice for guidance in routine estate administration, citing *Moeller*).

PRACTICE TIP: A personal representative may be able to protect attorney-client communications regarding his or her personal interest or liability by hiring a separate attorney, paid with personal funds, for advice on those matters. Under *Moeller,* the successor trustee inherits the attorney-client privilege only as to communications that occurred "when the predecessor, in its fiduciary capacity, sought the attorney's advice for guidance in administering the trust." 16 C4th at 1134. A predecessor trustee that seeks legal advice in its personal capacity out of concern for possible future charges of breach of fiduciary duty "may be able to avoid disclosing the advice to a successor trustee by hiring a separate lawyer and paying for the advice out of its personal funds." 16 C4th at 1134. See *Borissoff, supra,* at 534.

Finally, a prospective, *e.g.,* personal representative who has a conflict of interest with the estate (claims ownership of an asset that the estate also claims), may be subject to removal if appointed. Prob C §§8402(a)(3), 8502. See §16.12.

If a prospective litigant decides not to pursue a priority for appointment, the fallback strategy will generally be to

seek appointment of a competent and perhaps sympathetic neutral, in order to block the adversary from obtaining appointment. This may be pursued through nomination of a proposed representative. See Prob C §8465.

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§16.2 B. Immediate Appointment of Special Administrator

When circumstances require immediate action, the court may appoint a special administrator to exercise any powers appropriate to the circumstances. Prob C §8540. The appointment may be for only a specified term and limited to the power to perform particular acts. Prob C §8540(b). The appointment may be made "at any time without notice or on such notice to interested persons as the court deems reasonable." Prob C §8541(a). In making the appointment, the court ordinarily should give preference to the person entitled to appointment as the personal representative. Prob C §8541(b).

If it appears proper, the court may grant the special administrator the powers of a general personal representative. Prob C §8545(a). A grant of general powers is often made when there is likely to be a lengthy delay in the appointment of a personal representative, as in the case of a will contest or of an appeal of an order appointing a personal representative. See Comment to Prob C §8545.

When it first becomes apparent that there will be a fight over the estate, courts are often inclined to appoint a neutral person to serve as special administrator, unless an interested person can establish a legal entitlement to appointment under the rules discussed in §§16.3-16.6. The court will normally ask the adversaries to come up with a joint recommendation. Despite the mistrust and hostility that often mark the commencement of litigation, the court's request for a joint recommendation should be viewed by counsel and the parties as an opportunity to collaborate on a matter of mutual self-interest. If the court is not going to appoint one of the adversaries to the position of personal representative, it is in the best interests of all to have a neutral special administrator who is capable of handling the specific challenges of the estate under a reasonable fee structure. The parties should use this opportunity to interview several candidates to select the best one. If the adversaries are unable to reach a joint recommendation, the decision will be left, by default, to the court, which will make an appointment without interviewing the candidates, using a statutory fee structure.

An order appointing a special administrator, with or without general powers, is not an appealable order. Prob C §1303(a); *Estate of Hughes* (1978) 77 CA3d 899, 143 CR 858. The appointment may be reviewed by means of an extraordinary writ; however, except in the rare case of disregard of the facts amounting to gross abuse of discretion, the order will not be disturbed. See, *e.g., O'Bryan v Superior Court of Los Angeles County* (1941) 18 C2d 490, 496, 116 P2d 49 (mandamus will not lie to control discretion of court except in rare instances when under the facts it can be exercised in but one way).

The court also has power to control administration pending appeal. For example, when appeal of some other order might threaten injury or loss, the court has power under Prob C §1310(b) to appoint a special administrator and to give directions. Actions of the special administrator under the directions are valid, regardless of the result of the appeal, and an appeal of the directions does not stay them during appeal. Prob C §1310(b).

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§16.3 C. Right to Appointment as Personal Representative

In general, disputes concerning who should be appointed as personal representative involve two factors:

- Who is entitled to priority; and
- Whether a person otherwise entitled to appointment is statutorily disqualified (see §§16.8-16.16).

The right to appointment is controlled generally by Prob C §§8420-8425 (executors), 8440-8441 (administrators with the will annexed), 8460-8469 (administrators), and 8540-8541 (special administrators). Ordinarily, if a person with higher priority is not disqualified, his or her appointment is mandatory. Prob C §8461; *Estate of Cummings* (1972) 23 CA3d 617, 622, 100 CR 809 (decided under former Prob C §422); *Estate of Gibson* (1963) 222 CA2d 299, 300, 35 CR 103 ("[t]he court has very limited discretion in this matter and generally must appoint a qualified person with the highest priority"). Thus, a petition for appointment may be challenged by a competing claim to higher priority.

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§16.4 1. Executors

If a will expressly names an executor, or by its terms shows the intention of the decedent that execution of the will and administration of the estate be carried out by a particular person, that person has the *right* to appointment as personal representative unless he or she is statutorily disqualified. Prob C §§8420-8421. The will may also give a person the power to name an executor, coexecutor, or successor executor or coexecutor. Prob C §8422(a). The designation must be in writing and filed with the court. Prob C §8422(b).

See §§16.8-16.16 for statutory grounds for disqualification.

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§16.5 2. Administrators

When the decedent dies intestate, the court appoints one or more persons as administrators. Prob C §8460. Any competent adult may be appointed, subject to the statutory grounds for disqualification. Prob C §8402(a). See §§16.8-16.15.

Generally, the order of priority follows the same sequence as distribution rights on intestacy (except that it also allows for the domestic partner): surviving spouse or domestic partner, children, grandchildren, other issue, parents, brothers and sisters, issue of brothers and sisters, grandparents, issue of grandparents, children of a predeceased spouse or domestic partner, other issue of a predeceased spouse or domestic partner, other next of kin, parents of a predeceased spouse or domestic partner, issue of parents of a predeceased spouse or domestic partner, or their nominees, subject to various exceptions. Prob C §§8461. When there are no family members (not even issue of parents of a predeceased spouse or domestic partner) available or willing to serve, certain conservators or guardians of the estate, the public administrator, creditors, or any other person, in that order, may be appointed. Prob C §8461(o)-(r).

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§16.6 3. Administrators With Will Annexed

When the will does not name an executor, or when the prospective executors have waived the right to appointment or declined to accept appointment, the court appoints an administrator with the will annexed. Prob C §8440. The order of priority is generally the same as for appointment of an administrator when there is no will (see §16.5), except that a person who takes under the will has priority over a person who does not, unless the court, in its discretion, gives priority to a person with a statutory interest that is substantially greater than the devise to the person taking under the will. Prob C §8441. A person taking more than 50 percent of the value of the estate under the will, or the nominee of that person or of a group of persons taking more than 50 percent, has priority over other persons taking under the will. Prob C §8441(b).

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§16.7 4. Waiver of Right to Appointment

A person named in the will as executor who fails to petition for administration within 30 days after the person has knowledge of the decedent's death and that he or she is named as executor may be held to have waived the right to appointment unless good cause for the delay is shown. Prob C §8001.

A person who fails to claim appointment as administrator risks waiving his or her claim of priority to any other qualified person who steps forward. Prob C §8468.

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§16.8 D. Grounds for Disqualification

A proposed personal representative who would otherwise be entitled to appointment may be challenged on various statutory grounds for disqualification. Prob C §§8004(a), 8402. These grounds are discussed in §§16.9-16.16.

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§16.9 1. Minor

A person under the age of majority is disqualified from appointment as a personal representative. Prob C §8402(a)(1). If the minor and another person are named as personal representative, the other person may be appointed and administer the estate until the minor reaches the age of majority (18 under Fam C §6500), when the minor may be appointed coexecutor. Prob C §8424(a). If no other executor is named, another person may be appointed as personal representative, but the court may revoke the appointment and appoint the minor when he or she reaches the age of majority. Prob C §8424(b).

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Source: Estate Planning/California Trust and Probate Litigation/16 Contesting Appointment of Personal Representative/ §16.10 2. Conservatee, or Person Otherwise Incapable or Unfit

§16.10 2. Conservatee, or Person Otherwise Incapable or Unfit

A person who is subject to a conservatorship of his or her estate, or is otherwise incapable or unfit to execute the duties of a personal representative, is disqualified from appointment. Prob C §8402(a)(2).

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3. Persons Subject to Removal

§16.11 a. In General

Probate Code §8402(a)(3) disqualifies those who would be subject to removal under Prob C §8502. The grounds for removal under §8502, and thus for denial of appointment, include:

- The personal representative has wasted, embezzled, mismanaged, or committed a fraud on the estate, or is about to do so;
- The personal representative is unable to perform the duties of office;
- The personal representative has wrongfully neglected the estate;
- Removal is necessary to protect the estate or interested persons; and
- Any other cause provided by statute.

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§16.12 b. Conflict of Interest as Basis for Disqualification

For almost a century, case law held that there was no statutory basis for denying appointment of an executor named in the will on the grounds that the executor had a conflict of interest with the estate. The only remedy was to allow appointment, and then to remove the executor later if he or she advanced his or her self-interest at the expense of the estate. *Estate of Daigh* (1963) 59 C2d 367, 29 CR 273; *Estate of Backer* (1985) 164 CA3d 1159, 211 CR 163. Probate Code §8402(a)(3) enables the court to avoid this inefficient and circuitous process by denying appointment if the personal representative has a conflict of interest that would require removal. See Comment to Prob C §8402.

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§16.13 4. Nonresident of United States

A person who is not a resident of the United States is disqualified from serving as a personal representative unless named as executor or successor executor in the will. Prob C §8402(a)(4).

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§16.14 5. Decedent's Surviving Partner

The decedent's surviving partner is disqualified from being a personal representative when an interested person objects, unless named as executor or successor executor in the will. Prob C §8402(a)(5).

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§16.15 6. Homicide

A person who feloniously and intentionally killed the decedent is not entitled to any nomination in a will as executor and is not entitled to take by intestate succession or by will, and thereby loses any claim to priority as administrator. Prob C §250.

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§16.16 7. Abuse of Elder or Dependent Adult

A person is disqualified from serving as personal representative if (a) the person is proved by clear and convincing evidence to be liable for physical abuse, neglect, or fiduciary abuse of a decedent who was an elder or dependent adult, (b) the person acted in bad faith, (c) the person is found to have been reckless, oppressive, fraudulent, or malicious in committing any of these acts on the decedent, and (d) the decedent, at the time the acts were committed and thereafter until death, is found to be unable to manage his or her financial resources or resist fraud or undue influence. Prob C §259(a). A person is also disqualified if he or she is convicted of violating Pen C §236 (false imprisonment) or any offense described in Pen C §368. Prob C §259(b). The nominating instrument must have been executed during a period when the decedent was unable to manage his or her financial resources or resist fraud or undue influence. Prob C §259(c).

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§16.17 E. Standing to Object

Any person interested in an estate has standing to initiate or join litigation concerning who should be appointed as personal representative. Prob C §8000(a). Although Prob C §8004(a) does not expressly state who has standing to file opposition, it restates former Prob C §§370, 407, and 442 "without change" (see Comment to Prob C §8004(a)), and former Prob C §§370 and 442 have been held to require that a person be interested in the estate in order to challenge the appointment of a personal representative. *Estate of Lyons* (1955) 132 CA2d 790, 283 P2d 66; *Estate of Bily* (1950) 96 CA2d 333, 215 P2d 78.

In general, "interested persons" include heirs (see Prob C §44), devisees (see Prob C §34), children (see Prob C §26), spouses, creditors, beneficiaries (including any person entitled to enforce a charitable trust; see Prob C §24(d)), any other person having a property right in or claim against the estate that may be affected by the proceeding (Prob C §48(a)(1)), any person having priority for appointment as personal representative (Prob C §48(a)(2)), and a fiduciary representing an interested person (Prob C §48(a)(3)).

The meaning of "interested person," however, depends on the context of the proceeding ("shall be determined according to the particular purposes of, and the matter involved in, any proceeding"). Prob C §48(b). Under §48(b), the court may "determine the sufficiency of a party's interest for the purposes of each proceeding conducted." *Estate of Maniscalco* (1992) 9 CA4th 520, 523, 11 CR2d 803. A party may be an interested person for purposes of one proceeding but not for another. *Estate of Davis* (1990) 219 CA3d 663, 668, 268 CR 384. See, *e.g., Estate of Lyons, supra* (decedent's son challenged appointment of personal representative in his capacity as personal representative of estate of his predeceased aunt; because sister's estate had no claim on decedent's estate, son had no standing, even though court noted that had he appeared in his individual capacity he would have had standing as heir of his father).

A potential debtor of an estate is not an "interested person." *Estate of Bily, supra*.

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II. PROCEDURES AND FORMS

§16.18 A. Petition for Appointment

Judicial Council Form DE-111 (Petition for Probate) must be used to petition for appointment of a personal representative, including the proposed appointment of a special administrator. The petition may be filed by any interested person at any time after the decedent's death. Prob C §8000. When there is a dispute over who should be appointed, a separate petition, using the same case number, should be filed for each proposal. The court "shall" hear the competing petitions together. Prob C §8004(a). For discussion on completing Form DE-111 for appointment of general personal representative or special administrator, and on related procedural matters, see California Decedent Estate Practice, chap 7 (2d ed Cal CEB 2009).

Sometimes, in the race to the courthouse, adversaries will file separate petitions before having been served with the opponent's papers and will be unaware of an earlier filing. As a result, competing petitions are sometimes filed under different case numbers. When this happens, the court will normally consolidate the multiple petitions for hearing under the initial case number. For consolidation of cases, see CCP §1048; California Civil Procedure Before Trial §§43.26-43.62 (4th ed Cal CEB 2004).

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§16.19 B. Notice of Hearing

Notice of a hearing of a petition for appointment of a personal representative must be given on Judicial Council Form DE-121 (Notice of Petition to Administer Estate). Generally, the hearing is set for 15 to 30 days after the filing (unless the petitioner requests at the time of filing that the hearing be set for 30 to 45 days after filing). Prob C §8003(a). Notice must be published and served in accordance with Prob C §§8100-8125. Notice must be served by mail or personal delivery at least 15 days before the hearing on each heir and on each devisee, executor, and alternate executor named in any will being offered for probate. Prob C §8110. See also *Estate of Carter* (2003) 111 CA4th 1139, 4 CR3d 490 (construing "reasonably ascertainable" heirs under Prob C §8110 as requiring notice to all potential heirs whose existence and identity are known to petitioner). Notice must also be served on the Attorney General in cases involving charitable trusts under some circumstances (together with the petition and will) (Prob C §8111), and on a recognized diplomatic or consular office in certain cases involving foreign citizens (Prob C §8113).

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§16.20 C. Contest of Petition

If appointment of the personal representative is contested, opposition to the petition for appointment should state the grounds, including a challenge to the proposed personal representative's competency or right to appointment. Prob C §8004. For grounds for opposing appointment, see §§16.8-16.16.

Objections may be made in writing at or before the hearing, or orally at the hearing. Prob C §1043. As a matter of good advocacy, however, as well as courtesy to court and counsel, and as may be required by local custom or rule, opposition should be filed in writing well in advance of the hearing, if at all possible. Objections made in writing must be verified. Prob C §1021. If the court grants a continuance to allow a written objection to be made and the objection is not timely filed and served, the court may deem it waived. Cal Rules of Ct 7.801.

If an oral objection is made, the court may hear and rule on the objection at the hearing or continue the matter to permit the objection to be made in writing. Prob C §1043(b).

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§16.21 D. Memorandum in Support of Contest

There is no statutory requirement that the contest of the appointment be accompanied by a separate memorandum. As a matter of advocacy, however, it may be important to provide the court with persuasive argument and analysis of relevant authorities in order to prevail at a contested hearing.

In probate practice, papers filed before the hearing are usually structured in one of two ways. Some practitioners prefer to weave their arguments and citations of authorities into the verified pleadings. This approach gives life to what might otherwise be a dry recital of ultimate facts and reduces the number of papers the court must review in preparing for the daily calendar. It can be awkward, however, because it requires a layperson client to verify under penalty of perjury all of counsel's arguments, opinions, conclusions, and characterizations of the cases cited.

Other practitioners prefer to reserve their arguments, opinions, conclusions, and citations to a memorandum because it is not constrained by the formal rules of pleading and the verification requirement. This may allow greater freedom to interweave the facts and the law to produce a persuasive argument. In general, the more complicated or more important a disputed matter is, the more likely a separate memorandum should be used.

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§16.22 E. Contested Hearing

Many disputed probate matters are determined without formal introduction of evidence other than the verified pleadings and any additional affidavits or declarations under penalty of perjury filed with the court. Although Prob C §1022 provides that an affidavit or verified petition shall be received as evidence when offered in *uncontested* proceedings, they may not be received in evidence in a contested matter if a party objects. *Evangelho v Presoto* (1998) 67 CA4th 615, 79 CR2d 146; *Estate of Wallace* (1977) 74 CA3d 196, 141 CR 426. Any party to a contested probate proceeding may demand an evidentiary hearing at which issues of fact will be tried in conformity with the rules of practice in civil actions. Prob C §1000. See also *Estate of Lensch* (2009) 177 CA4th 667, 99 CR3d 246; *Estate of Bennett* (2008) 163 CA4th 1303, 78 CR3d 435. Thus, each party should evaluate whether the dispute should be submitted on the papers and oral argument at the hearing, or whether oral testimony or cross-examination is necessary for an effective presentation. For discussion of trial on verified pleadings and affidavits, see §10.39.

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Source: Estate Planning/California Trust and Probate Litigation/16 Contesting Appointment of Personal Representative/ §16.23 F. Form: Contest of Appointment of Personal Representative

§16.23 F. Form: Contest of Appointment of Personal Representative

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[*Title of court*]

Estate of _ _[*name*]_ _, **Deceased**	**No.** _ _ _ _ _ _
	CONTEST OF APPOINTMENT OF PERSONAL REPRESENTATIVE (PROBATE CODE §§1043, 8004(a), 8402)
	Hearing: _ _[*date*; *time*]_ _
	Dep't: _ _[*number*]_ _
	Hearing judge: _ _[*if known*]_ _

Contestant is a person interested in the Estate of _ _[*name*]_ _**, because** _ _[*specify contestant's interest, e.g., contestant is decedent's surviving spouse*]_ _**.**

Contestant opposes the appointment of _ _[*name of proposed personal representative*]_ _ **as** _ _[*executor/administrator/administrator with the will annexed*]_ _ **on the following grounds:**

1. _ _[*Name of proposed personal representative*]_ _ **is not competent to serve as personal representative because** _ _[*specify grounds of opposition, under one or more categories in Prob C §8402 or §8502, e.g., he or she is incapable of executing the duties of the office due to senility and an inability to manage financial affairs (add supporting factual detail); he or she is unfit to execute the duties of the office due to a long-standing addiction to alcohol and a history of misusing any available funds to gamble (add supporting factual detail); or he or she would be subject to immediate removal because he or she claims to be the outright owner of property over which the decedent's probate estate has a meritorious conflicting ownership claim (add supporting factual detail)*]_ _**.**

2. _ _[*Continue with any additional grounds for opposition.*]_ _

[*Add if contestant asserts his or her right to appointment as personal representative*]

3. Contestant is entitled to appointment _ _[*after petitioner,*]_ _ **as** _ _[*executor/administrator/administrator with the will annexed*]_ _ **and to letters** _ _[*testamentary/of administration/of administration with the will annexed*]_ _**. Contestant has filed** _ _[*his/her*]_ _ **petition for appointment and has served notice of hearing on the petition in the manner provided in Probate Code §§8110-8113. Copies of the petition and notice are attached as exhibits to this contest.**

WHEREFORE, contestant prays that the court :

1. Deny _ _[*name*]_ _**'s petition for appointment as** _ _[*executor/administrator/administrator with the will annexed*]_ _ **of the Estate of** _ _[*name*]_ _ **and for issuance of letters** _ _[*testamentary/of administration/of administration with the will annexed*]_ _**.**

2. Award contestant _ _[*his/her*]_ _ **costs in this proceeding.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Contestant

Date: _ _ _ _ _ _ __[*Signature*]__

_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*Verification; see §§17.56, 17.61*]

Comment: An objection or response to a petition must be verified. Prob C §1021(a)(2). For an award of costs, see CCP §1032(a)(4).

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/16 Contesting Appointment of Personal Representative/ §16.24 G. Form: Order Denying Petition for Appointment of Personal Representative

§16.24 G. Form: Order Denying Petition for Appointment of Personal Representative

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[*Title of court*]

Estate of _ _[*name*]_ _, **Deceased**	)	**No.** _ _ _ _ _ _
	)	
	)	**ORDER DENYING PETITION**
	)	**FOR APPOINTMENT OF**
	)	**PERSONAL**
	)	**REPRESENTATIVE**
	)	
	)	**Hearing:** _ _[*date*; *time*]_ _
	)	**Dep't:** _ _[*number*]_ _
_____	)	**Hearing judge:** _ _[*if known*]_ _

The Petition for Probate filed herein on _ _[*date*]_ _ **by** _ _[*name of petitioner*]_ _ **requesting appointment of** _ _[*name of proposed personal representative*]_ _ **as personal representative of the Estate of** _ _[*name*]_ _**, was heard at the above date and time.** _ _[*Name of contestant*]_ _ **filed a Contest of Appointment of Personal Representative on** _ _[*date*]_ _**, objecting to the appointment of** _ _[*name of proposed personal representative*]_ _ **as personal representative. The matter was argued and submitted on the** _ _[*complete as appropriate, e.g., on the verified Petition for Probate and Contest of Appointment of Personal Representative, Declaration of* _ _[*name*]_ _*, documents received in evidence at the hearing identified as, e.g., Exhibit A, memorandums in support of and in opposition to the petition, oral representations, and arguments of counsel*]_ _**.**

THE COURT FINDS, based on proof made to the satisfaction of the Court, that:

1. _ _[*Name of contestant*]_ _ **is a person interested in the Estate of** _ _[*name*]_ _ **under Probate Code §48 for purposes of this proceeding.**

2. _ _[*Name of proposed personal representative*]_ _ **is not competent to serve as personal representative of the estate of the estate of the above-named decedent because** _ _[*specify grounds on which the Court ruled, e.g., he or she is incapable of executing the duties of the office due to senility and inability to manage financial affairs of this estate; he or she is unfit to execute the duties of the office due to a long-standing addiction to alcohol and a history of misusing any available funds to gamble; or he or she would be subject to immediate removal because he or she claims to be the outright owner of property to which the probate estate has a meritorious competing claim of ownership*]_ _**.**

THE COURT ORDERS that:

1. The request of _ _[*name of petitioner*]_ _ **that** _ _[*name of proposed personal representative*]_ _ **be appointed personal representative of the Estate of** _ _[*name*]_ _**, contained in the Petition for Probate filed herein on** _ _[*date*]_ _ **by** _ _[*name of petitioner*]_ _**, is denied.**

2. _ _[*Name of contestant*]_ _ **recover against** _ _[*name of petitioner*]_ _ **costs in the amount of** _ _[*dollar amount*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Judge/Commissioner*]_ _
of the Superior Court

Comment: If the petition for probate also sought admission of a will to probate and admission is granted, it may be documented by (a) a separate minute order admitting the will to probate; (b) completing item 2 (concerning admission of the will to probate) of Judicial Council Form DE-140 (Order for Probate) (if a competing petition for appointment of a

personal representative is granted, items 3-6 may be completed as appropriate for the successful petitioner); or (c) modifying the above order to reflect admission of the will to probate, using the language from item 2.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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§16.25 H. Appeal

An order granting or refusing to grant letters to a personal representative is appealable, except for letters of special administration or letters of special administration with general powers. Prob C §1303(a). For discussion of appellate procedures, see §§10.92-10.101.

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17

Will Contests

Clark R. Byam
Marc L. Sallus

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I. INTRODUCTION

§17.1 A. Nature of Proceeding

A will contest is an action to prevent probate of a tendered will or to revoke a will that has been admitted to probate. Although it has some attributes of a civil action, it is still a probate matter governed by the Probate Code.

This chapter discusses the basic elements in pursuing a will contest. Standing, grounds, evidentiary requirements, procedures, and pleadings peculiar to this type of proceeding are discussed, as well as the economics of will contests and settlement procedures. Because the limited statutory grounds for contest (see §17.25) sometimes preclude its use even in valid will disputes, other available remedies are also considered. See §§17.35-17.55.

A general discussion of trial technique is beyond the scope of this book. Successful practice often means knowing when to consult the experts, *e.g.,* at the prospect of a difficult settlement or an extended adversary proceeding. This contingency should be discussed with the client in advance and specified in the retainer agreement.

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§17.2 B. Interview and Fact-Gathering

Persons interested in contesting a will are usually the disappointed and distraught family members of the decedent. These clients are likely to have a vague idea about will contests, but, aside from a subjective judgment of what they believe is fair, they probably have no firm knowledge of what is involved.

The potential contestant must be made to understand at the outset what may be gained from a contest as well as the financial risks. A contestant may be estopped by acquiescence (*Castro v Castro* (1856) 6 C 158); by unreasonable delay in prosecuting his or her contest (*Estate of Cutler* (1959) 168 CA2d 261, 335 P2d 731); by agreeing to a settlement or compromise (*Estate of Edelman* (1905) 148 C 233, 82 P 962; *Estate of Wickersham* (1902) 138 C 355, 70 P 1076; *Estate of Garcelon* (1894) 104 C 570, 38 P 414); or by failing to divest himself or herself of any beneficial interest that he or she has or that accrues to him or her under the will (*Del Campo v Camarillo* (1908) 154 C 647, 98 P 1049; *Estate of Walkerly* (1895) 108 C 627, 41 P 772).

After a painstaking fact-gathering process (see §§4.1-4.9 and items suggested in §17.3), and with these facts and the available grounds for contest in mind, the attorney should realistically and objectively analyze the evidence that may justify litigation and the likelihood of success. Thorough probing, questioning, and investigation will be required to develop the necessary facts.

Frequently, time is limited, and the attorney will not have sufficient opportunity to explore all the facts and make a proper review before accepting a retainer or before the date of hearing of the petition for probate. Most probate courts, on proper showing, will grant a continuance to the attorney who appears at the hearing on the petition for probate of the will and orally objects, declaring that his or her client wishes to file a written contest. Such a continuance is intended to prevent the filing of a hasty, poorly prepared contest. Local rules should be consulted for practice in a particular county.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.3 C. Checklist : Client Information

§17.3 C. Checklist : Client Information

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The following checklist can expedite the preliminary lawyer-client interviews and conferences. Although most factors to be considered before and during a will contest are noted, the checklist is not definitive. The most important steps and practice suggestions are discussed in the particular sections given in the cross-references.

Name of client _____ Office file no. _____

Address: _____ Estate of _____

Telephone: _____

A. PRELIMINARY MATTERS

1. Was decedent a former client? Yes ___ No ___

2. Did the law office handle decedent's estate planning? Yes ___ No ___

   File available? Yes ___ No ___

3. Information on client:

   Relationship to decedent: _____

   Is client: Contestant? ___ Proponent? ___ Other interested party? ___

   Value of estate: $_____

Heirs and Beneficiaries

[*List all intestate heirs and beneficiaries under will, trust, life insurance policies, employee benefits, Totten trust accounts, joint tenancy property*]

Name	Address	Relationship to Descendent
_____	_____	_____
_____	_____	_____
_____	_____	_____

Has this office represented any of the beneficiaries? Yes ___ No ___

Is there a conflict of interest? Yes ___ No ___ [See *Estate of Huber* (1973) 31 CA3d 126, 107 CR 89]

B. ADVISING CLIENT

1. What is the complaint? _____

   Will(s)? Yes ___ No ___

   Contract to make will for services? Yes ___ No ___ [See §§17.49-17.51]

   Other basis? _____

   Summary of client's narrative:_____

   _____

   Any will filed? Yes ___ No ___ Where? _____ Date _____

   Where does the client stand? _____

   What is specific will provision? _____

   Client's share: $_____

   Other legatees' share: $_____

Would the client benefit if the will were denied probate or revoked? Yes ___ No ___ How?

If the will is denied probate or revoked, would the decedent then be intestate or is there a prior will?

_____

If the decedent would then be intestate, how does the client benefit under the laws of intestacy?

If there is a prior will that would then be offered for probate, how does the client benefit under the prior will?

How many prior wills are there and how would the client benefit under each if the wills were sequentially denied probate?

_____

Who will oppose probate of will? _____

2. Review of evidence [On evidentiary requirements, see §§6.11-6.20, 17.25-17.53]

   a. Ground for contest: Incapacity

      Evidence produced by client:

      Witnesses: _____

      Documents:_____

      Other: _____

   b. Ground for contest: Undue influence

      Evidence produced by client:

      Witnesses: _____

      Documents:_____

      Other: _____

   c. Can the client obtain other evidence to help the case? Yes ___ No ___

   d. Can such other evidence be made available? Yes ___ No ___

3. Examination and inspection of the last will and testament:

   Typewritten? _____ Original? _____ Copy? _____

   Codicils? Yes ___ No ___

   Valid execution? Yes ___ No ___ [See §17.27]

   [On examination of witnesses, see §17.30]

   Holographic will? Yes ___ No ___

   Genuineness:

      Pages tampered with? Yes ___ No ___

      Any stapling marks? Yes ___ No ___

      Changes in inking or type? Yes ___ No ___

      Different papers used? (Insertion or substitution?) Yes ___ No ___

      Nonuniform typing? Yes ___ No ___

      Signature compared with samples? Yes ___ No ___

      Tracing? Yes ___ No ___

      Handwriting or other experts required? Yes ___ No ___

4. Scrutiny of testamentary provisions:

   Is the will legal? Does it comply with statutory requirements? Yes ___ No ___

   Is the client purposely left out? Yes ___ No ___

   Reasons given in will? Yes ___ No ___

   [See *Estate of Smith* (1973) 9 C3d 74, 106 CR 774; *Estate of Torregano* (1960) 54 C2d 234, 5 CR 137]

Was the will poorly drafted? Yes ___ No ___

5. Special problems:

   Tax [See §§5.52-5.57; California Decedent Estate Practice, chaps 33-34 (2d ed Cal CEB 2009)]

   Community or separate property problems? Yes ___ No ___

   Out-of-state interests? Yes ___ No ___ [See Decedent Estate Prac, chaps 11-12]

   Should specialists be consulted? Yes ___ No ___ [See §§4.19-4.23, 17.31]

6. No-contest clauses

   Is there a no-contest clause? Yes ___ No ___

   Phrasing of no-contest clause: _____

   [See §§5.2-5.14]

   Effect of provision on client: _____

7. Estoppel? Yes ___ No ___ [See §17.43]

   Facts supporting estoppel: _____

8. Mutual wills? Yes ___ No ___ [See §§17.42-17.48]

   Prenuptial agreement? Yes ___ No ___

   Property settlement agreement? Yes ___ No ___

9. Lawyer's evaluation of the case:

   Is it actionable? Yes ___ No ___

10. Has each will-contest client been admonished that the purpose of the contest is not to embarrass or harass a proponent or some other party interested in the estate? Yes ___ No ___

C. ECONOMICS OF CONTEST AND RETAINER

- Explain how much a contest will cost the client.
- If the client's interest in the estate is negligible, advise client against a contest or to consider other remedies.
- Reach complete agreement about attorney fees.
- Prepare a fee contract in writing for the client's signature.
- Collect fees in advance if client is determined to contest on "principle."
- Reach a clear understanding of the attorney's control of the case and his or her authority to settle.

D. COMPROMISE AND SETTLEMENT [See chap 12, §§17.84-17.92]

- Ascertain before filing what amount of money or property will satisfy the client.

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§17.4 D. Evaluating Costs of Contest

The objector, proponent, and beneficiaries should be made aware of the high cost of a will contest. In addition to the normal costs of litigation, the estate may be held liable for extraordinary fees paid to the representative and his or her attorney for defending a will contest, further reducing the amount available for distribution. See §§3.17-3.19, 5.38-5.45. Therefore, regardless of the merits of the issues, the parties should consider whether contests and appeals are justified and whether compromise may be possible.

Costs may be denied to an unsuccessful proponent. They must then be paid by the proponent personally. Each heir, devisee, and beneficiary may have to bear the costs of a contest. *Estate of Stauffer* (1959) 53 C2d 124, 346 P2d 748. Furthermore, when costs are awarded to the contestant, they are paid by the proponent, heirs, or devisees, or some of them, not out of the estate; otherwise, the contestant in effect would be paying his or her own costs. *Estate of Miller* (1968) 259 CA2d 554, 66 CR 768. See §§17.82-17.83.

Counsel must also consider the possible tax consequences of a successful will contest in deciding whether to proceed. For example, the contestant's intestate share may end up being less than the devise provided by the will if the contest succeeds in defeating a will that qualifies for the marital or charitable deduction. The deductibility of contest expenses from federal estate and income taxes is another factor that must be considered. For more detailed discussion, see California Decedent Estate Practice, chap 26 (2d ed Cal CEB 2009); Kemp, *How to achieve optimum income, gift and estate tax benefits in a will contest*, 38 J Tax 285 (1973); Kemp, *Federal Tax Aspects of Will Contests*, 23 U Miami L Rev 72 (1968). Tax consequences of litigation are discussed in §§5.52-5.57, 12.5-12.10.

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II. LEGAL REQUIREMENTS

§17.5 A. Governing Law

Typical adversary proceedings are governed by Prob C §§1000-1051 (general procedural provisions), 1200-1214 (general notice provisions; see Cal Rules of Ct 7.51), 6100-6113 (validity and execution of wills), 7220-7280 (rules of procedure), 8250-8254 (contesting will before probate), 8270-8272 (revocation of will after probate), 9830 (authority to compromise claims), 9837 (court authorization of compromise), 21300-21308 (operative through December 31, 2009), and 21310-21315 (operative beginning January 1, 2010) (enforceability of no-contest clause); Cal Rules of Ct 3.1100 and 3.1103(a) (application of law and motion rules to probate proceedings); IRC §§102(a) (exclusions from gross income) and 642 (special rules for deductions and credits); and Treas Reg §§20.2053-1—20.2054-1 (deductions for estate expenses, indebtedness, taxes, casualties, or thefts). Local probate rules should be consulted as well.

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§17.6 B. Standing to Contest

"Any interested person" has the right to contest either before or after probate of a will. Prob C §§1043, 8004, 8250, 8270. Probate Code §48(a) defines the term "interested person" to include an heir, devisee, child, spouse, creditor, beneficiary, anyone having a property right or claim against the estate that may be affected, anyone having priority for appointment as representative, or a fiduciary of any of the above.

Who is an interested person may vary and must be determined case by case according to the purposes of and issues in any proceeding. Prob C §48(b). The interest must be a pecuniary interest in the devolution of the estate that may be impaired or defeated by probate of the will or benefited by having it set aside. *Estate of Plaut* (1945) 27 C2d 424, 164 P2d 765; *Estate of Lind* (1989) 209 CA3d 1424, 257 CR 853; *Estate of Molera* (1972) 23 CA3d 993, 100 CR 696. The beneficiary of an earlier plan can lose standing by violating the no-contest clause in that earlier instrument. *Montegani v Johnson* (2008) 162 CA4th 1231, 76 CR3d 621. For purposes of a will contest, an executor who is left nothing is not an interested person. *Jay v Superior Court* (1970) 10 CA3d 754, 89 CR 466.

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1. Personal Representative

§17.7 a. Proposed Executor Under Will Offered for Probate

A person named as executor in the will does not have a duty to defend a will contest until appointed as the personal representative. Prob C §8250(b). Generally, however, a representative who is named in a will that has been offered for or admitted to probate has the *right* to oppose or resist a contest to the will (*Estate of Perreira* (1961) 191 CA2d 369, 12 CR 589) but may not initiate a will contest before appointment unless he or she otherwise has standing as an interested person. *Jay v Superior Court* (1970) 10 CA3d 754, 89 CR 466.

The probate court determines whether it was necessary or proper for the representative to resist opposition to the probate. *Estate of Higgins* (1910) 158 C 355, 111 P 8; *Estate of Miller* (1968) 259 CA2d 536, 66 CR 756; *Estate of Arnold* (1932) 121 CA 247, 8 P2d 897. The basic question is whether the representative is a "person interested" within the purview of Prob C §§1043, 8251, and 8270. See also Prob C §48(b). The determination of this question has a direct bearing on attorney fees and costs. See §§3.28-3.39.

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§17.8 b. Contest of Subsequent Will

A representative appointed under an earlier will has standing to contest a subsequent will, even though he or she has no beneficial interest in the estate, if it is possible that the testator's wishes would be thwarted by an admission of the later will. *Estate of Langley* (1903) 140 C 126, 73 P 824; *Estate of Costa* (1961) 191 CA2d 515, 12 CR 920 (executor); *Estate of Denman* (1979) 94 CA3d 289, 156 CR 341 (administrator with will annexed). The right is not based on any pecuniary interest of the representative but on the theory that he or she represents those who would be entitled to the estate under the will in which he or she is named. *Jay v Superior Court* (1970) 10 CA3d 754, 89 CR 466.

A named executor is not an interested person who may contest a subsequent will or codicil that revokes his or her nomination as executor when the subsequent will does not change the dispositive provisions and it is not shown that the testator's object and intent will be thwarted by the subsequent document. *Jay v Superior Court, supra*.

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§17.9 2. Heirs

An heir is a "person interested," if he or she would take by intestacy in the event the will is rejected. *Estate of Field* (1951) 38 C2d 151, 238 P2d 578; *Estate of Lind* (1989) 209 CA3d 1424, 257 CR 853; *Estate of Eskridge* (1942) 51 CA2d 634, 125 P2d 527 (decedent's niece had no standing to contest probate of alleged will if decedent had heirs who would succeed to estate on intestacy to exclusion of decedent's niece). A surviving spouse may contest, despite execution of a separation agreement waiving property rights, unless the agreement specifically excluded any right of inheritance. *Estate of Minier* (1932) 215 C 31, 8 P2d 123. See §17.52 on prenuptial agreements and §17.53 on *Marvin* agreements.

An heir cannot contest the will in every case. He or she must show that he or she has an interest that may be impaired or defeated by the contested will. *Estate of Land* (1913) 166 C 538, 137 P 246; *Estate of Weber* (1991) 229 CA3d 22, 280 CR 22 (decedent's son did not have standing because he would receive the same interest under the will or intestacy).

Pretermitted heirs do not have standing to contest a will, because they take their statutory shares by operation of law and do not derive additional benefit in their capacity as pretermitted heirs if the will is not admitted to probate. Prob C §§21600-21623; *Estate of Shimun* (1977) 67 CA3d 436, 440, 136 CR 668; *Estate of Philippi* (1945) 71 CA2d 127, 133, 161 P2d 1006 (decided under former law). There is an exception for persons who would receive a larger share than their pretermitted share if the will is not admitted. For example, an omitted spouse who is also the decedent's sole legal heir would inherit the entire estate, not just the pretermitted spouse's statutory share, if the decedent's will is invalidated. See *Estate of Katleman* (1993) 13 CA4th 51, 16 CR2d 468.

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§17.10 3. Beneficiaries Under Prior or Later Will

A beneficiary under an earlier will, whose interest may be impaired or defeated by a later will has standing to contest the later will, even though he or she would not take by intestate succession if the contested will were set aside. *Estate of Plaut* (1945) 27 C2d 424, 164 P2d 765; *Estate of Munfrey* (1943) 61 CA2d 565, 143 P2d 414. The contestant may contest the later will without first obtaining probate of the earlier will. *Estate of Arbuckle* (1950) 98 CA2d 562, 220 P2d 950.

The right to contest is extended to a beneficiary under an earlier will that has been fraudulently destroyed or destroyed by another without the testator's knowledge or consent. *Estate of Arbuckle, supra*. It is not sufficient to allege on information and belief and hearsay testimony of the existence of a will naming the contestants as beneficiaries. *Estate of Sherwood* (1954) 123 CA2d 209, 266 P2d 580.

In *Estate of Lane* (1970) 7 CA3d 402, 86 CR 620, contestants who were unrelated to the decedent or to her predeceased husband alleged that they were sole beneficiaries of a previous will that they were unable to produce. To establish standing, the contestants were required to show that they could prove the previous will as a lost will, which they were unable to do. See *Estate of Robinson* (1961) 192 CA2d 847, 13 CR 842 (interest of beneficiary under earlier lost will expressly challenged, and contestant failed to establish prima facie case of lost will).

A beneficiary under a later will has standing to contest an earlier will if his or her interest might be impaired or defeated by probate of the earlier will. *Estate of O'Brien* (1966) 246 CA2d 788, 55 CR 343 (suggesting better procedure would have been to consolidate proceedings to probate both wills).

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§17.11 4. Estate of Person Interested

The personal representative of a decedent who had grounds to contest may initiate a will contest. Prob C §48(a)(3). See also *Estate of Field* (1951) 38 C2d 151, 238 P2d 578. A will contest, once filed, outlives the contestant's death and the right to contest survives. *Estate of Sanderson* (1962) 58 C2d 522, 25 CR 69; *Estate of Hughes* (1962) 202 CA2d 12, 20 CR 475. See also *Estate of Bose* (1978) 77 CA3d 269, 142 CR 241, explaining the distinction in *Hughes* between the right to contest a will and the right to property passing under the will.

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§17.12 5. Assignment of Right to Contest

The right to contest a will is assignable (*Estate of Clark* (1928) 94 CA 453, 271 P 542), but it is the policy of the law to discourage the enforcement of heir-hunting contracts, assignments, and arrangements and to void commercial exploitation of litigation involving estates. See *Estate of Bennett* (2008) 163 CA4th 1303, 78 CR3d 435 (court has power under Prob C §11604 to order rescission of assignment of interest in estate on grounds such as fraud, duress, and mistake). No distinction is made between amateur and professional heir hunters. *Estate of Collins* (1968) 268 CA2d 86, 73 CR 599.

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§17.13 6. Creditors of Heirs

A general creditor of a disinherited heir does not have a sufficient interest to contest the will. A judgment creditor who has perfected a judgment lien at the time the property would devolve to the heir if the will is set aside, however, is an interested person who has standing to contest the will. *Estate of Harootenian* (1951) 38 C2d 242, 238 P2d 992.

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§17.14 7. Debtors of Estate

A person who is or who may become liable to the decedent's estate is not an interested person and cannot contest a will. *Estate of Bily* (1950) 96 CA2d 333, 215 P2d 78.

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§17.15 8. State of California

If the decedent leaves no heirs, the State of California has sufficient interest to contest probate of a will. *Estate of McCabe* (1934) 219 C 742, 29 P2d 195. The state must allege facts and circumstances showing its interest in the estate and its right to appear in the proceeding to contest the will.

The Attorney General may answer a will contest and participate in the proceedings to protect charitable gifts and trusts. When there is any question about the validity of a purported charitable provision in a will, the Attorney General has the power to act as advocate in support of its validity. *Estate of Ventura* (1963) 217 CA2d 50, 31 CR 490.

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§17.16 9. Public Administrator

A public administrator is not an interested person entitled to contest a will. *Estate of Golden* (1935) 4 C2d 300, 48 P2d 962. But see *Estate of Davis* (1905) 182 NY 468, 75 NE 530 (public administrator appointed in California as personal representative of decedent's property in that state, under claim that decedent died intestate, should be allowed to intervene in proceeding for probate of decedent's alleged will, which was pending in New York).

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§17.17 C. Limitation on Right to Revoke Probate

A contest after the will has been admitted to probate is called a petition to revoke the probate of a will. Prob C §8270. After the will is admitted to probate, a person who was a party to a preprobate contest or who had actual notice of a preprobate contest and could have joined that action may not petition to revoke probate of the will. Prob C §8270. A person cannot be found to have actual notice in time to have joined in the contest, however, unless he or she also has knowledge of his or her right to contest as an interested person. *Estate of Meyer* (1953) 116 CA2d 498, 251 P2d 430 (parties had actual notice of pendency of contest, but no knowledge of their interests until time of trial).

An interested party who has actual notice should intervene in the pending contest before trial. See CCP §387.

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§17.18 D. Methods of Contest

There are three statutory methods of pursuing a will contest: (1) filing an objection to the petition for probate (Prob C §§8004, 8250-8254; see §§17.56-17.59); (2) filing a petition to revoke the probate of the will within 120 days after the will is admitted to probate (Prob C §§8270-8272; see §§17.72-17.74); and (3) filing a complaint in intervention under CCP §387 (see §17.93).

An objection to the petition for probate may be filed any time before the hearing on the petition for probate. Prob C §§8004, 8250. A contestant who does not file before the hearing is limited to filing a petition to revoke probate of the will, which must be filed within 120 days after the will is admitted to probate. The 120-day limit is jurisdictional if no objection was made within that time, and the probate of the will is deemed conclusive, unless the court lacked jurisdiction to admit the will to probate. Prob C §§8226(a), 8007; *Estate of Sanders* (1985) 40 C3d 607, 221 CR 432 (heirs deceived by executor's extrinsic fraud entitled to contest will after expiration of contest period).

Minors and incompetents who had no guardian or conservator at the time the will was admitted to probate may petition to revoke the probate of the will at any time before the entry of an order for final distribution. Prob C §8270(b). See also §17.23.

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§17.19 1. Advantages of Preprobate Versus Postprobate Contests

For the attorney representing a contestant, it is much more desirable, circumstances permitting, to file a contest before probate than to attempt to revoke a probate. A preprobate contest may force settlement because of the delay in settling the estate, the appointment of special administrator and counsel, and the resulting division of fees. Also, after a will has been admitted to probate, the personal representative has the duty to defend the will against attack and is entitled to an award of attorney fees for extraordinary services for any good faith defense, whether it is successful or not. Prob C §10801; *Estate of Dunton* (1936) 15 CA2d 729, 60 P2d 159. In a preprobate contest, fees for extraordinary services are allowable only for a successful defense. See §5.39.

Furthermore, admission of a will to probate establishes prima facie for all purposes of contest that the will was duly executed in the manner required by law. *Estate of Goddard* (1958) 164 CA2d 152, 330 P2d 399. In other words, the will, after it is admitted to probate, must be treated as valid until the probate is revoked. *Estate of Trissel* (1962) 208 CA2d 188, 25 CR 205. But see §§17.26-17.34.

It is also less desirable to file a petition to revoke a will after probate because statutory provisions governing time, grounds, and parties limit the right to revoke a will. *Fisher v Superior Court* (1937) 23 CA2d 528, 73 P2d 892; *Estate of Whiting* (1930) 110 CA 399, 294 P 502. No right to revoke a probate of a will after probate exists under common law. In a preprobate contest, the right may be construed more broadly in the absence of statutory restrictions.

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§17.20 2. Jurisdiction

The statute of limitations restricting the time within which to object to an order admitting a will to probate does not apply when the probate court lacked jurisdiction to admit the will to probate in the first place. *Estate of Poder* (1969) 274 CA2d 786, 79 CR 484 (public administrator's failure to give proper notice as required by former Prob C §328). A probate order that is void on its face for lack of jurisdiction may be attacked at any time on this ground. See California Decedent Estate Practice, chap 5 (2d ed Cal CEB 2009).

Probate Code §8007, however, provides that an order admitting a will to probate or appointing a personal representative, once final, is a conclusive determination of jurisdiction and cannot be collaterally attacked unless the court order was procured by extrinsic fraud or was based on an erroneous determination that the decedent died.

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§17.21 3. Fraud or Misrepresentation

A petition to revoke a probate based on fraud must be filed within 120 days after the will has been admitted to probate. Prob C §8270.

When a testator was induced to execute a will through false and fraudulent representations, the California courts have held the distributee a constructive trustee for the heirs under certain circumstances, even after the time to contest the probate of the will has expired. See *Caldwell v Taylor* (1933) 218 C 471, 23 P2d 758. For a discussion of fraud as a basis for attacking a will or a trust, see §§6.27-6.29.

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§17.22 4. Probate of Another Will

Probate Code §8226(b) provides that failure to contest a will does not preclude subsequent probate of another will of the decedent. Probate of an earlier will is not a contest and is not barred by the statute of limitations for contest. *Estate of Robertson* (1968) 266 CA2d 866, 72 CR 396.

The proponent of a subsequent will who has received formal notice under Prob C §8110 of a prior petition for probate or for letters of administration may petition for probate only within the later of (a) 120 days after issuance of the order admitting the first will to probate or determining that the decedent died intestate or (b) 60 days after the proponent of the subsequent will first learns of the will. Prob C §8226(c). *Estate of Earley* (2009) 173 CA4th 369, 92 CR 3d 577; *Estate of Kelly* (2009) 172 CA4th 1367, 91 CR3d 674 (actual knowledge of probate proceeding is not enough to start time periods under Prob C §8226(c); formal written notice under Prob C §8110 is required). The subsequent will may not affect previously distributed property. However, the court may determine how the will affects undistributed property and provisions of another will. Prob C §8226(b).

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§17.23 5. Persons Under Disability

The clear intention of Prob C §8226(a) is that, when no contest is filed within the time allowed, probate of the will becomes final, with the exception that persons under disability may attack the probate as far as their own rights are concerned until an order of final distribution is entered. See §17.18. A successful contest brought by such a person has a similar effect as when there is a pretermitted heir: The contestant takes his or her share of the estate while the will stands for all others. *Security Trust & Sav. Bank v Superior Court* (1937) 21 CA2d 551, 69 P2d 921.

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§17.24 6. Will Contest or Action Based on Invalidity of Transfer Described in Prob C §21350

Any time a party intends to assert the invalidity of one or more provisions of a will, counsel must carefully analyze whether the action could be considered a will contest. If the action is not *limited* to establishing the invalidity of a will provision as a transfer to a disqualified person under Prob C §21350, the statutes of limitations for will contests and application of any no-contest clause in the will must be considered. See §§5.2-5.21, 17.18-17.23, 17.35.

On the other hand, if an action is *limited* to establishing that a will provision is invalid as a transfer described in §21350, it may be brought any time after the issuance of letters to the general representative and before the final order for distribution. Prob C §21356. A no-contest clause is not enforceable against a beneficiary who, with reasonable cause, brings an action described in §21350. Prob C §21306(a)(3) (operative through December 31, 2009).

NOTE: Probate Code §21306 will be repealed effective January 1, 2010. For instruments that became irrevocable on or after January 1, 2001, §21306 will be superseded by new Prob C §21311, which states in pertinent part that a no-contest clause is enforceable against a Prob C §21350 challenge only if it is brought without probable cause (rather than reasonable cause). See Prob C §§21311(a)(1), 21310(b)(6). See §5.12F for discussion of probable cause.

A Petition for Determination of Entitlement to Distribution under Prob C §§11700-11705 may be brought to determine if a provision in a will is invalid because the transfer would be made to a disqualified person as defined in Prob C §21350(a), to whom no exception applies. This would be similar to using Prob C §11700 to assert a presumption of undue influence by an interested witness. Prob C §6112(c). The time in which an action under Prob C §11700 and an action under Prob C §21356 can be brought are the same, *i.e.,* at any time after letters are first issued to a general representative and before an order for final distribution is made.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.25 E. Grounds for Direct Contest

§17.25 E. Grounds for Direct Contest

The statutory grounds for contesting a will include the following (Prob C §§8252(a)):

- Lack of due execution;
- Lack of testamentary intent or capacity to make a will;
- Undue influence, fraud, menace, or duress;
- Mistake;
- Revocation; and
- Forgery.

A gift to a "disqualified person" under Prob C §§21350-21356 is also a ground for contest. See chap 6A.

For discussion of due execution, see §§17.27-17.32; for lack of testamentary intent, see §17.33; for revocation, see §17.34. For discussion of lack of capacity, undue influence, fraud, duress, and mistake, see chap 6.

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§17.26 1. Validity of Will; Burden of Proof

Under Prob C §8252(b), the court must try and determine any contested issue of fact that affects the validity of the will. Probate Code §8252(a) prescribes which party has the burden of proof for certain issues.

Proponents of the will have the burden of proving due execution. See Prob C §§6110-6113 for requirements for execution of wills. Proof of the testator's and witnesses' signatures creates a presumption that the will was duly executed. *Estate of Pitcairn* (1936) 6 C2d 730, 59 P2d 90. See §17.27. If a will is not witnessed by at least two witnesses during the testator's lifetime as required under Prob C §6110(c)(1), a proponent of the will has the burden of proving by clear and convincing evidence that, at the time the testator signed the will, the testator intended it to constitute his or her will.

Contestants have the burden of proving lack of testamentary intent or capacity (Prob C §§6100-6100.5), undue influence, fraud, duress (Prob C §6104), and, presumably, menace, although §8252(a) does not specifically refer to menace. Prob C §8252(a). Contestants also have the burden of proving mistake and revocation under §8252(a) (see Prob C §§6120-6124 on revocation).

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§17.27 2. Compliance With Legal Requirements: Due Execution

A formal witnessed will is validly executed if the testator signed it or if someone else signed the testator's name in the testator's presence and at the testator's direction. Prob C §6110(b)(1)-(2). A formal will is validly attested if it was signed during the testator's lifetime by at least two persons, "each of whom (A) being present at the same time, witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will and (B) understand[s] that the instrument they sign is the testator's will." Prob C §6110(c). See *Estate of Saueressig* (2006) 38 C4th 1045, 44 CR3d 672.

A testamentary document prepared on a California statutory will form (Prob C §6240) that is signed by the testator and two witnesses who attest to the facts specified in Prob C §6110(c) satisfies the general Probate Code requirements for execution of a will, even if the specific requirements of Prob C §6221 for execution of a statutory will form are not met. *Estate of Perry* (1996) 51 CA4th 440, 58 CR2d 797 (testator did not personally fill in form's blanks). Extrinsic evidence is admissible to determine whether a document constitutes a valid witnessed or holographic will. Prob C §6111.5.

For holographic wills, only the testator's signature and the material provisions of the will must be in the testator's handwriting. Prob C §6111. A holographic will was found to be valid even though it did not include the testator's name at the end of document; evidence showed that the decedent had placed his name in block letters at the top of the document with the intent to authenticate it. *Estate of Williams* (2007) 155 CA4th 197, 66 CR3d 34. A photocopy of the testator's handwritten list of property dispositions on which handwritten additions, including the testator's signature and the statement, "This is my new will," were made in ink, satisfied the requirements of §6111 that provisions be in the testator's handwriting. *Estate of Brenner* (1999) 76 CA4th 1298, 91 CR2d 149. However, handwritten additions to a formally attested will that lack testamentary intent without reference to the typewritten words of the formal will on which they appear do not make a valid holographic will. *Estate of Sola* (1990) 225 CA3d 241, 275 CR 98.

Signatures of witnesses will not invalidate an otherwise effective holographic will. Prob C §6111; *Estate of Archer* (1987) 193 CA3d 238, 239 CR 137. A holographic will does not have to be dated to be a valid document; failure to date the instrument, however, may result in invalidity if it is in conflict with another, dated instrument. See Prob C §§6111-6111.5.

Proper disposition of wills executed by decedents who are admittedly incompetent or who have executed testamentary documents that should be denied probate for latent reasons presents a problem for both attorneys and judges. Some attorneys seek to avoid the issue by withholding the document, but the law requires filing or depositing of the will. If a document appears on its face to be a will, the court cannot permit it to be ignored. Other attorneys file the will along with the consent of all interested parties and seek by stipulation to have the court make an order denying probate. The court cannot enter such an order until evidence is presented to establish the defects that render the will ineffective. Whether by negotiation or by stipulation, if a will is to be denied probate, a record should be made to support the order to be entered by the court, and a duly noticed petition must be filed giving the court jurisdiction to enter such an order.

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§17.28 a. Before Probate

In contests before probate, the proponent of the will has the burden of establishing due execution. Prob C §8252(a). See Prob C §§6110-6113 for requirements for execution of wills. Proof of the testator's and the witnesses' signatures creates a presumption that the will was duly executed. *Estate of Pitcairn* (1936) 6 C2d 730, 59 P2d 90; *Estate of Browne* (1958) 159 CA2d 99, 323 P2d 827. If the proponent fails to make a prima facie case, the court may deny probate of the will without receiving the contestant's evidence. *Estate of Fletcher* (1958) 50 C2d 317, 325 P2d 103.

When a prima facie case of due execution is established, the burden shifts to the contestant to show lack of due execution by "positive and affirmative" evidence. *Swift v Superior Court* (1952) 39 C2d 358, 247 P2d 6; *Estate of Williams* (1961) 198 CA2d 238, 17 CR 716. The mere assertion that the decedent did not understand the legal effect of the clause in question does not constitute such evidence. *Estate of Woehr* (1958) 166 CA2d 4, 332 P2d 818.

In *Estate of Harvey* (1956) 143 CA2d 368, 299 P2d 712, the attestation clause with proof of the three signatures raised a presumption of due execution. The contestant relied on circumstantial evidence to disprove the execution of the will, presenting evidence showing that the decedent could not have made the will on the day it was dated because he was deliriously ill and incapable of transacting any business. The appellate court held that such showing indicated only a substantial conflict in the evidence for the trial judge or jury to resolve.

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§17.29 b. After Admission to Probate

It is unclear whether a will is presumed to be valid after it is admitted to probate. Probate Code §8252(a) codifies the burden of proof, whether before or after probate, but does not raise any presumptions regarding a will's validity merely because it has been admitted to probate. In *Estate of Nelson* (1923) 191 C 280, 216 P 368, the court specifically rejected the presumption that a will already admitted to probate is valid. However, Prob C §8272(a) requires *satisfactory proof* that a will should be denied probate before the court must revoke probate of the will, and the contestant seeking to revoke probate has the burden of proving the will's invalidity (Prob C §8252(a)).

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c. Proof of Due Execution

§17.30 (1) Testimony of Subscribing Witnesses

If the will is contested, each subscribing witness must be produced and examined. Prob C §8253. If none of the subscribing witnesses is available as a witness within the meaning of Evid C §240, the court may admit the evidence of other witnesses to prove due execution of the will. Prob C §8253. If a subscribing witness has become unavailable within the meaning of Evid C §240, the testimony of the other subscribing witness may be sufficient to prove due execution. *Estate of Burdette* (2000) 81 CA4th 938, 97 CR2d 263. In addition, if the unavailable witness's testimony regarding the execution or provisions of a will or the testamentary capacity of the decedent has been reduced to writing, signed by the witness, and filed with the court, that testimony can be used in a subsequent will contest. Prob C §8224.

Proof of the testator's and the witnesses' signatures creates a presumption of due execution. *Estate of Pitcairn* (1936) 6 C2d 730, 59 P2d 90. This shifts the burden of proof to the contestant to show lack of due execution. *Estate of Latour* (1903) 140 C 414, 74 P 414.

In some counties, when a witness to a will casts doubts on or impeaches due execution of the will, the hearing will be continued and the other witness or witnesses to the will must be subpoenaed to appear before the probate court and give testimony. Local rules and policies should be checked for the practice in a particular county.

The forgetfulness of an attesting witness does not destroy other proof (*Estate of Browne* (1958) 159 CA2d 99, 323 P2d 827), and the writing may be authenticated by other evidence. Evid C §1412.

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§17.31 (2) Questioned Handwriting

If the contest involves the question of whether the signature of the testator or of a subscribing witness is genuine, counsel for the contestant should obtain an order from the court directing the county clerk to take the original will to a handwriting expert designated by the contestant. The clerk may not leave the will with the handwriting expert but he or she can be required to deliver it at proper times to the expert for examination; counsel should check local procedure. On code requirements for authentication and proof of writings generally, see Evid C §§1400-1454.

As in other civil cases, any conflict in testimony or expert testimony is for the trier of fact to resolve. See, *e.g., Estate of Zalud* (1972) 27 CA3d 945, 104 CR 329 (jury was justified in finding that decedent's signature was forgery based on conflicting opinions of expert witnesses presented by contestants and proponents on whether questioned will was genuine); *Estate of Nelson* (1923) 191 C 280, 216 P 368 (order setting aside probate of holographic will sustained on appeal on basis of expert testimony that will was not in testator's handwriting, even though decedent's acquaintances who were familiar with his handwriting testified to contrary).

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§17.32 (3) Punctuation

Expert evidence of punctuation that is relevant to resolving an ambiguity in a will or codicil, if consistent with other evident intent of the testator, is admissible. *Estate of Cuneo (Carolina)* (1969) 1 CA3d 1008, 82 CR 261. Further, the court may insert punctuation to help determine what document or documents constitute the last will of the deceased. *Estate of Cuneo, supra*.

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§17.33 3. Lack of Testamentary Intent

A document offered as a will must express present testamentary intent to be admitted to probate. *Estate of Sargavak* (1950) 35 C2d 93, 216 P2d 850 (testator believed document was mortgage); *Estate of Southworth* (1996) 51 CA4th 564, 59 CR2d 272 (decedent's handwritten statement on charity's donor card did not comply with requirements for holographic will; document did not show present testamentary intent, only future intent to leave estate to charity). No particular words are required to create testamentary intent, but it must appear from the document offered that the decedent intended to transfer specified property on his or her death. *Estate of Wunderle* (1947) 30 C2d 274, 181 P2d 874; *Estate of Williams* (2007) 155 CA4th 197, 66 CR3d 34. If it is not clear that a document shows testamentary intent, the court may consider extrinsic evidence of the surrounding circumstances. *Estate of Wong* (1995) 40 CA4th 1198, 47 CR2d 707.

Probate Code §6111.5 specifically permits extrinsic evidence to be admitted to determine whether a document constitutes a valid witnessed or holographic will or to determine the meaning of will language "if the meaning is unclear." Extrinsic evidence is admissible to show that an instrument was not intended by the testator to be effective as a will. *Estate of Sargavak, supra; Estate of Smith* (1998) 61 CA4th 259, 71 CR2d 424. It is also admissible to prove that the testator intended the document to be a will and that the document complied with the signature requirement. *Estate of Williams, supra* (extrinsic evidence showed that testator intended name written in block letters at top of document to constitute signature for purpose of will authentication). For another example of a court's allowing evidence of a testator's oral declarations to help determine the testator's intention with respect to the meaning of ambiguous language in the will to avoid having to declare the will invalid, see *Estate of Kime* (1983) 144 CA3d 246, 193 CR 718.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.34 4. Revocation

§17.34 4. Revocation

Will contests sometimes challenge a will's validity, either before or after probate, on the ground of revocation. See Prob C §§6120-6124, 8252. California allows two methods of total revocation of a will:

- By subsequent instrument that revokes the earlier will or part of the earlier will either expressly or by inconsistency (Prob C §6120(a)); or
- By mutilation or destruction of the will with the intent and for the purpose of revoking it, by the testator or another person in the testator's presence and at the testator's direction (Prob C §6120(b)).

Specified will provisions concerning a spouse or registered domestic partner are revoked by the dissolution or annulment of the marriage or termination of the domestic partnership unless the will provides otherwise. Prob C §§6122, 6122.1. See also *Estate of Coleman* (2005) 129 CA4th 380, 28 CR3d 282; *Estate of Jones* (2004) 122 CA4th 326, 18 CR3d 637 (Prob C §6122 does not address effect of divorce on bequests to children of former spouse; normally, testator intends to exclude children of ex-spouse after dissolution unless contrary intention is indicated elsewhere in will or by extrinsic evidence (*e.g.,* continued relationship between testator and ex-spouse's child after divorce)).

Probate Code §6122 applies only to dissolutions or annulments occurring after 1984; under prior law, dissolution or annulment did not affect the dispositive provisions of a will. See 16 Cal L Rev'n Comm'n Reports 2325 (1982). Similarly, specified provisions concerning a domestic partnership in a will executed on or after January 1, 2002, are revoked by the termination of the domestic partnership unless the will provides otherwise. Prob C §6122.1. For discussion of revocation of wills generally, see California Will Drafting, chap 9 (3d ed Cal CEB 1992).

If neither the original nor a duplicate original will is found after the testator's death and it is shown that the will was last in the testator's possession and that the testator was competent until death, it is presumed that the testator destroyed the will with the intent to revoke it. Prob C §6124. A photocopy of the will is not a duplicate original for purposes of Prob C §6124, so the presumption of revocation still applies. *Lauermann v Superior Court* (2005) 127 CA4th 1327, 26 CR3d 258. The presumption of revocation is a presumption that shifts the burden of producing evidence. Prob C §6124. Until sufficient evidence is introduced to establish that the testator did not intend to destroy the will, the burden remains on the proponent of the will.

If a later will does not expressly revoke an earlier will and there are only minor inconsistencies between them, the court will construe the two instruments together to the extent they are not inconsistent. *Estate of Johnson* (1979) 91 CA3d 800, 154 CR 586. See also *Estate of Nielson* (1980) 105 CA3d 796, 165 CR 319 (handwritten interlineations in typed will constituted valid holographic will incorporating by reference those portions of typed will not modified or revoked by holographic codicil).

Revocation of a codicil does not revoke the will, and the will is admissible to probate at least to the extent that it was not modified by execution of the codicil. *Estate of Schnoor* (1935) 4 C2d 590, 51 P2d 424; *Estate of Shute* (1942) 55 CA2d 573, 131 P2d 54. When a codicil is so complete that it can be given effect without the will and is thus considered capable of standing alone as a separate testamentary instrument, revocation of the will generally does not automatically revoke the codicil. In this situation, the testator's intent controls. *Estate of Cuneo (Carolina)* (1963) 60 C2d 196, 32 CR 409.

Under the doctrine of dependent relative revocation, a will that is revoked by a later will in the belief that the later one will become effective remains in effect to the extent that the later will is invalid. In *Estate of Anderson* (1997) 56 CA4th 235, 65 CR2d 307, the decedent inadvertently failed to exercise a power of appointment in a will that expressly revoked a prior will. Applying the doctrine of dependent relative revocation, the court concluded that the second will did not revoke the exercise of the power in the first will, even though the second will did not show on its face that the decedent had intended to continue a part of the prior testamentary plan.

On other applications of the doctrine of dependent relative revocation, see *Estate of Cuneo (Carolina)* (1963) 60 C2d 196, 32 CR 409; *Estate of Salmonski* (1951) 38 C2d 199, 238 P2d 966; *Estate of Robertson* (1968) 266 CA2d 866, 72 CR 396.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/ III. OTHER REMEDIES/§17.35 A. Actions Without Contest

III. OTHER REMEDIES

§17.35 A. Actions Without Contest

If the beneficiary opposing probate of a will containing a no-contest clause wishes to avoid a head-on challenge, a number of proceedings that might not be considered contests may be available, depending on the no-contest clause. For discussion of no-contest clauses, see chap 5. Assuming that they are available under the instrument or an exception set forth in Prob C §§21305-21307 (operative before January 1, 2010), these remedies may be pursued at various stages of the probate proceeding and are not subject to the 120-day limitation on postprobate contests. The following are examples:

- Action challenging probate jurisdiction. *Estate of Crisler* (1950) 97 CA2d 198, 217 P2d 470.
- Probate of another will. *Estate of Robertson* (1968) 266 CA2d 866, 72 CR 396.
- Action to remove a personal representative. Prob C §21305(b)(7). See *Estate of Ferber* (1998) 66 CA4th 244, 77 CR2d 774. See §5.8; chap 14.
- Request for accounting and objections to a fiduciary's accounting. Prob C §21305(b)(8). See *Estate of Ferber* (1998) 66 CA4th 244, 77 CR2d 774; *Estate of Kruse* (1970) 7 CA3d 471, 86 CR 491. See also *Estate of Strader* (2003) 107 CA4th 996, 132 CR2d 649 (change in amount available for distribution to residuary beneficiaries because of request in accounting to distribute litigation proceeds is not attack on will provision apportioning residue among beneficiaries if no unequivocal indication of testator's intent with respect to disputed property). See §5.8; chap 13.
- Action seeking construction or interpretation of a will. *Estate of Kruse, supra; Estate of Miller* (1964) 230 CA2d 888, 903, 41 CR 410.
- Petition to determine heirship. Prob C §11700; *Estate of Basore* (1971) 19 CA3d 623, 96 CR 874. See chap 18.
- Action to rescind conveyance of property. *Estate of McCarthy* (1970) 5 CA3d 158, 85 CR 50.
- Action to have property characterized in a particular way (*e.g.,* joint tenancy property, community property, or domestic partnership property), unless the will forces the beneficiary to make an election between rights to property outside the will and rights under the will. *Jacobs-Zorne v Superior Court* (1996) 46 CA4th 1064, 54 CR2d 385; *Estate of Richter* (1993) 12 CA4th 1361, 16 CR2d 108. See Prob C §21305(a)(2) (operative until January 1, 2010) (an action to determine the character of property does not constitute a contest unless expressly identified in the no contest clause as violation of it). See §5.6. After January 1, 2010, this challenge, unless it is a forced election that is identified in the no-contest clause, will not be a violation of the no-contest clause. Prob C §21310-21311.
- Action to establish prior contract. *Estate of Watson* (1986) 177 CA3d 569, 223 CR 14; *Estate of Miller* (1964) 230 CA2d 888, 41 CR 410; *Estate of Miller* (1963) 212 CA2d 284, 27 CR 909.
- Action to recover property. *Estate of Dow* (1957) 149 CA2d 47, 308 P2d 475.
- Petition for modification of family allowance. Prob C §§6541, 6543. See *Estate of Cates* (1971) 16 CA3d 1, 93 CR 696.
- Objection to preliminary (Prob C §11620) or final (Prob C §11640) distribution. See *Estate of Smith* (1973) 9 C3d 74, 106 CR 774 (objection to distribution as provided for in will); *Estate of Peterson* (1968) 259 CA2d 492, 66 CR 629 (after settlement; charitable bequest in violation of former Prob C §41).
- Exceptions to recommendations of probate commissioner. See *Estate of Lund* (1973) 34 CA3d 668, 110 CR 183.
- Petition to try title under Prob C §§850-859. See *Estate of Black* (1984) 160 CA3d 582, 206 CR 663 (decedent's unmarried cohabitant of 18 years properly petitioned under former Prob C §851.5 (a predecessor to current §850) to enforce claim of *Marvin* interest in estate assets under express and implied contract without violating will's no-contest clause).
- Actions under Prob C §21305 that (a) do not constitute a contest unless expressly identified in the no contest clause as violations of it (*e.g.*, filing of a creditor's claim) or (b) are deemed not to violate a no-contest clause as

a matter of public policy (*e.g.*, petition challenging the exercise of a fiduciary power). See §5.8.

- The beneficiary, with reasonable cause, brings a contest limited to grounds of forgery, revocation, or invalidity of a transfer to a disqualified person described by Prob C §21350 (technically, a contest, but the no-contest clause is not enforceable). Prob C §21306.
- The beneficiary, with probable cause, contests a provision of the will that benefits (Prob C §21307):
- One who drafted or transcribed the instrument;
- One who directed the drafter concerning dispositive provisions, substantive content, or inclusion of the no-contest clause (but not if the transferor affirmatively instructed the drafter to include the contents of the provision or no-contest clause); or
- One who witnessed the instrument (technically, a contest, but no-contest clause does not apply).

On quasi-specific performance of contract to make wills, see §17.51.

For proceedings that are not considered contests under a no-contest provision of a trust agreement, see *Poag v Winston* (1987) 195 CA3d 1161, 241 CR 330; *Masry v Masry* (2008) 166 CA4th 738, 82 CR3d 915 (action by trustees in compliance with duty to gather trust assets did not violate no-contest clause).

Beginning January 1, 2010, for instruments that became irrevocable on or after January 1, 2001, a no-contest clause will only be enforced against three types of contests. See §§5.12A-5.12I.

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B. Declaratory Relief Actions Under Law Applicable Through December 31, 2009

§17.36 1. Authority to Use Declaratory Relief

NOTE: The current statutes governing no-contest clauses (Prob C §§21300-21322) will be repealed operative January 1, 2010, and replaced by Prob C §§21310-21315, which do not have a declaratory relief mechanism comparable to the one discussed in §§17.36-17.40. See §5.12I. This new scheme will apply to any instrument that became irrevocable on or after January 1, 2001. Prob C §21315.

Once an instrument has become irrevocable, a beneficiary may apply to the court for a determination on whether a proposed action, including the filing of a creditor's claim or an action involving a contract to make a will, would be a contest within the terms of a no-contest clause. Prob C §§21320-21322. Any statute of limitations will be tolled during the period that the declaratory relief is being sought. Prob C §21308.

The application must be limited to the procedures and purposes described in Prob C §21320(a). Prob C §21320(b). The court may not determine whether a proposed action violates a no-contest clause under §21320 if this would require a determination of the merits. Prob C §21320(c). See Senate Judiciary Committee Analysis of SB 1878 (May 7, 2002).

The application also cannot be used to determine whether Prob C §21306 or §21307 would apply; however, a no-contest clause is not enforceable against a beneficiary who, with reasonable (§21306) or probable (§21307) cause, brings a contest under these sections. Prob C §21320(d); *Estate of Peterson* (1999) 72 CA4th 431, 85 CR2d 110. See §§5.8, 5.10. For further discussion of declaratory relief actions, see §§5.10-5.14.

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§17.37 2. Proper Court to Bring Declaratory Action

NOTE: See Note in §17.36 regarding January 1, 2010, repeal of declaratory relief provisions discussed in this section.

Probate Code §21321 sets forth the rules for determining where to file the application. If a probate is pending, the proper court to bring the action in is the probate court where the proceeding is pending. Prob C §21321(a). If there is no probate and the transferor is deceased, the application may be filed in any court where administration of the transferor's estate would be proper. Prob C §21321(b). If the transferor is living and resides in California, the application can be filed in the county where the transferor resides. Prob C §21321(c). If no probate proceeding is pending and the transferor is alive but resides out of state, the application can be filed in any county in which property affected by the transfer is located or, if none, then any county in California. Prob C §21321(d).

Notwithstanding these rules, Prob C §21321(e) provides that, if the instrument is a trust with a no-contest clause, an application for declaratory relief should be filed in the court having jurisdiction over the trust under Prob C §§17000-17006.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.38 3. Notice Requirements

§17.38 3. Notice Requirements

NOTE: See Note in §17.36 regarding January 1, 2010, repeal of declaratory relief provisions discussed in this section.

If a proceeding for administration of the decedent's estate is pending, notice is given as provided in Prob C §1220. Notice must be given to (Prob C §21322(a)):

- Persons listed in Prob C §1220;
- Each beneficiary who could be adversely affected;
- The Attorney General if there are charitable purposes involved.

If no proceeding is pending for administration of the transferor's estate, service must be made at least 30 days before the hearing on the application, in the manner required for service of a summons and complaint under CCP §415.10 or §415.30. Prob C §21322(b). Notice must be given to (Prob C §21322(b)):

- Each beneficiary who could be adversely affected;
- Each executor, trustee or other fiduciary named in the instrument;
- The Attorney General if there are charitable purposes involved.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.39 4. Form: Sample Application for Determination Under Prob C §§21320-21322

§17.39 4. Form: Sample Application for Determination Under Prob C §§21320-21322

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[*Title of Court*]

Estate of _ _[*name*]_ _,	**)**	**APPLICATION FOR**
Deceased	**)**	**DETERMINATION THAT**
	)	**PROPOSED PETITION TO**
	)	**DETERMINE THAT CERTAIN**
	)	**ASSETS HELD IN JOINT**
	)	**TENANCY BETWEEN**
	)	**DECEASED AND**
	)	**_ _[*NAME*]_ _ DOES NOT**
	)	**VIOLATE THE TERMS OF THE**
	)	**NO-CONTEST CLAUSE IN**
	)	**DECEDENT'S WILL**
	)	**(PROBATE CODE**
_____)		**§§21320-21322)**

Applicant, _ _[*name*]_ _, alleges:

1. Applicant is the surviving spouse of the decedent, _ _[*name*]_ _, and is therefore an interested person in decedent's estate. Applicant is also named as the beneficiary of certain bequests under decedent's will dated _ _[*date*]_ _, admitted to probate by order of the court dated _ _[*date*]_ _. _ _[*Name*]_ _ is the duly appointed and acting executor of decedent's will.

2. Decedent died leaving an estate located in the County of _ _ _ _ _ _, State of California.

3. At the time of decedent's death, there were certain bank accounts that were held in joint tenancy between decedent and applicant.

4. Under Article _ _ of decedent's will, decedent provided: "I confirm to my spouse my spouse's interest in our community property, if any. It is my intention by this will to dispose of my separate property, and my one-half interest in our community property."

5. By Article _ _ of decedent's will, decedent gave to applicant _ _[*his/her*]_ _ half of their residence, together with the tangible personal property therein and also provided _ _[*him/her*]_ _ with a cash bequest of _ _[*dollar amount*]_ _.

6. Decedent's will contained a no-contest clause as Article _ _, which provides: "If any beneficiary under this will in any matter directly or indirectly contests or attacks this will or any of its provisions, any share or interest in my estate given to that contesting or attacking beneficiary under this will is revoked and shall be disposed of in the same manner provided herein as if that contesting or attacking beneficiary had predeceased me without issue."

7. The executor has requested applicant to transfer the joint tenancy bank accounts to the estate, claiming these accounts are to be treated as part of decedent's estate.

8. Applicant proposes to file a petition, a copy of which is attached to this application as Exhibit A, which seeks to have this court find that the joint tenancy bank accounts of decedent and applicant are not part of decedent's estate.

**9. Names, ages, addresses, and relationships of all beneficiaries under the will are: _ _[*List names, ages,*

addresses, and relationships]_ _.

10. The intestate heirs of the decedent are: _ _[*List names, ages, addresses, and relationships*]_ _.

11. Special notice has been requested by: _ _[*List names and addresses of those requesting special notice*]_ _.

WHEREFORE, applicant requests that this court make a determination that:

1. The petition seeking a determination that the joint tenancy bank accounts of decedent and applicant are not part of decedent's estate would not be a contest within the terms of the no-contest clause of decedent's will.

2. For such other and further relief as the court may deem proper.

Date: _ _ _ _ _ _ __[*Signature of applicant*]__
_ _[*Typed name*]_ _

[*Verification; see §§17.56, 17.61*]

Copies: Original (file with court clerk); copies for service (one for the attorney representing the fiduciary involved; for the transferor if alive; for each individual or beneficiary named in the instrument containing the no-contest clause whose interest could be adversely affected by the application. Copies should also be made available for each of the heirs who would be entitled to a portion of the transferor's estate if the instrument containing the no-contest clause is invalidated or otherwise adversely affected by the application); office copies.

Comment: This sample application contains a no-contest clause that is the same as the one set forth in *Jacobs-Zorne v Superior Court* (1996) 46 CA4th 1064, 54 CR2d 385. For further discussion of *Jacobs-Zorne,* see §§5.6, 17.41.

The action that the party proposes to file if the Declaratory Relief Action is granted should be attached to the petition.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

NOTE: See Note in §17.36 regarding January 1, 2010, repeal of no-contest clause declaratory relief provisions.

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§17.40 5. Tolling of Statute of Limitations

NOTE: See Note in §17.36 regarding January 1, 2010, repeal of no-contest clause provisions discussed in this section.

The statute of limitations to commence any motion, petition, or other action referred to in Prob C §21320 is tolled until the court's determination on whether the motion, petition, or other action would be a contest is final. Prob C §21308. The tolling commences on the filing of the Declaratory Relief Action and ends when there is a final determination, including appeals. This prevents a cause of action from being lost while an appeal of a determination of its effect on the no-contest clause is pending.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.41 C. Determination of Ownership in Spousal and Putative Spousal Arrangements

§17.41 C. Determination of Ownership in Spousal and Putative Spousal Arrangements

Probate Code §§13650-13660, allowing the passage of property to a surviving spouse, present a novel problem in contests. When final, an order determining that property is property passing to a surviving spouse or confirming ownership of property belonging to the surviving spouse is conclusive on all persons, whether or not they are alive. Prob C §13657.

Whether an action to determine spousal property would be a prohibited will contest depends on the language of the no-contest clause and the circumstances of each case. *Burch v George* (1994) 7 C4th 246, 27 CR2d 165; *Estate of Pittman* (1998) 63 CA4th 290, 73 CR2d 622; *Estate of Richter* (1993) 12 CA4th 1361, 16 CR2d 108; *Estate of Black* (1984) 160 CA3d 582, 206 CR 663; *Estate of Kazian* (1976) 59 CA3d 797, 130 CR 908. Counsel should pay particular attention to the specific wording of the instrument and the decedent's expressed intent. If the will or trust clearly characterizes property, *e.g.,* as separate or community, a challenge to the characterization of property may be held to thwart the testamentary plan. See §5.5.

For instruments executed on or after January 1, 2001, an action or proceeding to determine the character, title, or ownership of property must be expressly identified in the no-contest clause as an action that will constitute a contest for the action to trigger the no-contest clause. Prob C §21305(a)(2) (operative through December 31, 2009). Further, for such instruments, an instrument other than the one containing the no-contest clause must be expressly identified in the clause for its challenge to constitute a contest. Prob C §21305(a)(3) (operative through December 31, 2009).

EXAMPLE: In a case involving a written prenuptial agreement, the prenuptial agreement must be expressly identified in the no-contest clause as an instrument, which, if its validity is challenged, will trigger the no-contest clause.

For no-contest clauses in instruments executed before January 1, 2001, compare *Estate of Pittman* (1998) 63 CA4th 290, 73 CR2d 622 (petition by decedent's children challenging accuracy of characterization of property as separate or community property of decedent and decedent's spouse on a schedule attached to the decedent's living trust violated no-contest clause) with *Jacobs-Zorne v Superior Court* (1996) 46 CA4th 1064, 54 CR2d 385 (petition to determine ownership of joint property was not a contest when decedent's will stated he was disposing of only his separate property and his one-half interest in community property, did not designate items of separate and community property, and the language of the will did not force the spouse to elect between ownership rights outside the will and rights under the will), and *Estate of Richter* (1993) 12 CA4th 1361, 16 CR2d 108 (petition to determine community property assets was not a will contest when will did not specify estate property).

The conduct that may cause forfeiture is not limited to actions challenging the characterization of property actually owned by the decedent. For example, in *Burch v George, supra,* the decedent created an estate plan consisting of a will and an inter vivos trust to provide for his wife, his mother, his children from a previous marriage, and other relatives. Each instrument contained a no-contest clause. The trust instrument also provided that all property subject to the trust was and "shall remain" the trustor's separate property. The court held that litigation proposed by the decedent's wife to determine her rights as a surviving spouse to certain trust assets under community property law and the Employee Retirement Income Security Act of 1974 (ERISA) would trigger the no-contest clause, even if it were found that she was merely challenging the decedent's attempt to devise property that he did not own, because the litigation was designed to thwart the basic intent of the decedent's estate plan as expressed by the language of the trust instrument and by testimony of the decedent's attorney and one of the trustees. For further discussion of no-contest clauses, see §§5.2-5.9.

Probate Code §21320, operative through December 31, 2009, permits counsel to apply to the court for a determination on whether the intended action would trigger the no-contest clause. See the discussion in §§5.10-5.12, 17.36-17.40. It would be prudent for counsel to do so when there is a question about the character of estate property, but counsel must be careful not to frame the request in a manner that would require a determination of the merits of the intended action. To do so might itself trigger the no-contest clause. See Prob C §21320(c), operative through December 31, 2009.

NOTE: The current statutes governing no-contest clauses (Prob C §§21300-21322) will be repealed operative January 1, 2010, and replaced by Prob C §§21310-21315, which do not have a comparable declaratory relief mechanism. See §5.12I. This new scheme will apply to any instrument that became irrevocable on or after January 1, 2001. Prob C §21315.

These same potential problems would apply to a putative spouse or a *Marvin* spouse (see *Marvin v Marvin* (1976) 18 C3d 660, 134 CR 815) who receives, by will, less than his or her alleged one-half interest in the "community" property and wishes to claim the full one-half interest. For discussion of the period of limitations on a *Marvin*-type claim, see *Cochran v Cochran* (1997) 56 CA4th 1115, 66 CR2d 337 (*Marvin* agreement not automatically breached when parties end relationship; statute of limitations begins to run when party charged with duty to perform refuses to do so).

In *Estate of Black* (1984) 160 CA3d 582, 206 CR 663, the court held under a former Prob C §851.5 petition that the *Marvin* spouse of the decedent could seek a determination of claimed property rights arising during her relationship with the decedent without forfeiting under the will's no-contest clause a specific gift to her in the will. Because her claim did not contradict anything in the will but sought only to determine and limit the property subject to the decedent's testamentary disposition, the court held that the no-contest clause would not be violated. The court distinguished *Estate of Kazian* (1976) 59 CA3d 797, 130 CR 908, in which a community property claim by the decedent's widow was held to be a contest in violation of a no-contest clause because the will in that case specifically stated that the property in question was the decedent's separate property. The claim thus contradicted the will. In *Black,* the will did not attempt to describe the decedent's property or deny the plaintiff's interest in any property.

Operative January 1, 2010, for instruments that became irrevocable on or after January 1, 2001, a no-contest clause may be enforced against a pleading to challenge a transfer of property on the grounds that it was not the transferor's property at the time of transfer, but only if the no-contest clause expressly provides for that application. Prob C §21311(a)(2). Prob C §21311(a)(2) is intended to continue the substance of Prob C §21305(a)(2) to allow a transferor to create a forced election while preventing an overbroad interpretation that would apply to "any action that would determine a beneficiary's right to a gift under an estate plan." See *Revision of No Contest Clause Statute,* 37 Cal L Rev'n Comm'n Reports 359, 394 (2007). See also §5.12G.

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D. Actions on Contract to Make Wills

§17.42 1. Requirements of Contract to Make Will

A person may make a valid agreement binding himself or herself legally to make a particular disposition of his or her property by will. See Prob C §21700 and see §5.22. Such an agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed. A single instrument may constitute both a will and a contract. The parties' rights to such an agreement depend on the contract, and revocation of the will or other breach of the contract does not prevent the intended devisee from enforcing the contractual obligations. See *Brewer v Simpson* (1960) 53 C2d 567, 2 CR 609; *Brown v Superior Court* (1949) 34 C2d 559, 212 P2d 878. On the adequacy of consideration to support such a contract, see *Crail v Blakely* (1973) 8 C3d 744, 106 CR 187.

The Uniform Premarital Agreement Act (Fam C §§1600-1617), operative for premarital agreements entered into after 1985, specifically authorizes the parties to contract to make a will or trust. Fam C §1612(a)(4).

The options for proving this sort of contract depend on when the contract was formed. These contracts are subject to a modified statute of frauds that has altered over time.

After December 31, 2000: If formed after this date, a contract to make a will or devise, not to revoke a will or devise, or to die intestate may be established by any of the following (Prob C §21700):

- Provisions of a will or other instrument stating the material provisions of the contract;
- Express reference to a contract in a will or other instrument if there is extrinsic evidence proving the contract terms;
- The decedent's signed writing evidencing the contract; or
- Clear and convincing evidence of an agreement or a promise between the decedent and the claimant, or between the decedent and another person for the benefit of the claimant, that is enforceable in equity.

January 1, 1985, through December 31, 2000: If the contract was entered into during this period, it may be established only by three specified forms of writing, which are the same as those included in Prob C §21700(a)(1)-(3). Prob C §21700(c), former Prob C §150. However, principles of equitable estoppel may apply and allow the claimant to recover under an oral contract. *Juran v Epstein* (1994) 23 CA4th 882, 28 CR2d 588, (application of equitable estoppel to enforce unwritten agreements if there has been substantial detrimental reliance).

Before January 1, 1985: A contract to make a will that was entered into before January 1, 1985, must be established under former CC §1624(6) (contract to make will invalid unless in writing and signed by party to be charged). Prob C §21700(c) and former Prob C §150(c). However principles of equitable estoppel may apply and allow the claimant to recover under an oral contract. *Juran v Epstein* (1994) 23 CA4th 882, 28 CR2d 588.

An agreement to make mutual wills is a common example of this type of contract. The making of mutual wills by itself, however, does not create a presumption of a contract not to revoke the will or wills. Prob C §21700(b). Mutual wills between spouses that provide for the survivor and a common distribution of remaining assets after the survivor's death do not create an enforceable contract requiring disposition as provided in the wills, unless a written or oral contract can be established under which the survivor enjoyed benefits. *Lich v Carlin* (1960) 184 CA2d 128, 7 CR 555.

For discussion of oral contracts, see §§7.10, 17.43.

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§17.42A 2. Breach of Agreement

A party who agrees to make a particular disposition of property by will breaches that contract by making any disposition of the property different from that contemplated. The courts have referred to this in terms of estoppel, and such estoppel cannot be avoided by the party's subsequent marriage or execution of a will in disregard of the contract terms. The basis of the estoppel lies in the promisor's acceptance of the contract benefits. *Estate of Cates* (1971) 16 CA3d 1, 93 CR 696; *Thompson v Boyd* (1963) 217 CA2d 365, 32 CR 513 (and cases cited). Such estoppel is not, as a matter of law, a ground for contest. *Estate of Straisinger* (1967) 247 CA2d 574, 582, 55 CR 750, 755. An alleged breach of contract to make certain provisions in the will does not revoke probate of the will. On prenuptial agreement, see §17.52.

In the event of a breach by a promisor who has died, the promisee may take one of the following steps to enforce the contract, as long as the necessary prerequisites are met:

- Bring an action at law for damages. But see Prob C §§9000(a)(1), 9002(b) (creditor claim required to sue on liability arising in contract).
- Seek equitable relief in the form of quasi-specific performance of the contract when the remedy at law is inadequate. CC §3384; *Brown v Superior Court* (1949) 34 C2d 559, 563, 212 P2d 878; see *Wilkison v Wiederkehr* (2002) 101 CA4th 822, 124 CR2d 631 (reversing judgment of quasi-specific performance of contract to make a will on grounds that plaintiff, who was seeking to impose constructive trust on the proceeds of sale of family home decedent had promised to leave to plaintiff's father, had adequate legal remedy and failed to file creditor claim).

If the promisor is still alive when the breach occurs, the promisee need not wait until the promisor's death before acting, at least when the promisor has made an inter vivos conveyance of the property in question. In these circumstances, the promisee may seek equitable relief against an inter vivos conveyance made in fraud of the rights granted by the contract. *Brown v Superior Court* (1949) 34 C2d 559, 564, 212 P2d 878.

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a. Oral Agreements

§17.43 (1) Equitable Estoppel

Probate Code §21700 requires a post-2000 contract to make a will or devise, not to revoke a will or devise, or to die intestate to be established by one of three specified forms of writing *or* by clear and convincing evidence of an agreement or a promise between the decedent and the claimant, or between the decedent and another person for the benefit of the claimant, that is enforceable in equity. Section 21700 thus codifies previously developed case law.

Under former law, when a writing was statutorily required, courts held that the doctrine of equitable estoppel could be applied in "appropriate circumstances." *Estate of Housley* (1997) 56 CA4th 342, 354, 65 CR2d 628 (constructive trust may be imposed on estate property based on oral promises to leave estate by will or trust if promisee detrimentally relied or promisor would be unjustly enriched); *Juran v Epstein* (1994) 23 CA4th 882, 897, 28 CR2d 588 (court enforced oral contract not to revoke mutual wills when survivor accepted benefits under decedent's will); *Crail v Blakely* (1973) 8 C3d 744, 106 CR 187 (deceased parents executed mutual wills leaving estate to surviving parent, or children if neither survived; court enforced oral agreement requiring surviving parent to leave all property to children when mother had changed her position in reliance on agreement by committing suicide before father repudiated agreement); *Redke v Silvertrust* (1971) 6 C3d 94, 98 CR 293 (court enforced oral agreement requiring husband to leave his share of wife's property to daughter if wife predeceased him when wife relied on agreement by not changing her will); *Notten v Mensing* (1935) 3 C2d 469, 45 P2d 198 (when two parties executed reciprocal wills under oral agreement, one of the parties died before either will was revoked, and other party accepted benefit of decedent's will and then revoked, constructive fraud sufficient to raise estoppel had been practiced on first decedent and on beneficiaries of oral agreement; no actual intent to defraud is required).

On effect of findings of fact and conclusions of law on appeal in oral agreement cases, see *Mintz v Rowitz* (1970) 13 CA3d 216, 221, 227, 91 CR 435. On whether an oral agreement to make a testamentary disposition of a particular nature is against public policy as an attempted evasion of death taxes, see *Redke v Silvertrust, supra*.

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§17.44 (2) Burden of Proof

In cases involving oral contracts to make wills, the plaintiff has the burden of proving the oral agreement and the elements of estoppel by clear and convincing evidence. Prob C §21700(a)(4)-(5). See also *Crail v Blakely* (1973) 8 C3d 744, 106 CR 187; *Estate of Housley* (1997) 56 CA4th 342, 65 CR2d 628.

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§17.45 b. Enforcement by Third-Party Beneficiaries

A breach of contract to make a mutually binding disposition of property (see §17.42) may affect third-party beneficiaries more than the promisee. The question in this situation is whether a third-party beneficiary may enforce a reciprocal will contract against the beneficiary of a will or other dispositions made by the surviving promisor in violation of the agreement. To recover for breach of the agreement, the third-party beneficiary must show that the contract was made expressly for his or her benefit. CC §1559. Normally, it is the promisee, not the promisor, who must intend to confer a benefit on the third party. *Walters v Calderon* (1972) 25 CA3d 863, 873, 102 CR 89 (contract not enforceable by beneficiary; no evidence that promisee intended to benefit third party).

See also *Estate of Cates* (1971) 16 CA3d 1, 93 CR 696, in which the third-party beneficiaries of a written agreement between the decedent and his predeceased first wife to execute mutual and reciprocal wills brought an action against the decedent's second wife, who was the beneficiary of a later will that revoked the reciprocal will. The court of appeal held that the reciprocal agreement was a valid and enforceable contract supported by adequate consideration and that the decedent's second wife knew of the existence of the agreement when she married him.

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§17.46 c. Statute of Limitations

A cause of action to impress a trust on property the decedent had promised to leave to the promisee ordinarily does not accrue until the promisor's death. *Ludwicki v Guerin* (1961) 57 C2d 127, 17 CR 823. An action on an oral or written agreement to make a will or other testamentary device must be brought within one year after the date of the promisor's death. CCP §366.3.

When the promisor makes an inter vivos transfer of property that is specifically covered by the contract to make a will, however, the promisee may bring an action against the promisor *during* his or her lifetime. See *Brewer v Simpson* (1960) 53 C2d 567, 2 CR 609; *Battuello v Battuello* (1998) 64 CA4th 842, 75 CR2d 548. See also *Marriage of Edwards* (1995) 38 CA4th 456, 45 CR2d 138 (contract to make a will ordinarily cannot be enforced until after the promisor's death; when promisor breaches the agreement or makes it impossible to perform due to bad faith inter vivos transfers for purpose of defrauding intended beneficiaries, however, judicial intervention may be appropriate before his or her death.).

For decisions in which the CCP §338(d) (former CCP §338(4)) limitations period, relating to relief on the ground of fraud (within 3 years after discovery), applied, see *Day v Greene* (1963) 59 C2d 404, 29 CR 785 (constructive fraud); *Souza & McCue Constr. Co. v Superior Court* (1962) 57 C2d 508, 20 CR 634 (fraudulent breach of contract); *Getty v Getty* (1986) 187 CA3d 1159, 232 CR 603 (fraud, constructive trust).

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§17.47 d. Effect on Probate Proceedings

An action to impose a constructive trust for alleged failure to perform a promise to make a will does not interfere with probate proceedings. It is not an action to set aside probate of a will or to modify any probate order. *Ludwicki v Guerin* (1961) 57 C2d 127, 17 CR 823; *Estate of Miller* (1963) 212 CA2d 284, 27 CR 909. Unlike an action based on recovery for personal services (see §§17.49-17.51), it does not set forth a claim against the estate, the representative, or the representative's right to possession for purposes of administration. It is actually an action between a claimant under the contract and claimants under the will or by intestacy to determine who is entitled to all or part of the estate. *Ludwicki v Guerin, supra*. See, *e.g., Estate of Berry* (1925) 195 C 354, 233 P 330.

The representative may be made a party defendant to prevent distribution of the property without regard for the plaintiff's interests. *Ludwicki v Guerin, supra*. The *Ludwicki* decision also approved the procedure to pursue the action before estate assets are distributed. See also *Silverman v Union Bank* (1971) 21 CA3d 352, 98 CR 332, in which the plaintiff sought quasi-specific performance of a contract to make reciprocal wills. The husband breached the agreement by executing a new will. The judgment awarded the plaintiff-widow all property remaining in the estate after payment of taxes, creditors' claims, executor and attorney fees, and all other costs of administration.

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§17.48 e. Superior Equities

Clear and definite agreements to make mutual wills supported by adequate consideration and possessing the attributes of honesty, fairness, and reasonableness will be enforced unless superior equities have intervened that make enforcement unfair, unreasonable, or unjust to innocent third parties. *Estate of Cates* (1971) 16 CA3d 1, 93 CR 696 (11-month marriage did not give second wife superior equities sufficient to prevent enforcement of agreement with predeceased wife of 38 years).

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2. Personal Service Contracts

§17.49 a. Action in Quantum Meruit

When a contract to make a testamentary disposition is made in consideration of personal services rendered or to be rendered by the beneficiary, enforcement of the contract after the promisor's death is ordinarily by a legal action to recover the reasonable value of the services rendered by the promisee, *i.e.,* an action in quantum meruit. See, *e.g., Mattes v Pinkney* (1968) 260 CA2d 491, 67 CR 255 (action to recover reasonable value of services rendered before decedent's death; oral agreement; judgment for plaintiff payable in due course of administration; Prob C §9301); *Drvol v Bant* (1960) 183 CA2d 351, 7 CR 1 (action against administratrix to recover on claim filed against estate; claim for value of services rendered by plaintiff to aunt on her oral promise to devise him her home; evidence supported finding on reasonable value of work and labor performed).

The filing of a creditor's claim is a prerequisite to maintaining such an action against the decedent's estate. See *Tabata v Murane* (1944) 24 C2d 221, 148 P2d 605.

On potential tax liability, see §17.50; on compromise of claim, see §17.84.

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§17.50 b. Tax Liability

Unlike the status of property received by a claimant in settlement of a contest, when the claimant settles as a party to a contract for services rather than as a devisee, the recovery may constitute taxable income. See, *e.g., Wilbur D. Jones,* TC Memo 1958-191.

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§17.51 c. Action for Quasi-Specific Performance

When the services rendered in return for a promise to make a testamentary disposition are so exceptional and extraordinary (see *Murdock v Swanson* (1948) 85 CA2d 380, 193 P2d 81) that they cannot be properly compensated in money (*i.e.,* there is no adequate legal remedy), the remedy is an action for quasi-specific performance to impose a constructive trust on the property of the decedent's estate and to enforce the agreement to make a will. *Wurche v Stenzel* (1969) 270 CA2d 499, 75 CR 856 (administrator held estate in trust for niece who came from Germany to take care of uncle who made oral and written agreements to "leave everything to her"; decedent died intestate); *Riganti v McElhinney* (1967) 248 CA2d 116, 56 CR 195 (decedent failed to provide for plaintiffs who performed unique filial services for 6 years; plaintiffs entitled to quasi-specific performance to avoid perpetration of fraud on them and unjust enrichment of devisee); *De Hermosillo v Morales* (1956) 146 CA2d 819, 304 P2d 854 (promisee closed her academy in Mexico and gave up many other activities in reliance on oral contract).

Vague promises, indefinite terms of service, and provision to terminate agreement at will would deprive such a contract of adequate consideration. See *Wurche v Stenzel* (1969) 270 CA2d 499, 504, 75 CR 856.

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§17.52 E. Prenuptial Agreement

Sometimes, the beneficiaries' rights to estate property may be clouded by the issue of community and separate property and the surviving spouse's right under a valid prenuptial agreement. To avoid disputes between the surviving spouse and those who claim under the deceased spouse's will, waiver of rights must appear in the instrument in clear language. See *Estate of Howe* (1947) 81 CA2d 95, 183 P2d 329 (first appeal); *Estate of Howe* (1948) 88 CA2d 454, 199 P2d 59 (second appeal).

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§17.53 F. *Marvin* Agreement

Counsel should ascertain whether anyone may claim an interest in the estate based on a *Marvin*-type agreement with the decedent. See *Marvin v Marvin* (1976) 18 C3d 660, 134 CR 815 (knowingly unmarried, cohabiting couple may by express or implied agreement pool their efforts and earnings and share equally in any property accumulated). See 11 Witkin, Summary of California Law, *Community Property* §§271-280 (10th ed 2005). For discussion of the period of limitations on a *Marvin*-type claim, see *Cochran v Cochran* (1997) 56 CA4th 1115, 66 CR2d 337 (*Marvin* agreement not automatically breached when parties end relationship; statute of limitations begins to run when party charged with duty to perform refuses to do so). For discussion of *Marvin* claims, see §7.11.

For an analysis of the statutory and case law governing unmarried couples, see Kay & Amyx, *Marvin v. Marvin*: *Preserving the Options*, 65 Cal L Rev 937 (Sept. 1977). See also Pfaff, *Death Is Not the Great Equalizer: Division of Nonmarital Property*, 13 U San Francisco L Rev (Winter 1980).

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G. Action Against Drafter

§17.54 1. Attorney's Malpractice Liability

The elements of a cause of action for legal malpractice are (1) the attorney-client relationship or other basis for duty, (2) a negligent act or omission, (3) causation, and (4) damages. *Lombardo v Huysentruyt* (2001) 91 CA4th 656, 665, 110 CR2d 691. Each of these elements is discussed below.

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§17.54A a. Duty of Care

In drafting a will or trust, an attorney generally owes a duty of care not only to the client but also to expressly named beneficiaries with regard to bequests expressly set forth in the executed testamentary instrument. *Lucas v Hamm* (1961) 56 C2d 583, 15 CR 821 (will); *Chang v Lederman* (2009) 172 CA4th 67, 90 CR3d 758 (duty of care is limited to named beneficiaries of express bequest in executed testamentary instrument); *Bucquet v Livingston* (1976) 57 CA3d 914, 922, 129 CR 514 (inter vivos trust).

A beneficiary's claim against the attorney may be based on negligence or on breach of contract (as a third-party beneficiary). *Heyer v Flaig* (1969) 70 C2d 223, 226, 74 CR 225, overruled on other grounds in *Laird v Blacker* (1992) 2 C4th 606, 617, 7 CR2d 550. However, the attorney's primary duty is to the client and his or her primary obligation is to serve and carry out the client's intentions. When there is a question about whether a third-party beneficiary was, in fact, the decedent's intended beneficiary, and the beneficiary claims that the attorney failed to adequately ascertain the testator's intent, the attorney will not be held accountable to the third-party beneficiary because any other conclusion would place the attorney in an untenable position of divided loyalty (*Boranian v Clark* (2004) 123 CA4th 1012, 20 CR3d 405) and would impose an undue burden on the profession (*Chang v Lederman, supra*). Similarly, the attorney does not owe heirs or beneficiaries a duty to ascertain and document the client's testamentary capacity, because the attorney's duty of loyalty to the client could be compromised by imposing such a duty. The attorney might then owe conflicting duties to the client and different factions of beneficiaries. *Moore v Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 CA4th 1287, 1298, 135 CR2d 888.

Furthermore, under some circumstances an attorney does not owe a duty of care to a potential beneficiary of an unsigned will. In *Radovich v Locke-Paddon* (1995) 35 CA4th 946, 41 CR2d 573, the client, who had breast cancer, met with her attorney to discuss drafting a new will leaving all the income of her testamentary trust to her husband for life, but expressed her intention to confer with her sister before finalizing the will. More than three months later, the attorney delivered a draft to the client. The client died two months later without signing the new will. During that two-month period, the attorney did not discuss the new will with the client, remind her of what she needed to do to execute it, or even find out whether she wished to execute it.

The court found that the circumstances, including the client's failure to sign the will during the two months after receiving the draft, were insufficient to manifest a commitment by the client to benefit the husband. The court noted that imposing liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily, and "contravene the attorney's primary responsibility to ensure that the proposed estate plan effectuates the client's wishes." 35 CA4th at 965. The court held that, under the circumstances, the attorney did not owe a duty of care to the husband.

In *Chang v Lederman* (2009) 172 CA4th 67, 90 CR3d 758, the court analyzed prior case law in detail and concluded that estate planners do not owe a duty of care to nonclient potential beneficiaries who are not expressly named in the executed estate plan. Even as to potential beneficiaries named in the executed estate plan, the duty of care is limited to a duty to exercise ordinary care and skill to properly effectuate a bequest expressly set forth in the executed testamentary instrument. The duty of care does not extend to a duty to effectuate the alleged intent of a client, since deceased, to revise a bequest to something other than the bequest expressly stated in the instrument. To extend the duty of care to cover purported intended bequests would mean that malpractice claims alleging such intended bequests would routinely survive demurrer and involve speculative disputes over the decedent's intent that would impose an undue burden on the profession.

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§17.54B b. Standard of Care

By accepting employment to give legal advice or services, a general practitioner impliedly agrees to use the same skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise under similar circumstances. *Lucas v Hamm* (1961) 56 C2d 583, 591, 15 CR 821; *Wright v Williams* (1975) 47 CA3d 802, 809, 121 CR 194. An attorney holding himself or herself out as a specialist must exercise the skill, prudence and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field. 47 CA3d at 810.

The extent and limits of the professional drafter's duty are not yet clearly defined by the courts. There have been few cases on the question since *Lucas v Hamm, supra*. In one, *Heyer v Flaig* (1969) 70 C2d 223, 74 CR 225, overruled on other grounds in *Laird v Blacker* (1992) 2 C4th 606, 617, 7 CR2d 550, two daughters alleged that their mother had told her attorney that she intended to get married but wanted to leave her entire estate to them. The attorney drafted a will that left the entire estate to the daughters and did not mention the prospective husband. The mother signed the will, married 10 days later, and died 7 months later. The husband claimed a portion of the estate as a posttestamentary spouse under former Prob C §70. The court concluded that a reasonably prudent attorney should appreciate the consequences of a posttestamentary marriage, advise a testator client of such consequences, and use good judgment to avoid them if the client so desires.

In *Bucquet v Livingston* (1976) 57 CA3d 914, 129 CR 514, the beneficiaries of an inter vivos trust claimed that the drafting attorney had negligently failed to advise the settlors of the adverse tax consequences of a retained general power of appointment in the surviving settlor. The court held that the potential tax problems of a general power of appointment were "within the ambit of a reasonably competent and diligent practitioner." 57 CA3d at 925.

An attorney is not necessarily liable, however, for every mistake he or she may make. In *Lucas v Hamm, supra,* the court held that an attorney did not breach the standard of care by drafting a will that provided for a testamentary trust that would terminate 5 years after the court order distributing property to the trust. The court concluded that, although this provision could potentially violate the rule against perpetuities, due to the remote possibility that an order of distribution might be delayed for an impermissibly long period, an attorney of ordinary skill acting under the same circumstances might well have failed to recognize the danger. 56 C2d at 593.

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§17.54C c. Causation and Damages

Besides proving breach of duty of care, the plaintiff must show that actual loss or damage resulted from the conduct charged. For example, in *Heyer v Flaig* (1969) 70 C2d 223, 74 CR 225, overruled on other grounds in *Laird v Blacker* (1992) 2 C4th 606, 617, 7 CR2d 550, discussed in §17.54A, the will contained legal defects that prevented the testator's wishes as expressed in the document from being carried out. In *Hiemstra v Huston* (1970) 12 CA3d 1043, 91 CR 269, the will contained no legal defects; however, the plaintiff believed that the will deviated from the testator's intent, for which he sought to hold the drafter liable. The court held that the plaintiff had made no showing that the will did not contain what the testator had intended and, if the plaintiff was deprived of a substantial part of the estate, it was because the testator had changed his mind. See also *Ventura County Humane Soc'y v Holloway* (1974) 40 CA3d 897, 906, 115 CR 464 (complaint "utterly devoid" of any indication that the true intention of the testator was different from that expressed in the will).

If there has been a settlement of a distribution dispute arising from the drafter's malpractice, the settlement may affect the amount of the damages in the malpractice action, but generally does not bar it. In *Garcia v Borelli* (1982) 129 CA3d 24, 180 CR 768, the settlement of a petition to determine entitlement to distribution under former Prob C §1080 (replaced by Prob C §11700) did not collaterally estop the beneficiaries who joined in the settlement from bringing a malpractice action against the drafting attorney, although the settlement would reduce the amount of damages. The attorney's alleged misconduct was not litigated in the former Prob C §1080 proceeding, and the attorney was not and could not have been a party in that proceeding.

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§17.55 2. Lay Person as Drafter

Any person not licensed to practice law, or not in good standing with the state bar, who undertakes to make a will for another person is engaged in the unauthorized practice of law, which is a misdemeanor (Bus & P C §§6125-6126), and may incur civil liability for his or her negligence. *Biakanja v Irving* (1958) 49 C2d 647, 320 P2d 16 (notary public prepared will that lacked sufficient attestation).

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IV. CONTEST BEFORE PROBATE

§17.56 A. Contestant's Pleadings

An interested person may contest the probate of a will by filing written objections to the petition for probate. Prob C §§1043, 8004, 8250. The will contest proceeding is conducted in the same court and under the same file number as the original probate proceedings.

The usual practice is to use the double heading in a will contest. At trial, the contestant is the plaintiff and the petitioner for probate of the will is the defendant or respondent. Depending on local practice, the petitioner for probate of the will is sometimes identified as the "proponent." Local preference should be verified before the papers are prepared. All the heirs and persons interested in the will may be named as parties, but that is not required. However, it is important to list in the contest pleadings *all* the heirs and persons interested in the will, including minors and incompetents, because they must be served with the summons and a copy of the contest. Prob C §§8110, 8250.

If a minor is entitled to notice of hearing, the notice must be directly sent to the minor and also a separate copy must be sent to the minor's parents. Cal Rules of Ct 7.51(d).

NOTE: Notices sent to more than one person in a household must be mailed separately. Cal Rules of Ct 7.51(a)(3).

When the contestant files an objection to the probate of the will, the person named as executor in the will, who usually is the petitioner, is not a necessary party and may leave the defense of the will to others and file no answer. Prob C §8250(b). *Estate of Relph* (1923) 192 C 451, 221 P 361. A contestant is generally well advised to name the petitioner as a defendant, however, to secure those advantages in discovery proceedings that accrue to one making discovery against a party as opposed to a disinterested witness.

The pleading must be verified by the contestant or, if there is more than one, by any of them and signed by all nonverifying contestants. Prob C §§1021, 8004, 8250. Duplicate signing is not required, however, because Prob C §1020 provides that verification of a document constitutes signing of that document. If the contestant is absent from the county or is otherwise unable to sign or verify, the contestant's attorney may do so in the contestant's place unless the contestant is a fiduciary appointed in the proceeding. Prob C §1023. For a form of verification, see §17.61.

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§17.57 1. Required Allegations

The contestant must allege facts that establish him or her as an interested party. See §§4.4-4.6, 9.10-9.14, 17.6; *Estate of Marler* (1957) 148 CA2d 30, 306 P2d 105. Because only an interested person may contest the will (Prob C §1043), either a relationship to the decedent or other status that entitles him or her to contest must be set forth in the petition. See §§17.6-17.16 on who are interested persons.

Ultimate facts must be alleged with specificity to show that the petitioner's legal rights are adversely affected by the will and to support an interest of sufficient substantiality to permit a contest. *Estate of Eskridge* (1942) 51 CA2d 634, 125 P2d 527. See *Estate of Bixler* (1924) 194 C 585, 229 P 704, for discussion of the distinction between allegations of fact and conclusions of law, with suggestions on recitals that may be used to allege undue influence. Some matters that may be shown are the decedent's weakness of mind, his or her advanced years, the beneficiary's confidential relationship with the decedent, the decedent's ill health, his or her lack of business ability, importunities of beneficiaries, their activity in procurement of the will, lack of independent legal representation, and untrue statements to the decedent that influenced him or her.

PRACTICE TIP: Although the appellate courts seem particularly reluctant to permit wills to be set aside for lack of testamentary capacity, it is still a ground that should be asserted by the contestant whenever justified because it will permit discovery and allow evidence of the greatest possible latitude in showing the decedent's physical and mental condition, which in turn will tend to show his or her vulnerability to duress, mistake, fraud, or undue influence.

Note that mistake is not a specific ground for denial of probate of a purported will (see Prob C §6104), but it is a ground for contest of that will (see Prob C §8252).

For grounds for contesting a will, *e.g.,* lack of testamentary intent, incapacity, fraud, duress, mistake, or revocation, see chap 6 and §§17.33-17.34. See CC §§1569-1579 for code definitions of duress, menace, mistake, and fraud. Such allegations, not being ultimate facts but conclusions of law to be drawn from facts, must be pleaded with specificity and not merely in the language of the statute. The facts relied on must be stated. *Estate of Streeton* (1920) 183 C 284, 191 P 16.

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§17.58 2. Issuance and Service of Summons

When a will contest is filed, a summons must be issued and served with a copy of the contest on each known or reasonably ascertainable heir of the decedent and each devisee, executor, and alternative executor named in the contested will. Prob C §§8110, 8250. Notice must also be given to all affected persons, including minors and incompetents, wherever they reside. Comment to Prob C §8250. The summons must advise persons summoned that they have 30 days after service to file a written pleading in response to the contest. Prob C §8250.

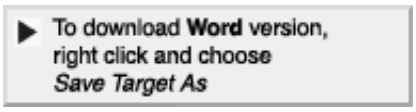
The summons is issued and served in the manner required in a civil action generally. Prob C §8250; CCP §§413.10-417.40. Publication cannot be ordered by the court until an affidavit of the failure of attempted service by one of the other methods of substituted service has been filed. CCP §415.50(a). See *Harris v Cavasso* (1977) 68 CA3d 723, 137 CR 410, and local rules or due diligence requirements. Failure to serve the summons within the 3-year period (including extensions) specified in CCP §§583.210-583.250 will result in dismissal of the contest. CCP §583.250. That failure and dismissal will not deprive the court of jurisdiction, because the probate court already has jurisdiction of the proceedings initiated by the petition to probate the decedent's will.

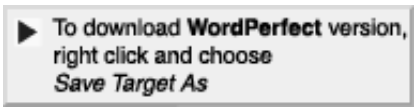
See §17.62 for the mandatory form of summons.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.59 3. Form: Objection to Probate of Will

§17.59 3. Form: Objection to Probate of Will





[*Title of court*]

Estate of _ _[*name*]_ _ , Deceased _ _[*Name*]_ _, **Contestant** **vs** _ _[*Name*]_ _, **Respondent**	**No. _ _ _ _ _ _** **CONTEST AND GROUNDS OF OBJECTION TO PROBATE OF PURPORTED WILL**

_ _[*Name of contestant*]_ _ **(contestant), alleges:**

1. _ _[*Name*]_ _, hereafter referred to as decedent, died on _ _[*date*]_ _. At the time of death, decedent was a resident of _ _ _ _ _ _ County, California and left property in _ _ _ _ _ _ County, California.

2. On _ _[*date*]_ _, _ _[*name of respondent petitioning for probate*]_ _ filed in this court a document dated _ _[*date*]_ _, purporting to be the last will of the decedent, together with a petition requesting that the document be admitted to probate as the decedent's last will and that letters _ _[*testamentary/of administration*]_ _ be issued to _ _[*himself/herself/_ _[name*]_ _]_ _.

3. Contestant is a person interested in decedent's estate and is entitled to contest admission of decedent's purported will to probate in that _ _[*state facts showing standing*]_ _.

4. Probate of the purported will should be denied on the following grounds:

[*List in as many paragraphs as necessary all grounds supported by the facts of the case, e.g.:*]

[a.] At the time of the alleged execution of the purported will, decedent was not of sound and disposing mind.

[b.] Contestant is informed and believes and on such information and belief alleges that decedent's purported will is not and never was decedent's will and was made at the time of its alleged execution as a result of the undue influence of _ _[*name*]_ _ in that: _ _[*Set forth facts constituting undue influence*]_ _.

[c.] Contestant is informed and believes and on such information and belief alleges that the document was not executed by decedent _ _[*and attested*]_ _ in the manner and form required by law for the execution of a will.

[d.] Contestant is informed and believes and on such information and belief alleges that the purported will of decedent was procured and signed by decedent as a result of the fraud of _ _[*name*]_ _ in that: _ _[*Set forth facts constituting fraud*]_ _.

[*Continue*]

5. The names, ages, and residences of decedent's heirs, so far as reasonably ascertainable by the contestant, are: _ _[*List names, ages, relationships, and addresses*]_ _.

The devisees named in the purported last will _ _[*and codicil(s)*]_ _ are: _ _[*List names, ages, relationships, and addresses*]_ _.

No other persons than these heirs and devisees are known to be interested in the purported will of decedent.

WHEREFORE, contestant requests that the purported will be denied probate, for costs of suit, and all other proper relief.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Contestant

[*Verification; see §§17.56, 17.61*]

Copies: Original for filing; one office copy to serve on the attorney of record of each respondent (or the respondent, if he or she has no attorney) and on each person on whom a summons must be served along with a copy of the summons; office copies.

Comment: The phrase regarding the decedent's residence (paragraph 1) should be modified when the decedent was a nonresident. See Prob C §7052.

The grounds of objection to probate should be stated separately.

The allegation in paragraph 4a is sufficient to raise the decedent's incompetency as a ground of contest; additional facts need not be pleaded. *Estate of Streeton* (1920) 183 C 284, 191 P 16. On testamentary capacity generally, see §§6.2, 6.10.

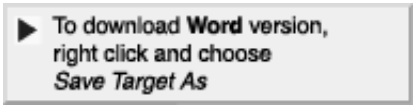
The allegation in paragraph 4c regarding lack of due execution is an ultimate fact, and additional facts need not be alleged. *Estate of Streeton, supra*. See Prob C §§6110-6113 regarding proper execution and attestation of wills. On validity of wills, see §§17.26-17.34.

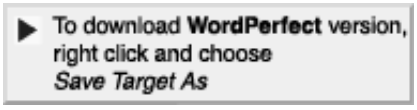
The age and residence of heirs and devisees (paragraph 5) need not be stated, but inclusion of this information may help to alert the attorney to the majority or minority of the heirs or devisees, and it provides a convenient list of addresses for service of summons. Under Prob C §8250(a), the summons must be served on all heirs and each devisee and executor named in any will being offered for probate, including minors and incompetents. See §17.23.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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§17.60 4. Form: Sample Allegation of Undue Influence





17.60-1 Sample allegation of undue influence

Contestant is informed and believes and on such information and belief alleges that decedent's purported will is not and never was decedent's will and was made at the time of its alleged execution as a result of the undue influence of _ _[*name*]_ _ in that:

1. Respondent lived with decedent for several years before decedent's death and occupied a position of trust and confidence with decedent. During this time, decedent's health progressively worsened and decedent put his trust and confidence in respondent. During this time, respondent isolated decedent from his close friends and relatives, including the contestant.

2. During the same period of time, by reason of the relationship of decedent with respondent, respondent was able to exert control and influence over the mind and actions of decedent to such a point that decedent was no longer capable of exercising his own conviction or desire with regard to his actions or thoughts, but rather, because of the pressure brought on him by respondent, both by arguments and entreaty, decedent's convictions or desires became the convictions or desires imposed on him by respondent.

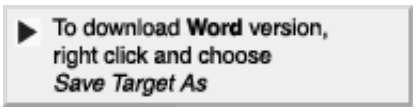
3. During this time, while decedent was under respondent's undue influence, respondent suggested the contents of the document submitted for probate to this court by respondent, arranged for execution of the document, and caused decedent to execute the document. At the time the document was executed, decedent was wholly under the influence of respondent and the document does not represent the free and voluntary act of decedent.

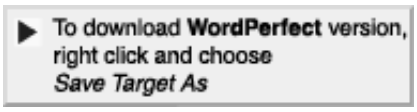
Comment: The sample language in this form closely mirrors the legal test for undue influence enunciated in *Estate of Anderson* (1921) 185 C 700, 707, 198 P 407.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.61 5. Form: Verification by Declaration

§17.61 5. Form: Verification by Declaration





17.61-1 Verification by declaration

I, _ _[*name*]_ _, the _ _[*petitioner/respondent*]_ _ in this matter, declare that I have read the _ _[*specify document, e.g., petition*]_ _ and know its contents, which are true to my own knowledge except for those matters stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Petitioner

Comment: This verification may be used whether it is executed in or outside of California. The declaration must be dated; otherwise, it is defective and worthless for evidence and proof. CCP §2015.5. See §17.56.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.62 6. Form: Summons (Probate) (Judicial Council Form DE-125)

§17.62 6. Form: Summons (Probate) (Judicial Council Form DE-125)



DE-125

PROBATE (JUICIO TESTAMENTARIO)

SUMMONS
(CITACION JUDICIAL)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

NOTICE TO: ***(Aviso a)***

FROM: ***(De)***

ESTATE OF: ***(Herencia de)***

A court proceeding has been started which may affect your interests in the estate. Read the document delivered with this *Summons*.

You have *30 CALENDAR DAYS* after this summons is served on you to file at this court a typewritten response if you want to be heard by the court.

A letter or phone call will not protect you. Your typewritten response must be in proper legal form if you want the court to consider it.

If you do not file your response on time, you may lose your right to participate in the proceeding or present your evidence. You will not receive another warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book) .

La corte ha comenzado a tramitar una acción judicial testamentaria que puede afectar sus intereses sucesorios. Lea el documento enviado con esta citación judicial.

Después de que le entreguen esta citación usted tiene un plazo de* 30 DIAS CALENDARIOS *para presentar en esta corte una respuesta escrita a máquina, si desea una audiencia ante la corte.

Una carta o una llamada telefónica no le ofrecerá protección; su respuesta escrita a máquina tiene que cumplir con las formalidades legales apropiadas si usted quiere que la corte considere su caso.

Si usted no presenta su respuesta a tiempo, puede perder su derecho a participar en el proceso juicial o a presentar sus pruebas. Usted no recibirá notificación adicional por parte de la corte.

Existen otros requisitos legales. Es posible que usted quiera llamar a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de referencia de abogados o a una oficina de ayuda legal (vea el directorio telefónico).

The name and address of the COURT is: *(El nombre y dirección de la CORTE es)*

CASE NUMBER: *(Número del caso)*

The name, address, and telephone number of the filing party's attorney, or the party without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del accionante, o del accionante que no tiene abogado, es)

DATE: *(Fecha)*

Clerk, by _____, Deputy
(Actuario) *(Delegado)*

(SEAL)

NOTICE TO THE PERSON SERVED: You are served

a. ☐ as an individual.

b. ☐ on behalf of *(specify)*:

under: ☐ Code Civ. Proc., § 416.10 (corporation)
☐ Code Civ. Proc., § 416.20 (defunct corporation)
☐ Code Civ. Proc., § 416.40 (association or partnership)
☐ Code Civ. Proc., § 416.60 (minor)
☐ Code Civ. Proc., § 416.70 (conservatee)
☐ Code Civ. Proc., § 416.90 (individual)
☐ other *(specify)*:

c. ☐ by personal delivery on *(date)*:

(Proof of Service on reverse)

Print

ESTATE OF *(Name)*: DECEDENT	CASE NUMBER:

PROOF OF SERVICE

1. At the time of service I was at least 18 years of age and not a party to this action, and **I served copies** of the *(specify documents)*:

2. a. Party served *(specify name of party as shown on the documents served)*:

   b. Person served: ☐ party in item 2a ☐ other *(specify name and title or relationship to the party named in item 2a)*:

   c. Address:

3. I served the party named in item 2
   a. ☐ **by personally delivering** the copies (1) on *(date)*: (2) at *(time)*:
   b. ☐ **by leaving** the copies with or in the presence of *(name and title or relationship to person indicated in item 2b)*:
      (1) ☐ **(business)** a person at least 18 years of age apparently in charge at the office or usual place of business of the person served. I informed him or her of the general nature of the papers.
      (2) ☐ **(home)** a competent member of the household (at least 18 years of age) at the dwelling house or usual place of abode of the person served. I informed him or her of the general nature of the papers.
      (3) on *(date)*: (4) at *(time)*:
      (5) ☐ A **declaration of diligence** is attached. *(Substituted service on natural person, minor, conservatee, or candidate.)*
   c. ☐ **by mailing** the copies to the person served, addressed as shown in item 2c, by first-class mail, postage prepaid,
      (1) on *(date)*: (2) from *(city)*:
      (3) ☐ with two copies of the *Notice and Acknowledgment of Receipt* and a postage-paid return envelope addressed to me. *(Attach completed form.)*
      (4) ☐ to an address outside California with return receipt requested. *(Attach completed form.)*
   d. ☐ **by causing copies to be mailed**. A declaration of mailing is attached.
   e. ☐ **other** *(specify other manner of service and authorizing code section)*:

4. The "Notice to the Person Served" (on the *Summons*) was completed as follows:
   a. ☐ as an individual defendant.
   b. ☐ as the person sued under the fictitious name of *(specify)*:
   c. ☐ on behalf of *(specify)*:
      under: ☐ Code Civ. Proc., § 416.10 (corporation)
      ☐ Code Civ. Proc., § 416.20 (defunct corporation)
      ☐ Code Civ. Proc., § 416.40 (association or partnership)
      ☐ Code Civ. Proc., § 416.60 (minor)
      ☐ Code Civ. Proc., § 416.70 (conservatee)
      ☐ Code Civ. Proc., § 416.90 (individual)
      ☐ other *(specify)*:

5. **Person serving** *(name, address, and telephone number)*:
   a. **Fee** for service: $
   b. ☐ Not a registered California process server.
   c. ☐ Exempt from registration under Business & Professions Code, § 22350(b).
   d. ☐ Registered California process server.
      (1) ☐ Employee or independent contractor
      (2) Registration No. *(specify)*:
      (3) County *(specify)*:
      (4) Expiration *(date)*:

6. ☐ **I declare** under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
7. ☐ **I am a California sheriff or marshal** and I certify that the foregoing is true and correct.

Date:

▶ _____
(SIGNATURE)

Copies: Probate Code §8250(a) requires that a summons be served on each known (or reasonably ascertainable)

heir, and each devisee and executor named in the will.

Comment: The original summons is issued by the court as a matter of course, and retained by the contestant's attorney for endorsement of proof of service on it. Use of this form is mandatory. A copy of the petition for administration of the decedent's estate must be served with the summons. Prob C §8250(a). See §17.58.

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§17.63 B. Diligent Prosecution and Proponent's Order to Show Cause

Because public policy favors the speedy administration and settlement of estates (*Focha v Estate of Focha* (1908) 8 CA 576, 97 P 321), a will contest may be dismissed for lack of prosecution (*Estate of Morrison* (1932) 125 CA 504, 14 P2d 102). Note that, although *Focha* and *Morrison* concerned the failure to serve a citation (which was replaced by the summons in will contests), their reasoning should continue to apply to service of summons in this context.

If the contestant fails to serve the summons on every one of the heirs and beneficiaries who would stand to benefit under the will, the proponent of the will should obtain an order to show cause why the contest should not be dismissed for lack of prosecution or, in the alternative, why the court should not fix the time within which the summons must be served. Normally, the court will require service of the summons and complaint on all the heirs and beneficiaries by the time of the trial setting conference.

NOTE: Although civil rules for the prompt disposition of actions do not apply to probate matters (Govt C §68603), probate or trust litigation will often proceed to trial faster than their civil counterparts.

A declaration under penalty of perjury (CCP §2015.5) or an affidavit setting forth the filing of the contest and the contestant's delay in having the summons issued or served should be filed as a foundation for the issuance of the order to show cause. A memorandum in support of the OSC should accompany the declaration.

NOTE: Lack of prosecution may also indicate lack of good faith and may subject the contestant to liability for malicious prosecution. See *Crowley v Katleman* (1994) 8 C4th 666, 34 CR2d 386; *MacDonald v Joslyn* (1969) 275 CA2d 282, 79 CR 707.

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§17.64 C. Responsive Pleading

The petitioner or any other interested person may jointly or separately answer or demur to the contest within 30 days after being served with the summons. Prob C §§8250-8251(a). The demurrer may be made on any of the grounds available in a civil action. Prob C §8251(b). On possible grounds for demurrer, see CCP §430.10. See §10.9.

When the contest merely denies the allegations of the petition, an answer does not have to be filed. *Swift v Superior Court* (1952) 39 C2d 358, 247 P2d 6.

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§17.65 1. Preparing Demurrer

The papers filed in support of a demurrer must include the demurrer, notice of hearing on the demurrer, and a memorandum in support of the demurrer. Cal Rules of Ct 3.1112(a). These papers may be filed as separate documents or combined in one or more documents. If they are combined, the caption must reflect the combined pleading. Cal Rules of Ct 3.1112(c). California Rules of Court 3.1320(e) requires that the caption of the demurrer (see form in §17.69) include the name of the party filing the demurrer and the name of the party whose pleading is the subject of the demurrer. The first page must also show the title of attached documents other than exhibits. Cal Rules of Ct 3.1110(b). See Cal Rules of Ct 3.1113 on the memorandum.

Local court rules may require a certificate of good faith. See §17.69 for form certificate of good faith.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.66 2. Service of Answer or Demurrer

§17.66 2. Service of Answer or Demurrer

When the contestant is represented by counsel, service should be made on the attorney for the contestant, not on the contestant himself or herself. Proof of service may be made by affidavit (CCP §2009), by declaration under penalty of perjury (CCP §2015.5), or by certificate, affidavit, or declaration of mailing (CCP §§1013a, 2015.5).

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§17.67 3. Time to Amend or Answer After Ruling on Demurrer

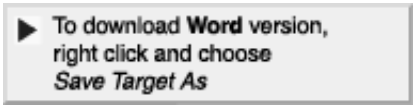
If a demurrer is sustained, the court may allow the contestant 15 days to amend the pleading. Prob C §8251(b). If the demurrer is overruled, the proponent and other interested persons have 15 days to answer the objection.

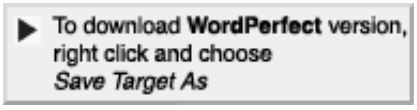
Unless notice is waived in open court and the waiver is entered in the minutes, the prevailing party must serve notice of the order to start the running of the time to amend or answer. CCP §472b. Proof of service of the notice of ruling may be made by (a) declaration under penalty of perjury or affidavit, as prescribed in CCP §§2009 and 2015.5, after personal service on the attorney for the plaintiff, or (b) by certificate, affidavit of mailing, or declaration, as set forth in CCP §§1010-1013a and 2015.5.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.68 4. Form: Notice of Hearing on Demurrer to Objection to Probate of Will

§17.68 4. Form: Notice of Hearing on Demurrer to Objection to Probate of Will





[*Title of court*]

Estate of _ _[*name*]_ _, **Deceased**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF HEARING ON**
_ _[*Name*]_ _, **Contestant**	)	**DEMURRER OF** _ _[*NAME*]_ _ **TO OBJECTION OF** _ _[*NAME*]_ _ **TO PROBATE OF WILL**
vs	)	
	)	
_ _[*Name*]_ _, **Respondent**	)	**Hearing:** _ _[*date*; *time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that the demurrer filed with this notice has been set for hearing at the above time and place.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original for filing; one copy for service on the attorney of record of each party (or the party, if he or she has no attorney); office copies.

Comment: Local rules should be consulted to see whether demurrers filed in probate matters are heard in the probate or in the law and motion department.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.69 5. Form: Demurrer to Objection to Probate of Will

§17.69 5. Form: Demurrer to Objection to Probate of Will

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[*Title of court*]

Estate of _ _[*name*]_ _ **,**	)	**No.** _ _ _ _ _ _
Deceased	)	
	)	**DEMURRER OF** _ _[*name*]_ _
_ _[*Name*]_ _,	)	**TO OBJECTION OF**
Contestant	)	_ _[*name*]_ _ **TO PROBATE**
	)	**OF WILL;**
vs	)	**NOTICE OF HEARING;**
	)	**MEMORANDUM IN SUPPORT**
_ _[*Name*]_ _,	)	**OF DEMURRER**
Respondent	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

_ _[*Name*]_ _, _ _[*proponent/(specify interest in estate and capacity, e.g., devisee mentioned in decedent's will)*]_ _, **demurs to the written opposition to the petition for probate of the will of** _ _[*name*]_ _**, decedent, on** _ _[*each of*]_ _ **the following ground(s):** _ _[*State each ground of demurrer separately in numbered paragraphs*]_ _**.**

WHEREFORE, _ _[*proponent/(specify other party in interest)*]_ _ **requests that this demurrer be sustained, that plaintiff take nothing by** _ _[*his/her*]_ _ **written opposition to the probate of the will of the above-named decedent, and that** _ _[*proponent/(specify other party in interest)*]_ _ **have judgment for** _ _[*his/her*]_ _ **costs of suit, and for all other proper relief.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

I hereby certify that this demurrer is filed in good faith, not for the purpose of delay, and in my opinion the grounds are well taken.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*Attach memorandum in support of demurrer*]

Copies: Original for filing; one copy for service on the attorney of record of each party (or the party, if he or she has no attorney); office copies.

Comment: See §§17.64-17.67. For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.70 6. Form: Notice of Ruling on Demurrer

§17.70 6. Form: Notice of Ruling on Demurrer

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[*Title of court*]

Estate of _ _[*name*]_ _**,**	**)No.** _ _ _ _ _ _
Deceased	**)**
	)NOTICE OF RULING
_ _[*Name*]_ _**,**	**)**_ _[*SUSTAINING/OVERRULING*]_ _
Contestant	**)**_ _[*NAME*]_ _**'S DEMURRER TO**
	)_ _[*NAME*]_ _**'S OBJECTION TO**
vs	**)PROBATE OF WILL**
	)
_ _[*Name*]_ _**,**	**)Hearing:** _ _[*date*; *time*]_ _
Respondent	**)Dep't:** _ _[*number*]_ _
	)Hearing judge: _ _[*if known*]_ _
	)Action filed: _ _[*date*]_ _
	)Trial date: _ _[*if set*]_ _
_____**)**	

To the above _ _[*contestant/respondent/(specify other party in interest)*]_ _ **and to** _ _[*his/her*]_ _ **attorney(s) of record in this action:**

PLEASE TAKE NOTICE that on _ _[*date*]_ _ **the court** _ _[*overruled/sustained*]_ _ _ _[*name*]_ _**'s demurrer to the contest and grounds of opposition to probate of the** _ _[*purported*]_ _ **will, on the grounds that** _ _[*state grounds*]_ _ **and gave** _ _[*contestant/respondent*]_ _ **days to** _ _[*amend/answer*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original for filing with proof of service; one copy to serve on the attorney of record of each party (or the party, if he or she has no attorney); office copies.

Comment: See §17.67. For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.71 7. Form: Answer to Objection to Probate of Will

§17.71 7. Form: Answer to Objection to Probate of Will

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[*Title of court*]

Estate of _ _[*name*]_ _ , Deceased _ _[*Name*]_ _, **Contestant** **vs** _ _[*Name*]_ _, **Respondent**	**No. _ _ _ _ _ _** **ANSWER OF _ _[*NAME*]_ _ TO WRITTEN OPPOSITION TO PROBATE OF PURPORTED WILL**

Respondent, _ _[*name*]_ _, answers the contest and grounds of opposition to probate of the purported will of petitioner, _ _[*name*]_ _, as follows:

1. Respondent admits the allegations of paragraph(s) _ _.

2. Respondent denies each and every allegation in paragraph(s) _ _.

[*If applicable, add one or more of the following options*]

[3.] Respondent admits the allegations of paragraph _ _ that _ _[*specify exact language from allegation that respondent admits, e.g., contestant is the son of decedent*]_ _, but except as specifically admitted, denies each and every allegation contained in paragraph _ _.

[4.] Respondent is without sufficient information or belief to admit or deny the allegations in paragraph _ _. Based on this lack of information or belief, respondent denies the allegations.

[5.] Respondent denies each and every allegation in paragraph _ _ and in each ground of opposition set forth therein.

[6.] Respondent admits the allegations of paragraph _ _ that _ _[*specify exact language from allegation that respondent admits, e.g., contestant is the son of decedent*]_ _, but, except as specifically admitted, denies each and every allegation contained in paragraph _ _ and in each ground of opposition set forth therein.

[*If appropriate, add*]

FIRST AFFIRMATIVE DEFENSE

[7.] The contest and grounds of opposition to probate of the purported will fails to state facts sufficient to grounds of opposition to probate of the will.

SECOND AFFIRMATIVE DEFENSE

[8.] Contestant lacks standing to bring a contest in that contestant does not and cannot allege any interest in the devolution of decedent's estate that may be impaired or defeated by probate of the purported will.

[*Set forth any additional affirmative defenses*]

[*Continue*]

WHEREFORE, respondent requests judgment as follows:

1. That the contest and grounds of opposition to the purported will be dismissed with prejudice and contestant(s) take nothing by _ _[*his/her/their*]_ _ action;

2. That decedent's _ _[*will dated _ _[date*]_ _ *be admitted to probate/estate be administered in accordance with the will dated _ _[date*]_ _]_ _.

3. That respondent(s) be awarded costs of suit;

4. That respondent(s) be awarded all other relief as the court deems proper.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Proponent

[*Verification; see §§17.56, 17.61*]

Copies: Original for filing; one copy to serve on the attorney of record of each party (or the party, if he or she has no attorney); office copies.

Comment: See §17.64. See Cal Rules of Ct 2.100-2.119 for format rules for lawyer-drafted documents. If the answer constitutes the respondent's first appearance (CCP §1014), the appearance fee must be paid.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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V. CONTEST AFTER PROBATE

§17.72 A. Time for Filing Petition for Revocation

Probate Code §8270(a) permits the filing of a contest after probate (in the form of a petition to revoke probate of the will) at any time within 120 days after the will is admitted to probate, as recorded in the minutes by the clerk. See Prob C §8225; *Estate of Horn* (1990) 219 CA3d 67, 268 CR 41; §§17.18-17.23. After expiration of the 120-day period, the order admitting the will to probate is conclusive and the court, with some exceptions, lacks jurisdiction to consider a later contest. See Prob C §8226(a); *Estate of Sanders* (1985) 40 C3d 607, 613, 221 CR 432; *Estate of Caruch* (1956) 139 CA2d 178, 182, 293 P2d 514; *Estate of Blalock* (1949) 95 CA2d 463, 470, 213 P2d 100. Amendments that add a new cause of action are not permitted after the statutory time has elapsed. *Estate of Blalock, supra*.

The 120-day period does not apply to a person who was a minor or an incompetent and had no guardian or conservator at the time the will was admitted to probate. Such a person may file a petition to revoke probate at any time before entry of an order for final distribution. Prob C §8270(b).

If order admitting the will to probate is appealed, the 120-day period does not begin until the order is affirmed. *Scott v Superior Court* (1932) 125 CA 513, 14 P2d 99. The 120-day period may also be extended on a showing of extrinsic fraud or mistake. See Prob C §8007(b). See also *Estate of Sanders* (1985) 40 C3d 607, 221 CR 432 (court may exercise equitable powers to set aside probate order on proof of extrinsic fraud). The extrinsic fraud or mistake must be of such a nature that the party seeking relief has been prevented from fully presenting his or her case to the court. *Estate of Sanders, supra*. Courts are more likely permit the filing of a late petition when a fiduciary or confidential relationship has been violated. See, *e.g., Estate of Sanders, supra*.

After the 120-day period has run, a contestant may still be able to get equitable relief if the filing of a timely contest was prevented by fraud. See, *e.g., Strasberg v Odyssey Group, Inc.* (1996) 51 CA4th 906, 59 CR2d 474 (suit for conversion and imposition of constructive trust on estate assets wrongfully concealed). On the availability of remedies that may not be contests, see §17.35.

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§17.73 B. Parties

Any interested person (see *Estate of Lane* (1970) 7 CA3d 402, 86 CR 620; *Estate of Collins* (1968) 268 CA2d 86, 73 CR 599; *Estate of O'Brien* (1966) 246 CA2d 788, 55 CR 343) may contest after probate except one who was a party to a contest before probate and one with actual notice of the previous contest in time to have joined in it. Prob C §8270. For discussion of interested persons, see §§17.6-17.17. This limitation is meant to discourage interested persons from deliberately failing to join in a contest before probate until the contest has been determined. *Estate of Robinson* (1961) 192 CA2d 847, 13 CR 842. On the effect of no-contest provisions, see §§5.2-5.9. On persons under disability, see §17.23.

Mere filing of a contest before probate and dismissal of it before trial does not preclude a contest after probate. *Estate of Hoover* (1934) 139 CA 753, 35 P2d 188.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.74 C. Form: Petition for Revocation of Probate of Purported Will

§17.74 C. Form: Petition for Revocation of Probate of Purported Will

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[*Title of court*]

Estate of _ _[*name*]_ _, Deceased _ _[*Name*]_ _, **Contestant** **vs.** _ _[*Name*]_ _, **Respondent**	**No. _ _ _ _ _ _** **PETITION FOR REVOCATION OF PROBATE OF PURPORTED WILL**

_ _[*Name of contestant*]_ _, hereafter referred to as contestant, alleges:

1. _ _[*Name*]_ _, hereafter referred to as decedent, died on _ _[*date*]_ _. At the time of death, decedent was a resident of _ _ _ _ _ _ County, California and left property in _ _ _ _ _ _ County, California.

2. On _ _[*date*]_ _, an order of this court was made admitting to probate the document of _ _[*date*]_ _ purporting to be decedent's last will; at the same time, this court made an order appointing _ _[*name*]_ _ the _ _[*executor/administrator with the will annexed*]_ _ of the _ _[*purported will/estate*]_ _.

[*Add one of the following alternatives*]

[*Alternative 1*]

3. The document was not contested before probate.

[*Alternative 2*]

3. The document was contested in Estate of _ _[*name*]_ _, Decedent: _ _[*name*]_ _, Petitioner vs. _ _[*name*]_ _, Respondent, No. _ _[*case number*]_ _. Contestant was not a party to that contest. Contestant _ _[*did not have actual notice of that contest _ _[in time to have joined that contest*]_ _/*was a* _ _[*minor/incompetent*]_ _ *for whom no _ _[guardian/conservator*]_ _ *had been appointed at the time the will was admitted to probate*]_ _.

[*Continue*]

4. Contestant is a person interested in decedent's estate and is entitled to contest admission of decedent's purported will to probate in that: _ _[*State facts showing standing*]_ _.

5. Probate of the purported will should be revoked on the following grounds:

[*List in as many paragraphs as necessary all grounds supported by the facts of the case, e.g.:*]

[a.] At the time of the alleged execution of the purported will, the decedent was not of sound and disposing mind.

[b.] Contestant is informed and believes and on such information and belief alleges that decedent's purported will is not and never was decedent's will and was made at the time of its alleged execution as a result of the undue influence of _ _[*name*]_ _ in that: _ _[*Set forth facts constituting undue influence*]_ _.

[c.] Contestant is informed and believes and on such information and belief alleges that the document was not executed by decedent _ _[*and attested*]_ _ in the manner and form required by law for the execution of a will.

[d.] Contestant is informed and believes and on such information and belief alleges that the purported will of decedent was procured and signed by decedent as a result of the fraud of _ _[*name*]_ _ in that: _ _[*Set forth facts constituting fraud.*]_ _

[*Continue*]

6. The names, ages, and residences of decedent's heirs, so far as reasonably ascertainable by the contestant, are: _ _[*List names, ages, relationships, and addresses*]_ _.

The devisees named in the purported last will _ _[*and codicil(s)*]_ _ are the following: _ _[*List names, ages, relationships, and addresses*]_ _.

No persons other than these heirs and devisees are known to be interested in the purported will of decedent.

WHEREFORE, contestant requests that the purported will be revoked, for costs of suit, and all other proper relief.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Contestant

[*Verification; see §§17.56, 17.61*]

Copies: Original for filing; one copy to serve on the attorney of record of each party respondent (or the party, if he or she has no attorney) with a copy of the summons; office copies.

Comment: For discussion of required allegations, see §§17.56-17.57, and comments to §17.59.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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§17.75 D. Service of Summons

The requirements for service of summons in a contest after probate are the same as a contest before probate. See §17.58, 17.62.

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§17.76 E. Demurrer; Answer

After the statutory period for filing a petition to revoke probate has expired, a demurrer to an amendment adding *new* grounds for the contest should be sustained, but amendments in amplification or more definite statements of the charge originally made may be allowed. *Estate of Wilson* (1897) 117 C 262, 49 P 172; *Estate of Blalock* (1949) 95 CA2d 463, 213 P2d 100.

On demurrer and answer in will contest proceedings generally, see §§17.64-17.71.

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VI. PRETRIAL AND TRIAL PROCEDURES

§17.77 A. Motions

Motion procedures available in civil actions may be used in will contests unless the Probate Code or Judicial Council rules provide otherwise. Prob C §§1000-1001. Local rules must always be consulted as well.

Motions that are usually made, or that should be made, before, during, or after trial are not discussed here. The procedural and practical problems involved in motions made in will contests are similar to those encountered in other civil actions. See generally California Civil Procedure Before Trial (4th ed Cal CEB 2004); California Trial Practice: Civil Procedure During Trial (3d ed Cal CEB 1995). See §§10.3-10.10.

Generally, attorneys for the proponent should seriously consider moving for summary judgment in a will contest. A great deal of case law is available to demonstrate the legal insufficiency of various fact situations to upset a will, so that summary judgment is perhaps a better alternative in will contests than in almost any other type of case. See, *e.g., Estate of Kerner* (1969) 275 CA2d 785, 80 CR 289; *Estate of Goddard* (1958) 164 CA2d 152, 330 P2d 399.

PRACTICE TIP: Even if a summary judgment motion is unsuccessful, it may be valuable as a discovery tool. A strong motion will usually compel the contestants to prepare affidavits of fact to oppose the motion that will focus on the supposed strength of their case.

The contestant may request a voluntary dismissal (CCP §581) subject to court approval. *Estate of Cook* (1928) 205 C 581, 271 P 1083; *Estate of Matthiessen* (1935) 10 CA2d 323, 52 P2d 248.

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§17.78 B. Trial Procedure

In a will contest before probate under Prob C §§8250-8254, there are two proceedings before the court: the petition for probate and the contest of the probate. In the adversary proceeding, the only issue is the validity of the will, which may be contested only on the grounds authorized by Prob C §8252. *Estate of Straisinger* (1967) 247 CA2d 574, 55 CR 750 (decided under former Prob C §371). It is an adversary proceeding in rem. *Estate of Miller* (1963) 212 CA2d 284, 27 CR 909. The court may require proof of the contestant's interest before proceeding with trial. *Estate of Lane* (1970) 7 CA3d 402, 86 CR 620.

When the decedent's heir files a petition for letters of administration, the named executor of the decedent's purported holographic will files a petition for probate and for letters testamentary, and the heir files a will contest, both petitions and the will contest may be calendared together. The petition for probate and for letters testamentary and the will contest should be heard and determined first, and, if the will is denied admission to probate, the petition for letters of administration should then be heard and determined. If the will is admitted to probate, however, the petition for letters of administration should be denied. *Estate of Duncan* (1969) 1 CA3d 212, 81 CR 568.

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§17.79 C. Trial by Court; Order of Proof

Trial by jury in a will contest is no longer permitted. The court must determine any contested issue of fact that affects the validity of the will, and may make any appropriate orders sustaining or denying objections. Prob C §§8252(b), 8254. The procedure is as follows (*Estate of Costa* (1961) 191 CA2d 515, 12 CR 920):

- The proponent presents a prima facie case for execution of the will. At this stage, the contestant does not have the right to cross-examine witnesses but may be permitted to do so by the court.
- If a prima facie case is made in support of the will, the contestant presents his or her case. The burden of proving invalidity of the will is on the contestant. Prob C §8252(a).
- The proponent submits his or her case.

The court has discretion to alter the procedure and to determine the order of proof and may require the proponent to prove due execution before it proceeds. *Estate of Fletcher* (1958) 50 C2d 317, 325 P2d 103; *Estate of Costa, supra*. See §§10.60-10.77.

In a contest before probate, each of the subscribing witnesses must be produced and examined. If none are available (as defined in Evid C §240), the court may admit the evidence of other witnesses to prove due execution of the will. Prob C §8253. The testimony of *one* subscribing witness is sufficient to prove a contested will, however, if no other subscribing witness is available and the written statement of an unavailable witness may be utilized as authorized by Prob C §8224. *Estate of Burdette* (2000) 81 CA4th 938, 97 CR2d 263.

PRACTICE TIP: In a court trial, counsel does not need to be as concerned with stating objections to each statement of a witness that might be objectionable if tried before a jury. A judge is much more likely to be able to discount any comment that might be objectionable, particularly if the objections are relatively minor and not prejudicial.

Counsel should consider stipulating to the credentials of expert witnesses to speed the trial because the credentials will not be set forth before a jury. Stipulating to the authenticity of documents will further shorten the length of the trial.

In determining whether to grant a motion for nonsuit, the same rules apply in a will contest as in civil cases. *Estate of Callahan* (1967) 67 C2d 609, 63 CR 277; *Estate of Straisinger* (1967) 247 CA2d 574, 55 CR 750.

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§17.80 D. Statement of Decision

In court trials, a formal written decision, called a statement of decision, must be filed if requested by a party. CCP §632. The statement must give the court's reasons and grounds for its decision on each of the principal controverted issues at trial.

For further discussion of the statement of decision, see California Trial Practice: Civil Procedure During Trial §§24.34-24.52 (3d ed Cal CEB 1995). See also §10.87.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.81 E. Judgment and Orders

§17.81 E. Judgment and Orders

A judgment is the final determination of the rights of the parties in an action or proceeding. CCP §577. In a preprobate will contest, the court must render a judgment either admitting the will to probate or rejecting it, in whole or in part, and appointing a personal representative. Prob C §8254. In a postprobate revocation proceeding the court must revoke probate on satisfactory proof that the will should be denied probate. Prob C §8272(a). Revocation of probate terminates the personal representative's powers. Prob C §8272(b).

PRACTICE TIP: Counsel is advised to use local forms and follow local court rules. Forms that are generally available include judgment after trial by court and judgment on verdict in open court.

See §17.80 on the statement of decision. On the nature and contents of, and procedures respecting, orders and judgments generally, see California Trial Practice: Civil Procedure During Trial, chap 23 (3d ed Cal CEB 1995).

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F. Costs

§17.82 1. Statutory Authority for Payment

In probate proceedings, unless otherwise prescribed, the superior court or the court of appeal has discretion to order costs paid by any party to the proceeding, or from the estate assets. Prob C §1002; *Estate of Martin* (1969) 270 CA2d 506, 75 CR 911; *Estate of Costa* (1961) 191 CA2d 515, 12 CR 920 (services of handwriting expert). Any such legitimate expense also would be allowable under Prob C §10801 for extraordinary services. *Estate of Costa, supra* (former Prob C §902).

In will contests, if probate is not revoked, the contestant must pay the costs of trial. If probate is revoked, the costs are assessed against the party who resisted revocation or from the decedent's property, as the court directs. Prob C §1002. Costs are paid when the contest is finally determined. *Estate of Nigro* (1966) 243 CA2d 152, 52 CR 128.

If the will contest results in mistrial, the court has no authority to charge either party with costs. *Estate of Yoell* (1911) 160 C 741, 117 P 1047. For discussion of attorney fees, see §5.38-5.45.

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§17.83 2. Obtaining Costs

On procedure for obtaining costs in the trial court generally, see California Trial Practice: Civil Procedure During Trial §§27.88-27.102 (3d ed Cal CEB 1995). Counsel should obtain and use available local forms for, *e.g.,* memorandum of costs, proof of service, and acknowledgment of service.

The prevailing party in a civil case is entitled to costs on appeal. Cal Rules of Ct 8.278(a). If the appellate court reverses the judgment in part or modifies it, or if there is more than one notice of appeal, the opinion must specify who shall pay costs on appeal. Cal Rules of Ct 8.278(a)(3); *Estate of Martin* (1969) 270 CA2d 506, 75 CR 911. In probate cases, the prevailing party *must* be awarded costs unless the appellate court orders otherwise, but the superior court decides who pays the award. Cal Rules of Ct 8.278(a)(4). On motion to tax appellate costs, see California Civil Appellate Practice §§20.10-20.11 (3d ed Cal CEB 1996). Counsel should obtain and use the official form for memorandum of costs on appeal and proof of service by mail. The items recoverable as costs on appeal are listed in Cal Rules of Ct 8.278(d).

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§17.84 VII. COMPROMISE AND SETTLEMENT

As in civil actions generally, many will contests result in settlement; the courts encourage compromise and settlement of contests. *Estate of Howe* (1948) 88 CA2d 454, 199 P2d 59. Compromise of a will contest will be enforced, if fairly made. *Estate of Peterson* (1968) 259 CA2d 492, 66 CR 629; *Estate of Lingg* (1945) 71 CA2d 403, 162 P2d 707.

Although the basis for will contests is statutory (see §17.25) and no statute specifically empowers a probate court to approve or disapprove compromises of will contests, that power is within the meaning of Prob C §11604 and there is direct authority for a petition for instructions to compromise a legal action (*Estate of Lucas* (1943) 23 C2d 454, 144 P2d 340). Notice of a petition for approval of a compromise or settlement must be given by the representative in the manner prescribed by Prob C §1220. Prob C §9837. For discussion of settlement considerations in trust and probate litigation, see chap 12.

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§17.85 A. Settlement Procedures in Will Contests

Courts encourage settlements and use both mandatory and voluntary procedures to help parties reach a resolution. Courts often effectuate settlements through the use of mandatory settlement conferences; however, mediation is becoming an increasingly common means of helping parties resolve contested matters. See chap 11.

The court may set one or more mandatory settlement conferences on its own motion or at the request of any party. Cal Rules of Ct 3.1380(a). The parties must submit a mandatory settlement conference statement at least 5 court days before the initial date set for the settlement conference. The statement must contain a good faith settlement demand and an itemization of economic damages by each plaintiff, and must discuss in detail all facts and law pertinent to the issues of liability and damages. The statement must also comply with any additional requirement imposed by local rule. Cal Rules of Ct 3.1380(c).

Although Rule 3.1380 describes the basic procedures involved in mandatory settlement conferences, counsel should review the local probate rules for specific procedures and for any additional requirements. Counsel should also call the local probate court and ask if there is any additional information not found in the local rules that they need to be aware of.

In Orange County, for example, although not published in the local Probate Court Rules, the Probate Court requires a Mandatory Settlement Conference ("MSC") in all contested matters. Trial counsel and all parties must appear at the MSC unless excused by the court on written request with notice to all other parties. A confidential Settlement Conference Statement must be lodged at least 5 court days before the MSC in the department to which the MSC is assigned. In addition, at the pretrial conference, the parties must submit a pretrial statement summarizing, inter alia, the status of settlement negotiations and indicating whether further negotiations are likely to be productive. If the case settles before a court hearing, the parties must either file a stipulation in writing, signed by all parties and counsel, or place the matter on the record. If the case is not settled. the department in which the MSC is heard retains the case for trial.

San Diego, on the other hand, uses only voluntary settlement procedures. The court will set a date for a settlement conference only if requested to do so by the parties at the case management conference. San Diego Ct R 4.22.7(B). The parties can also request in writing at the case management conference that the court refer the dispute to a temporary judge, to arbitration, or to a special master or referee. San Diego Ct R 4.22.7(C). A settlement conference may be set ex parte if all parties agree. San Diego Ct R 4.22.10.

In San Francisco, settlement conferences are mandatory in all unlimited matters with a trial estimate of more than one day. San Francisco Ct R 5.0. Settlement procedures in all other matters are voluntary. Settlement conference statements are due in the probate department 5 court days before the conference. San Francisco Ct R 14.14.

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B. Settlement Agreement

§17.86 1. Contents of Settlement Agreement

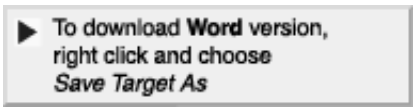
A contract not to contest a will, made after the testator's death, is a matter between or among the contracting parties and is not against public policy. Such an agreement, if fairly made, will be enforced. *Douillard v Woodd* (1942) 20 C2d 665, 128 P2d 6 (promise not to contest is sufficient consideration); *Estate of Garcelon* (1894) 104 C 570, 38 P 414; *Bacon v Kessel* (1939) 31 CA2d 245, 87 P2d 857 (plaintiff promised not to contest father's will in consideration of defendant's promise to give plaintiff certain distributive shares under will; contract enforceable).

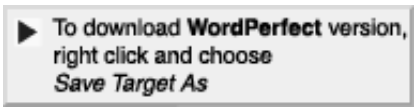
The particular contents of each settlement agreement depend on the nature of the estate, the matters at issue, and the interests of the parties. Local probate rules must be observed. One usual provision or stipulation recites that the parties "are desirous of making an early and amicable settlement of their (various) disputes." This is followed by the particular settlement provisions submitted for court approval. At the conclusion of the agreement, it should be stated that each party to the agreement acknowledges that he or she has had independent legal advice in the negotiation and preparation of the agreement. The settlement agreement should also include a general release and a release of rights under CC §1542. For suggested form, see §17.87. The settlement agreement must be signed by all parties to the agreement, including one acting in the capacity of representative. See *Estate of Muhammad* (1971) 16 CA3d 726, 730 n3, 94 CR 856. Besides the original for filing, sufficient copies should be made available for distribution among the signatory parties.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.87 2. Form: General Release and Release of Rights

§17.87 2. Form: General Release and Release of Rights





17.87-1 General release and release of rights

Except for the obligations herein, the parties, and each of them, hereby fully release and discharge the others, their agents, attorneys, assigns, and successors in interest from any and all claims, demands, causes of actions (in law or equity), liabilities, and expenses whatsoever, including attorney fees, known or unknown, that they may have against the other now or hereafter, arising out of or relating to the facts alleged in the contest. The parties acknowledge that they have each been advised by their attorneys concerning, are familiar with, and expressly waive the rights and benefits of Civil Code §1542, which reads as follows:

> **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.**

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§17.88 C. Compensation of Attorney

As in all civil actions, the general rule in will contests is that compensation for attorney services must be paid by the person employing the attorney, in the absence of a special agreement, special statutory provision, or exceptional circumstances. CCP §1021; *Estate of Stauffer* (1959) 53 C2d 124, 346 P2d 748. Thus, even if the contestant prevails, ordinarily the estate will not be liable for the contestant's attorney fees unless payment is provided for in a settlement agreement. See *Estate of Muhammad* (1971) 16 CA3d 726, 94 CR 856 (attorneys represented minor and guardian during negotiations leading to compromise in will contest, but settlement agreement failed to mention attorney fees; on appeal, attorneys could not collect $28,000 from trust).

The compromise agreement may provide, *e.g.,* that the fees of counsel for the executor (and special administrator, if any) and the fees of the contestant's counsel are to be chargeable to the estate, that the executor agrees to make partial payment of the fees during the calendar year, if possible, and that all fees are to be fixed by the court, except as otherwise agreed on by the parties.

The agreement should also cover the contingency of substitution and protect the interest of a counsel first retained and then displaced by the contestant, stipulating, *e.g.,* that the retiring counsel's compensation would be determined after the contest ended and that the lien of the retiring attorney for his or her fees is to attach to all the estate assets. See Prob C §11604 (providing for attorney's assignment of interest of a beneficiary of the estate).

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§17.89 D. Court Approval of Settlement

The probate court having jurisdiction of a decedent's estate may entertain, confirm, and effect a settlement agreement, whether in litigation or not, or it may modify or disapprove it. Application to the court for approval of a settlement agreement in a will contest is normally by petition of the personal representative, but it could be by petition of all parties to the agreement. On settlement of a contest before probate and before papers are filed and served, counsel should ascertain and follow the particular jurisdiction's requirements.

Local probate rules may provide that settlement of a will contest, properly brought to issue, cannot be summarily disposed of by stipulation of counsel. If the settlement contemplates probate of the will, by stipulation the will can be proved as an uncontested document and the terms of the settlement effected by assignment or by the duly executed settlement agreement. If the settlement contemplates denial of the will in question, sufficient evidence should be submitted to support the court's order denying probate and the terms of the settlement effected in the same manner.

WARNING: Care should be taken to avoid dropping the petitions off calendar because jurisdiction may thus be lost, requiring a new petition and new notices of posting, mailing, and publishing.

See §17.90 for sample petition. For further discussion of settlement procedures, see chap 10.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.90 1. Form: Petition for Approval of Will Contest Settlement Agreement

§17.90 1. Form: Petition for Approval of Will Contest Settlement Agreement

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[*Title of court*]

Estate of _ _[*name*]_ _, **Deceased**	)	**No.** _ _ _ _ _ _
	)	**PETITION FOR APPROVAL OF**
_ _[*Name*]_ _, **Contestant**	)	**WILL CONTEST SETTLEMENT AGREEMENT**
	)	
vs	)	**Hearing:** _ _[*date*; *time*]_ _
	)	**Dep't:** _ _[*number*]_ _
_ _[*Name*]_ _, **Respondent**	)	**Hearing judge:** _ _[*if known*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

Petitioner, _ _[*name*]_ _**, as** _ _[*named executor/executor/administrator*]_ _ **of the** _ _[*will/estate*]_ _ **of** _ _[*name*]_ _**, deceased ("decedent"), alleges:**

1. Decedent died _ _[*testate/intestate/partly intestate*]_ _ **on** _ _[*date*]_ _**. At the time of decedent's death, decedent was a resident of** _ _ _ _ _ _ **County,** _ _[*state*]_ _**.**

[*Add one of the following alternatives*]

[*Alternative 1: Preprobate contest*]

2. A petition for probate of an instrument dated _ _[*date*]_ _**, and believed to be decedent's last will was filed by** _ _[*name*]_ _ **on** _ _[*date*]_ _**.** _ _[*Name of contestant*]_ _**'s contest having been filed on** _ _[*date*]_ _**, letters of special administration were issued to** _ _[*name*]_ _ **on** _ _[*date*]_ _**.** _ _[*Name of special administrator*]_ _ **has been acting as the special administrator of decedent's will pending the outcome of the will contest since the issuance of letters of special administration.**

[*Alternative 2: Petition to revoke probate*]

2. Decedent's will of _ _[*date*]_ _**,** _ _[*and codicil(s) of* _ _[*date*]_ _]_ _ _ _[*was/were*]_ _ **admitted to probate by order of this court on** _ _[*date*]_ _**. Petitioner qualified as** _ _[*executor of the will/administrator with the will annexed*]_ _ **and letters** _ _[*testamentary/of administration with the will annexed*]_ _ **were issued to petitioner on** _ _[*date*]_ _**. At all times since then,** _ _[*he/she*]_ _ **has been and now is** _ _[*executor of decedent's will/administrator with the will annexed of decedent's estate*]_ _**.**

[*Continue*]

3. The devisees under decedent's will _ _[*and codicil(s)*]_ _ _ _[*admitted to probate by this court on* _ _[*date*]_ _]_ _ **and the portion of the estate devised and bequeathed to each of them are:** _ _[*List names, ages, relationships, addresses, and portions of the estate.*]_ _

[*Add if partial intestacy*]

Decedent's will _ _[*and codicil(s)*]_ _ **do(es) not dispose of the property described** _ _[*below/in Exhibit* _ _]_ _**.**

[*Continue*]

Petitioner is informed and believes and therefore alleges that decedent's heirs, their ages, and their relationships to decedent under the laws of succession of the State of California are: _ _[*List names, ages, relationships, and addresses.*]_ _

[*Add one of the following alternatives*]

[*Alternative 1: Special notice*]

4. The following requests for special notice or appearance have been served and filed herein: _ _[*Specify requests.*]**_ _**

[*Alternative 2: No request for special notice*]

4. No request for special notice has been filed in this matter.

[*Continue*]

5. On _ _[*date*]**_ _, _ _**[*name*]**_ _ _ _**[*state relationship, e.g., as an heir of decedent*]**_ _, filed a _ _**[*contest and opposition to probate/petition to revoke the probate*]**_ _ of the will, and _ _**[*name*]**_ _, as _ _**[*named executor/executor/administrator*]**_ _,**

[*Add if settlement of preprobate will contest*]

decedent's above-named heirs,

[*Continue*]

_ _[*and the above-named devisees under decedent's will*]**_ _ were named as respondents to the petition.**

[*Add if guardian ad litem has been appointed*]

6. _ _[*Name*]**_ _ was appointed by this court as guardian ad litem for _ _**[*name(s)*]**_ _, minor(s), the _ _**[*state relationship*]**_ _ of decedent, and _ _**[*name*]**_ _ was appointed guardian ad litem for unborn persons who may become grandchildren of decedent. The guardians ad litem have duly qualified and both are acting in their respective capacities.**

[*Continue*]

[7.] Extensive negotiations were conducted for the compromise and settlement of the above proceeding for the _ _[*contest and opposition to probate/petition to revoke probate*]**_ _ of decedent's will. These negotiations culminated in an agreement for the compromise and settlement of the _ _**[*will contest/petition for revocation*]**_ _, the terms being embodied in a settlement agreement that is attached to this petition as Exhibit _ _.**

[8.] Petitioner believes the settlement agreement to be just, fair, and reasonable and in the best interests of all persons interested in the estate based on the following: _ _[*Specify reasons, e.g., to avoid what would be expensive and protracted litigation due to the uncertainty of the outcome*]**_ _.**

[*Add one of the following alternatives*]

[*Alternative 1: Will admitted*]

[9.] As a result of the settlement agreement, the will shall be admitted and _ _[*name*]**_ _ appointed _ _**[*executor/administrator with the will annexed*]**_ _.**

[*Alternative 2: Will modified*]

[9.] The terms of the will are deemed modified as set forth in the settlement agreement.

[*Alternative 3: Will not admitted*]

[9.] The instrument that its proponents characterized as the decedent's Will is deemed not to be the decedent's Will and the estate will pass to the decedent's heirs under the laws of succession of the State of California with the following exceptions: _ _[*specify exceptions*]**_ _**

[*Continue*]

WHEREFORE, petitioner requests that this court approve the settlement agreement and authorize and direct the interested parties to perform according to its terms and for such other orders of this court as the court deems proper.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Petitioner

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Petitioner

Copies: Original for filing; one copy to serve on attorney of record for each party (or the party, if he or she has no attorney); office copies.

Comment: See §17.88 on including attorney fees in compromise and settlement agreements. But see *Estate of Miller* (1968) 259 CA2d 554, 66 CR 768; §17.4.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/17 Will Contests/§17.91 2. Form: Order Approving Will Contest Settlement Agreement

§17.91 2. Form: Order Approving Will Contest Settlement Agreement

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[*Title of court*]

Estate of _ _[*name*]_ _, Deceased _ _[*Name*]_ _, **Contestant** **vs** _ _[*Name*]_ _, **Respondent**	**No. _ _ _ _ _ _** **ORDER APPROVING WILL CONTEST SETTLEMENT AGREEMENT**

Petitioner, _ _[*name*]_ _, by _ _[*name*]_ _, _ _[*his/her*]_ _ attorney, has proved to the satisfaction of the court that the petition for approval of the will contest settlement agreement entered into by the parties was filed on _ _[*date*]_ _ for the hearing, and that due and legal notice of the time and place of hearing has been regularly given as required by law and in accordance with the order of this court fixing notice. Testimony has been taken by the court, and the guardians ad litem and counsel for the parties have been heard. The court, being fully advised in the premises, makes and enters its Statement of Decision and its Judgment as follows:

STATEMENT OF DECISION

1. This court has jurisdiction of the parties and over the subject matter of this proceeding and jurisdiction to approve the settlement agreement entered into by petitioners, respondents, and the guardians ad litem appointed by this court.

[*Add one of the following alternatives*]

[*Alternative 1: Preprobate contest*]

2. _ _[*Name*]_ _, as special administrator of the estate of _ _[*name*]_ _, decedent, has been properly served with process, and hereby consents to the agreement of the parties to this matter.

[*Alternative 2: Petition for revocation*]

2. _ _[*Name*]_ _, as executor under the will of _ _[*name*]_ _, decedent, has been properly served with process, and _ _[*name*]_ _, as executor under decedent's will, has filed an answer to the petition for revocation of the probate of the will and is subject to the jurisdiction of this court.

[*Continue*]

3. _ _[*Except for respondents, _ _[names]_ _, who were served and failed to respond, the/The*]_ _ respondents, _ _[*names*]_ _, are all over the age of 18 years and have individually signed and agreed to the settlement agreement presented to this court, have appeared at the hearing mentioned above by their attorneys, and are subject to the jurisdiction of this court.

4. The _ _[*will contest and grounds of opposition to probate of the purported will of decedent/petition for revocation of probate of decedent's will*]_ _ has been duly served according to law on _ _[*names*]_ _, _ _[*whose response is/and those respondents are*]_ _ subject to the jurisdiction of this court.

5. The interests of all unborn persons who may become grandchildren of decedent are represented lawfully and adequately by respondents, _ _[*names*]_ _, who have interests identical to those of these unborn persons.

6. The interests of all unborn persons who may become lineal descendants of the grandchildren of decedent are represented lawfully and adequately by the respondents, _ _[*names*]_ _, who have interests identical to those of these unborn persons.

7. This court has the power and authority to appoint a guardian ad litem for the minor respondents under Code of Civil Procedure §§372-373. Under Code of Civil Procedure §373.5, this court has the power and authority to appoint a guardian ad litem for unborn persons. The appointment of _ _[*name(s)*]_ _ as guardian(s) ad litem for _ _[*name(s)*]_ _, minor(s), and for unborn persons who may become lineal descendants of the grandchildren of decedent is confirmed. The appointment of _ _[*name*]_ _ as guardian ad litem for unborn persons who may become grandchildren of decedent is also confirmed. The guardians ad litem have filed their respective answers to the petition, and also to their respective reports to this court, and have been present and participated in the hearing. This court finds that the guardians ad litem have properly and fully represented and protected the interests of their respective wards, and the guardians ad litem have authority to enter into the settlement agreement and thus bind their respective wards on approval of the settlement agreement by this court.

8. All persons in being who are parties to this proceeding and all unborn persons who may have an interest in decedent's estate, being properly before this court, are bound and concluded by this judgment and by the settlement agreement as approved and confirmed in this judgment.

9. The evidence presented affirmatively shows that material facts exist that would support the _ _[*contest and grounds of opposition to probate of the purported will/petition filed to revoke the probate of the will*]_ _ and, accordingly, the compromise settlement of the will contest was and is in the best interests of the parties. The testimony further shows that the settlement agreement is in the best interests of all the respondents.

[*Add when the contestant is withdrawing the contest as part of settlement*]

Testimony presented by the respondents establishes that decedent's will _ _[*and codicil*]_ _ should be admitted and, therefore, contestant in accordance with the settlement agreement filed in this case has agreed to withdraw _ _[*his/her*]_ _ contest with prejudice.

[*Continue*]

10. The settlement agreement filed in this cause on _ _[*date*]_ _ and presented to this court for consideration is found and determined to be in the best interests of the minor respondents and unborn persons who may have an interest in the estate and of all persons sui juris who have an interest in the estate, and the settlement agreement therefore should be approved and confirmed by this court. It is, therefore,

ADJUDGED as follows:

1. The settlement agreement attached to the petition is approved and confirmed in all respects.

2. All parties to this proceeding are authorized and directed to perform the settlement agreement according to its terms and to do all acts and to execute all documents that may be necessary or proper in the performance of the settlement agreement and in making its provisions effective.

[*Add one of the following alternatives*]

[*Alternative 1: Preprobate contest*]

3. By reason of the foregoing settlement, the contest and grounds of opposition to probate of the will of decedent filed by _ _[*name*]_ _, is dismissed with prejudice, and _ _[*name of executor/administrator with the will annexed*]_ _ is appointed executor under the will of decedent, on the signing of the order appointing _ _[*him/her*]_ _ and issuance of letters testamentary.

[*Alternative 2: Petition for revocation*]

3. By reason of the foregoing settlement, the petition of _ _[*name*]_ _ for revocation of the probate of the will of decedent is denied with prejudice.

[*Continue*]

4. _ _[*Name*]_ _, as _ _[*executor/administrator with the will annexed*]_ _, under the will of decedent is authorized and directed to make the payments and distribution of the estate assets as provided for in the settlement agreement, to execute and enter into the trust agreements attached to the settlement agreement, and to perform the trust agreements according to their terms.

[*Add if appropriate*]

5. The law firm of _ _[*name*]_ _ is allowed an attorney fee of _ _[*dollar amount*]_ _ for its services as special attorneys to the executor and to the estate of decedent, to be paid by the executor from estate assets. The executor shall also reimburse those attorneys for all their reasonable and necessary costs and expenses incurred in investigating and defending the petition for revocation of probate of decedent's will and in accomplishing a settlement of the proceedings.

[*Add if appropriate*]

[6.] The law firm of _ _[*name*]_ _ is allowed an attorney fee of _ _[*dollar amount*]_ _ for its service to the estate of decedent in accomplishing a settlement of the will contest, the same to be paid by the executor from the estate. The executor shall also reimburse those attorneys for all their reasonable and necessary costs and expenses incurred in the preparation and filing of the petition for revocation of probate of decedent's will and in accomplishing a settlement of the proceeding.

[*Add if appropriate*]

[7.] _ _[*Name*]_ _ is allowed a fee of _ _[*dollar amount*]_ _ for services as guardian ad litem, the fees to be paid by the executor from estate assets.

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Copies: Original for filing; one copy for each attorney of record and each unrepresented party; office copies.

Comment: On request of any party "the court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial." CCP §632. Therefore, a recital of facts on which the settlement (and that order) is based will probably be significant, and the recitals set forth as "Statement of Decision" should be included. Counsel should consult the probate commissioner or the court clerk for local requirements for this order.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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§17.92 E. Effect of Compromise

A compromise and settlement agreement should include all interested persons, so the settlement is complete. If a contestant compromises, others who would have benefited by denial of probate had they joined the action are not entitled to share in the consideration for settlement of the contestant's claim. In a contest by one person, evidence that another party's contest on the same ground was settled by compromise is inadmissible because a compromise is not in the nature of an admission, and a separate compromise in no way strengthens the contestant's case before the court. *Estate of Johanson* (1943) 62 CA2d 41, 144 P2d 72.

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§17.93 VIII. INTERVENTION

Under CCP §387, a person may intervene in a will contest on timely application to the court. Intervention may be granted on a showing of good cause even after commencement of trial; however, courts are less likely to find an application timely once trial has begun. See California Civil Procedure Before Trial §31.28 (4th ed Cal CEB 2004).

The statute of limitations is not a defense to intervention. *Estate of Butzow* (1937) 21 CA2d 96, 68 P2d 374. If a contest has been filed within the statutory period, other interested parties may intervene in the contest even if the limitation period has run when the complaint in intervention is filed, provided they follow the statutory procedure for intervention and do not assert new grounds of contest. *Estate of Harootenian* (1951) 38 C2d 242, 238 P2d 992; *Voyce v Superior Court* (1942) 20 C2d 479, 127 P2d 536; *Estate of Walters* (1949) 89 CA2d 797, 202 P2d 89.

When a contestant has intervened, dismissal of the original contest by the court on the issue of interest does not deprive the court of jurisdiction of the intervenor's cause of action. *Estate of Harootenian, supra*.

The Attorney General may intervene and seek adjudication in distribution. *Estate of Quinn* (1955) 43 C2d 785, 278 P2d 692. On the Attorney General as a party in will contests, see §17.15.

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IX. APPEAL

§17.94 A. Scope of Review

Probate Code §§1300-1304 specify orders from which an appeal may be taken.

An order dismissing a will contest filed before a will is admitted to probate is not an order listed in §§1300-1304. Therefore, a judgment dismissing a contest after an order sustaining a demurrer to the opposition to probate of the will without leave to amend is nonappealable. *Estate of Weber* (1991) 229 CA3d 22, 280 CR 22 (decided under former Prob C §7240). The court noted, however, that the party who filed the complaint could appeal the order admitting the will to probate.

Probate Code §1303(j) allows an appeal from an order, or the refusal to make an order, determining whether a specific beneficiary action constitutes a contest under Prob C §§21320-21322, operative through December 31, 2009 (declaratory relief action to determine whether beneficiary's action constitutes a will contest).

NOTE: Operative January 1, 2010, Prob C §§21320-21322 will be repealed and replaced with Prob C §§21310-21315, which do not have a comparable declaratory relief mechanism. See §5.12I. This new statutory scheme will apply to any instrument that became irrevocable on or after January 1, 2001. Prob C §21315.

On the issue of whether a personal representative is an "aggrieved" party under CCP §902 with standing to appeal a ruling under Prob C §§21320-21322, the supreme court ruled in *Estate of Goulet* (1995) 10 C4th 1074, 43 CR2d 111, that a trustee has standing to appeal an order determining that a trust beneficiary's proposed claim would not violate the no-contest clause of a testamentary trust. The court specifically (10 C4th at 1080 n4), and by implication throughout the text by referring to "fiduciaries" and "personal representatives," states that the fiduciary duties of a personal representative and a trustee are in essential respects the same in this type of action, *i.e.,* each type of fiduciary is charged with preserving the fund with which each is charged until it is distributed to the beneficiaries.

On appeal, the reviewing court's province is the same in will contests as in any other civil case. *Estate of Teel* (1944) 25 C2d 520, 154 P2d 384; *Estate of Zalud* (1972) 27 CA3d 945, 104 CR 329.

For further discussion of appellate procedure, see chap 23.

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§17.95 B. Review of Evidence

The primary issue for the appellate court to determine is whether substantial evidence supports any ground of contest. The rules of law applicable to will contest situations are well settled. On appeal, the court is concerned only with "the applicability of those rules to the evidence at hand and the propriety of the trial court's conclusion in the premises." *Estate of Beckley* (1965) 233 CA2d 341, 342, 43 CR 649.

The rule for review of the evidence on appeal in a will contest was set forth by the supreme court in *Estate of Teel* (1944) 25 C2d 520, 526, 154 P2d 384, quoting *Estate of Bristol* (1943) 23 C2d 221, 143 P2d 689, as follows:

> In reviewing the evidence … all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. [W]hen a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.

The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict. The critical word in the definition is "substantial." *Estate of Zalud* (1972) 27 CA3d 945, 949, 104 CR 329.

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18

Proceedings to Determine Entitlement to Estate Distribution

Charles P. Wolff

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§18.1 I. OVERVIEW

Probate Code §§11700-11705 establish a versatile procedure for determining who is entitled to distribution of the assets of a probate estate. This statutory proceeding, often called an "heirship" proceeding, has been in existence in California in one form or another since 1885. One of the best general descriptions of the nature and purpose of the proceeding was set forth by the supreme court in *Whalen v Smith* (1912) 163 C 360, 364, 125 P 904:

> This section provides a special proceeding for the purpose of ascertaining and determining, in advance of distribution, the persons who have succeeded to the estate and the portions inherited by or devised to each of them. Upon the trial thereof the court must "determine the heirship to said deceased, the ownership of his estate, and the interest of each respective claimant thereto or therein, and persons entitled to distribution thereof." No other judgment is to be rendered and no disposition whatever is to be made of the estate. It is a determination, first, of the persons entitled as heirs, devisees, or legatees, or as their successors, if any have died; and, second, the interest of each one in the estate of the decedent.

The proceeding is initiated by a petition "for a court determination of the persons entitled to distribution of the decedent's estate." Prob C §11700. Any interested person can file a responsive pleading, known as a "statement of interest," that sets forth the person's interest in the estate (*e.g.,* as an intestate heir, a pretermitted heir, or a person named in the will through an ambiguous description). Prob C §11702(a). A hearing is scheduled in the existing probate proceeding. It may be submitted on the petition and statements of interest alone (Prob C §11704(a)) or may be an extensive evidentiary hearing, depending on the matters at issue. At the conclusion of the hearing, the court issues "an order that determines the persons entitled to distribution of the decedent's estate and specifies their shares." Prob C §11705(a). The order is appealable. Prob C §1303(f). *Estate of Stehr* (1986) 181 CA3d 1131, 1133 n2, 226 CR 806; *Estate of Barber* (1957) 49 C2d 112, 118, 315 P2d 317.

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II. APPLICABILITY OF PROB C §11700 PROCEEDING

§18.2 A. Broad Scope of Statute

The potential scope of a proceeding under Prob C §11700 is quite broad. It potentially applies to every dispute over who is entitled to take under a will or as an heir of the estate. As discussed below, this involves every form of interpretative question imaginable except interpretations of the scope of no-contest clauses or tax allocation clauses, which now have specific statutory schemes. The proceeding also may involve detailed questions of family history (to determine who is an intestate heir), arcane questions of prior probate and family law (to determine who would have been the member of a designated beneficiary class under the law in force at the death of a long-deceased testator), or complex forensic accounting issues (to determine what portion of a decedent's intestate estate is community property passing to the decedent's spouse and what portion is separate property passing under Prob C §§6401-6402).

A personal representative or other interested party seeking a determination of entitlement to estate assets as an heir or devisee of the estate should not petition the court for instructions under Prob C §9611. That proceeding is reserved for circumstances "where no other procedure is provided by statute." Prob C §9611(a). The availability of heirship proceedings under Prob C §11700 automatically takes such petitions outside the scope of Prob C §9611.

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Source: Estate Planning/California Trust and Probate Litigation/18 Proceedings to Determine Entitlement to Estate Distribution/§18.3 B. Examples of Use of Prob C §11700 Proceedings

§18.3 B. Examples of Use of Prob C §11700 Proceedings

Proceedings under Prob C §11700 can be used for the following purposes:

- To interpret wills or any provision of a will, including:
- The identity of an ambiguously named beneficiary;
- Whether a particular person or subclass is included in the scope of a named class of beneficiaries;
- The assets that fall within a description of property that is devised to a particular beneficiary or class of beneficiaries;
- The proper application of valuation instructions;
- The application of the cy pres doctrine;
- The resolution of ademption, abatement, and exoneration issues; and
- Whether a named beneficiary survived the decedent, and the application of the anti-lapse statutes, Prob C §§21109 and 21110 (*Estate of Lensch* (2009) 177 CA4th 667, 99 CR3d 246);
- To determine succession when there is no will or when a will does not dispose of all property, thereby creating a partial intestacy, including:
- Determination of the identity of heirs (§18.32);
- Determination of the relationship to the decedent (*e.g.,* spouse (§§18.35-18.38) or child (§§18.39-18.40));
- Determination of degrees of heirship; and
- Characterization of property as separate or community (§§18.41-18.46);
- To determine the rights of heirs who may succeed to assets of the estate even when a will disposes of the entire probate estate, including:
- Rights of omitted spouses or children (§18.34); and
- Rights of heirs of predeceased spouses (§18.33).

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§18.4 C. Limits on Use of Procedure

The passage of other statutory probate procedures at or about the time that Prob C §11700 was enacted may serve to limit the uses of the entitlement proceeding. In addition, other types of issues are not proper subjects for §11700 proceedings. The following are some of the issues that should be brought under statutes other than §11700:

- To determine whether certain actions would violate no-contest clauses in wills and trusts. Probate Code §§21320-21322 eliminated the ability to seek declaratory relief under a petition to determine entitlement. See *Estate of Richter* (1993) 12 CA4th 1361, 16 CR2d 108 (stating that procedures prescribed by Section 21320 supplanted procedure under former Prob C §1080 used in *Estate of Friedman* (1979) 100 CA3d 810, 161 CR 311, and *Estate of Black* (1984) 160 CA3d 582, 206 CR 663).

PRACTICE TIP: Because no-contest clauses may be interpreted very broadly (see §5.3), practitioners should advise clients to consider seeking a court determination under former Prob C §§21320-21322 of whether their seeking a determination of entitlement under Prob C §11700 would violate a no-contest clause in an instrument that became irrevocable before January 1, 2001 (see Prob C §21315). There are situations, however, in which the costs of seeking a no-contest determination outweigh the minimal risk of not seeking it.

NOTE: The statutes codifying the "safe harbor" declaratory relief procedure for no-contest clauses were repealed operative January 1, 2010, and replaced with Prob C §§21310-21315, which do not have a comparable declaratory relief mechanism applicable to instruments that became irrevocable on or after January 1, 2001.

- To determine the proration of estate taxes, which should now be brought under Prob C §§20100-20117.
- To determine the fact of death. Because a proceeding to determine entitlement to estate distribution assumes either a valid will or a whole or partial intestacy, it cannot be used to establish the fact of death—the predicate act underlying either of these conditions. The fact of death can be established only through a proceeding under Prob C §§200-212.
- To establish or challenge the validity of a will. Thus, Prob C §11700 proceedings are unsuitable for seeking admission of a will to probate (*Estate of Christensen* (1902) 135 C 674, 68 P 112) or for contesting the validity of a will unless the will is void on its face (*Estate of Caruch* (1956) 139 CA2d 178, 293 P2d 514; *Estate of Salmonski* (1951) 38 C2d 199, 238 P2d 966).
- To determine heirship for purposes other than succession. Such questions are resolved by proceedings under Prob C §§248-249, which can be used to determine, *e.g.,* the owners of a property previously owned by X, who recorded a grant deed vesting title in "the heirs of Grantor X."
- To effectuate distribution. This can be accomplished by the filing of a petition for preliminary distribution under Prob C §§11620-11623, or for final distribution under Prob C §§11640-11642. The court has jurisdiction to determine questions of contested heirship or the right to inherit at the hearing on a petition for distribution without resorting to a Prob C §11700 proceeding.
- To establish whether a decedent had executed a contract to make a will. A civil action is an appropriate method. *Ludwicki v Guerin* (1961) 57 C2d 127, 17 CR 823; *Estate of Watson* (1986) 177 CA3d 569, 223 CR 14.

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§18.5 III. WHO MAY PETITION

Only the personal representative or any person claiming to be a beneficiary or otherwise entitled to distribution of a share of the estate may petition under Prob C §11700. "Beneficiary" includes intestate heirs. Prob C §24(a).

Probate Code §11703 also specifically provides that the Attorney General is a person entitled to estate distribution (and thus a person entitled to file a Prob C §11700 petition) if the estate involves or may involve a charitable trust without a legally designated trustee, a charitable devise without an identified beneficiary, or an escheat to the State of California. See *State v Broderson* (1967) 247 CA2d 797, 56 CR 58 (escheat); *Estate of Zahn* (1971) 16 CA3d 106, 93 CR 810 (Attorney General has right to intervene in case involving application of cy pres doctrine).

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§18.6 A. Personal Representative

A personal representative may file a petition. Prob C §11700. Probate Code §11704(b) further provides that the personal representative "may file papers and otherwise participate in the proceeding as a party to assist the court." This role should be exercised judiciously. Even in those cases under former Prob C §1080 when the personal representative had been allowed to participate, its role was to represent "all the heirs" and it could not "favor one over the other." *Estate of Torrance* (1957) 154 CA2d 350, 358, 316 P2d 94. Nothing in the current Probate Code changes the mandatory impartiality of the personal representative. Obviously, the obligation to stay neutral between competing beneficiaries and the invitation to participate in the proceeding to assist the court are potentially at odds. This is particularly true because the personal representative is likely to be able to receive extraordinary compensation from the estate for his or her participation at the expense of the competing beneficiaries (see *Estate of Barnicoat* (1960) 179 CA2d 382, 3 CR 774), at least one of which is likely not to see any benefit at all to the personal representative's participation.

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Source: Estate Planning/California Trust and Probate Litigation/18 Proceedings to Determine Entitlement to Estate Distribution/§18.7 B. Beneficiaries or Persons Otherwise Entitled to Distribution

§18.7 B. Beneficiaries or Persons Otherwise Entitled to Distribution

Any person who claims to be a beneficiary or otherwise entitled to a distribution of a share of the estate may file a petition. Prob C §11700. This includes, of course, people claiming to be beneficiaries under a will, whether named as individuals or claiming to be part of a beneficiary class. It also includes people claiming as intestate heirs, whether they claim shares of an intestate estate or advance an interpretation of a will that gives rise to a partial intestacy. See Prob C §24(a).

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§18.8 C. Persons Who Do Not Have Standing to Petition

Relatives of persons who have interests in the estate are not included in the definition of those who may file a petition. *Estate of Sanders* (1992) 2 CA4th 462, 3 CR2d 536 (court rejected appellant's proposal to have mothers of decedent's adult children participate in DNA testing to establish or refute decedent's paternity of appellant's minor child because court lacked jurisdiction over mothers to be tested, none of whom had an interest in decedent's estate).

The claim must be "under" the will or intestate estate, not "against" it. Creditors cannot initiate a proceeding to adjudicate their "entitlement" to a distribution of the assets of an estate because they are not beneficiaries of the estate. Applying similar reasoning, the court in *Estate of Fincher* (1981) 119 CA3d 343, 349, 174 CR 18, characterized the appellant's *Marvin* claim (see *Marvin v Marvin* (1976) 18 C3d 660, 134 CR 815) against the decedent as "essentially a claim based upon an oral contract, not a claim to an interest in particular estate property," and therefore the court lacked jurisdiction. The same reasoning would appear to apply to claims of contracts to make wills. In *Fincher*, however, the court noted that, because the appellant later married the decedent and was also claiming a community property interest *in,* and not against, the estate, the court had jurisdiction to consider the whole controversy, including the appellant's *Marvin* claims. 119 CA3d at 349.

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Source: Estate Planning/California Trust and Probate Litigation/18 Proceedings to Determine Entitlement to Estate Distribution/§18.9 IV. TIME FOR FILING

§18.9 IV. TIME FOR FILING

A petition may be filed any time after letters are first issued to a general personal representative and before an order of final distribution is made. Prob C §11700.

NOTE: These time limits are jurisdictional. See Comment to Prob C §11700. Therefore, a petition cannot be filed before letters are first issued; nor can it be filed after the order of final distribution is made. See Prob C §11704(a).

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V. PROCEDURE

§18.10 A. Local Rules

Before beginning preparation of the petition, counsel should consult local probate rules to determine if there are special requirements in the county where the petition will be filed. For example, Los Angeles Ct R 10.45(c) requires that petitioners, other than the personal representative, set forth in the petition the persons the petitioner believes are entitled to distribution, rather than asking the court to decide without the benefit of the petitioner's position. A personal representative who petitions may set forth the alternative entitlements to be determined by the court. Rule 10.45 also requires the petitioner to include a genealogical chart showing the relationship between the decedent and those claiming heirship.

Many counties' local rules provide that, if a petition for entitlement under Prob C §11700 is appropriate, then the issue may not be resolved by a petition for instructions. The rule usually states that a petition for instructions is limited to those matters for which no other procedure is available, often citing a petition for entitlement to distribution as an example of a matter for which another procedure is available. See, *e.g.,* Los Angeles Ct R 10.46; San Francisco Ct R 14.85.

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B. Petitioner: File Petition and Obtain Hearing Date

§18.11 1. Content of Petition

The petition should identify the petitioner and must include a statement of the basis of the petitioner's claim of entitlement (*e.g.,* whether under the testamentary instrument or as an heir at law). Prob C §11700. It should also set forth any other issues that need to be resolved regarding the nature of the assets in question (*e.g.,* community versus separate property, the property subject to an allegedly ambiguous description in a will) or the nature of the beneficiaries (*e.g.,* the identity of parties within a class gift, or whether there is a partial intestacy under a will). All known heirs and devisees should be identified, as well as all other persons or entities entitled to notice. If costs are sought, a request should be included. See §18.49 on costs and attorney fees.

Petitioners have a duty to the court to reveal the extent of their knowledge of the rights of others to succeed to the estate. *State v Broderson* (1967) 247 CA2d 797, 56 CR 58. In *Broderson,* the petition under former Prob C §1080 did not disclose all the facts about the status of the property and about possible escheat to the State of California. In an action in equity to set aside the judgment determining heirship, the court held that the heirship order was subject to collateral attack because it was procured by extrinsic fraud arising from the parties' failure to disclose known rights of other claimants. See §18.53.

The petition must be verified. Prob C §1021. Because Prob C §11700 proceedings may be contested, the petitioner's filing of a verified petition requires all opposing pleadings, *e.g.,* statements of interest, to be verified. CCP §446. See Prob C §11702, which characterizes statements of interest as pleadings.

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Source: Estate Planning/California Trust and Probate Litigation/18 Proceedings to Determine Entitlement to Estate Distribution/§18.12 2. Form: Petition for Determination of Entitlement to Estate Distribution

§18.12 2. Form: Petition for Determination of Entitlement to Estate Distribution

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

[*Title of court*]

Estate of _ _[*name*]_ _,	)	**No. _ _ _ _ _ _**
Deceased	)	
	)	**PETITION FOR**
	)	**DETERMINATION OF**
	)	**ENTITLEMENT TO ESTATE**
	)	**DISTRIBUTION (PROBATE**
_____	)	**CODE §11700)**

Petitioner, _ _[*name*]_ _, alleges:

1. Petitioner is the _ _[*specify status or representative capacity*]_ _.

2. The above-named decedent died on _ _[*date*]_ _, and the estate is in progress of settlement in this court.

3. Letters _ _[*testamentary/of administration*]_ _ were issued to _ _[*petitioner/name of personal representative*]_ _ on _ _[*date*]_ _. No order for final distribution has been made.

[*Add one or more of the following options*]

[*Option 1: Determination of characterization of property*]

4. A dispute exists between _ _[*state parties, e.g., the devisees under the will and the decedent's widow*]_ _ over whether _ _[*asset(s) or portion of estate*]_ _ is separate or community property. Petitioner claims that _ _[*this/these*]_ _ asset(s) _ _[*is/are*]_ _ _ _[*community/separate*]_ _ in character because _ _[*set forth facts on which claim is based*]_ _.

[*Option 2: Determination of identity of devisees*]

[5.] In paragraph _ _ of the will dated _ _[*date*]_ _, and admitted to probate on _ _[*date*]_ _, decedent devised _ _[*describe item or portion of estate*]_ _ to the person described as _ _[*quote description*]_ _. An uncertainty exists concerning decedent's intention because _ _[*state facts creating ambiguity*]_ _.

[*Continue*]

[6.] The names, addresses, and relationship of the heirs and devisees of the deceased and of all persons entitled to notice of the time and place of the hearing of this petition, as far as are known to the petitioner, are: _ _[*List names, addresses, and relationship to decedent.*]_ _

[7.] _ _[*No one has/The following have*]_ _ **filed request(s) for special notice:** _ _[*List names, if any.*]_ _

[8.] WHEREFORE petitioner requests that the court determine those who are entitled to distribution of _ _[*the estate/(specify assets)*]_ _ and for all other proper orders.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Petitioner

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Petitioner

[*Verification; see §17.61*]

Copies: Original for filing; office copies; additional copies as required, *e.g.,* for interested parties.

Comment: For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/18 Proceedings to Determine Entitlement to Estate Distribution/§18.13 3. Assignment of Hearing Date

§18.13 3. Assignment of Hearing Date

When the petition is filed, the court clerk will set the petition for hearing. This can be the date for an evidentiary hearing on the merits of the petition. In most probate courts, however, the first date is for an initial status conference. Counsel should consult the local probate rules. Judicial Council Form DE-120 (Notice of Hearing—Decedent's Estate or Trust) is usually completed and submitted at the time the petition is filed. The probate clerk will often stamp the initial hearing date on the notice form. This form is then used by the petitioner to give notice to all persons and entities who are entitled to receive notice.

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Source: Estate Planning/California Trust and Probate Litigation/18 Proceedings to Determine Entitlement to Estate Distribution/§18.14 4. Serve Notice

§18.14 4. Serve Notice

Under the provisions of Prob C §11701, at least 15 days before the date set for the hearing of the petition by the court, the petitioner must mail notice of the hearing as provided in Prob C §1220 to:

- The non-petitioning personal representative;
- All known devisees whose interest in the estate would be affected by the petition;
- All known heirs of the decedent whose interest in the estate would be affected by the petition;
- The Attorney General if any portion of the estate will escheat to the state and its interest would be affected by the petition; and

NOTE: Although not required by Prob C §11701, notice should also be given to the Attorney General if the petition affects the interest of a charitable trust without a legally designated trustee or a charitable devise without an identified beneficiary. See Prob C §11703.

- All persons who have requested special notice.

NOTE: Under Prob C §1252(a), a copy of the petition also must be mailed to persons who have requested special notice.

Notice to a person who is represented by an attorney of record must be sent both to the person and to the attorney unless, in the case of special notice, the request specifies otherwise. Prob C §1214; Cal Rules of Ct 7.51(b).

PRACTICE TIP: It is wise in Prob C §11700 proceedings, as in all probate proceedings, to err on the side of overinclusiveness; better to give notice to an extra person than to risk having a favorable result overturned by a claim of extrinsic fraud. Copies of the petition should also be served, so that those receiving notice can see if the interests set forth in the petition accurately reflect and protect their own interests and thus avoid the filing of repetitious statements of interest that duplicate the allegations of the petition. Some local rules specifically require this. For example, Los Angeles Ct R 10.45 requires that a copy of the petition must be served with the notice of hearing on the affected parties and their attorneys of record.

Proof of service of the notice and petition is filed after the petition is filed and served. In this respect, it is more like a proof of service of summons and complaint than a proof of service of motion that is filed simultaneously with the moving papers.

PRACTICE TIP: In addition to the provisions of the Probate Code regarding notice, local rules may have additional notice requirements for Prob C §11700 petitions.

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C. Respondent: File Statement of Interest in Estate

§18.15 1. Who May File; Content

The response to the petition to determine entitlement is called a "statement of interest in estate." As set forth in Prob C §11702(a), "[a]ny interested person may appear and, at or before the time of the hearing, file a written statement of the person's interest in the estate." Note that, unless the local rules of the probate court provide otherwise (and they often do), a response can be filed at any time up until the hearing. Also note that an "interested person" who may file statements of interest is a conceptually broader category than the categories of persons entitled to notice. "Interested persons" include all heirs and devisees (Prob C §48), while notice must be given only to "known" heirs and devisees. Thus, a person claiming as an heir or devisee who does not receive formal notice of the petition to determine entitlement may still file a statement of interest without leave of the court.

NOTE: Although creditors of an estate are not among the persons who can initiate an entitlement proceeding by filing a petition under Prob C §11700, they fall within the definition of an "interested person" under Prob C §11702(a) who may file a statement of interest in response to a previously filed petition. The reason for this distinction is unclear, particularly given the creditor's claim process detailed in Prob C §§9000-9399.

The contents of a statement of interest depend not only on the facts of the case, but also on the allegations made in the original petition. An interested person may desire to file a statement of interest in support of a petition to determine entitlement to ensure his or her right to participate in the entitlement proceedings. Even though the statement of interest is in response to a verified petition, it need not specifically respond to each allegation of the petition. Moreover, there is no need to file an answer to deny or oppose the statements of interest filed by other interested persons because "the written statement of each claimant shall be deemed denied by each of the other claimants to the extent the written statements conflict." Prob C §11702(a).

When two §11700 petitions have been filed, the second is treated as a statement of interest. *Estate of Wise* (1949) 34 C2d 376, 382, 210 P2d 497.

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§18.16 2. Practical Considerations

Even if local rules permit filing a response at any time up until the hearing, it is generally not good practice, particularly if the attorney is unsure whether an evidentiary hearing will actually occur on the date set for the initial hearing. Once again, the local rules and practice of the probate court should be consulted in connection with the timing of the filing of a statement of interest.

Failure to file a statement of interest in a timely manner does not automatically deprive an heir or devisee of an interest in the estate. However, the person may not participate further in the proceeding and is bound by the result. Prob C §§11702(b)(2)-(3), 11705. The claimant who is unsure whether his or her claim is included in the petition or other documents already on file should perfect the claim by filing a statement of interest, thus protecting the right to introduce evidence and to appeal. *Estate of Winnie* (1959) 175 CA2d 698, 346 P2d 856; *Estate of Ward* (1954) 127 CA2d 207, 273 P2d 601.

Although there is no express requirement that notice of the filing of a statement of interest be given, good practice would dictate giving notice to those persons entitled to notice of the hearing of the Prob C §11700 petition.

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§18.16A 3. Contents of Statement of Interest

The statement of interest should bear the same caption as papers previously filed in the proceeding and should be titled "Statement of Interest in Estate." All that need be alleged is the claimant's name and the factual statement of the claim. The statement should request a determination of the claimant's interest in the estate and right to distribution, specifying any particular property or share, if appropriate. As the Prob C §11700 petition must be verified (Prob C §1021; see §18.11), the statement of interest must also be verified. CCP §446.

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Source: Estate Planning/California Trust and Probate Litigation/18 Proceedings to Determine Entitlement to Estate Distribution/§18.17 4. Form: Statement of Interest

§18.17 4. Form: Statement of Interest

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[*Title of court*]

Estate of _ _[*name*]_ _,	)	**No. _ _ _ _ _ _**
Deceased	)	
	)	**STATEMENT OF INTEREST IN**
	)	**ESTATE**
_____	)	**(PROBATE CODE §11702)**

Claimant, _ _[*name*]_ _, respectfully states:

1. On _ _[*date*]_ _, _ _[*petitioner's name and status*]_ _, filed in this proceeding a petition for determination of entitlement to estate distribution.

2. Claimant is the _ _[*state relationship, e.g., niece and an heir/widow*]_ _ of the deceased and therefore claims to be entitled to distribution of _ _[*designate interest and specify property (or share of estate)*]_ _.

3. This property should be distributed to claimant because _ _[*set forth interest or share of estate*]_ _.

4. WHEREFORE, claimant requests that the court determine that _ _[*he/she*]_ _ is entitled to _ _[*designate interest and specify property (or share of estate)*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Claimant

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Claimant

[*Verification; see §17.61*]

Copies: Original for filing; copies for service as required; office copies.

Comment: For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/18 Proceedings to Determine Entitlement to Estate Distribution/§18.18 D. The Hearing: An Overview

§18.18 D. The Hearing: An Overview

An entitlement petition can be decided on the memorandums and declarations of the parties if the extrinsic evidence proffered by the parties is not in dispute. If there are disputes over the extrinsic evidence, however, then an evidentiary hearing may be held to resolve the disputes.

There is no right to a jury trial. Probate Code §825 sets forth the general rule that there is no right to a jury trial in proceedings under the Probate Code "[e]xcept as otherwise expressly provided." Prob C §§11700-11705 do not provide otherwise for entitlement proceedings.

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§18.19 1. When to Seek Evidentiary Hearing: Strategic Considerations

The decision on whether or not to seek an evidentiary hearing may be of great importance. Obviously, an evidentiary hearing can increase the cost of litigating the claim significantly. There is a great strategic advantage in obtaining an evidentiary hearing, however, for the party advocating a less conventional but more sympathetic interpretation. If the stakes are sufficient, participants who want the court to focus on the equities should not shy away from an evidentiary hearing merely because it will engender a trial or a mini-trial.

If a party to a Prob C §11700 proceeding desires an evidentiary hearing, the court should be informed well in advance. Many probate courts have separate calendars for evidentiary hearings. To schedule a case on the proper calendar, advance notice is essential. In addition, many probate courts will send out evidentiary proceedings that are expected to exceed a certain length (*e.g.,* two hours or two afternoons) to the civil calendar to be heard by a civil judge sitting in probate. It is important for counsel to know the practice of the probate court in the county in which the proceeding is being heard, particularly if counsel believes the case would benefit from a judge who is more or less knowledgeable in probate law.

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§18.20 2. Evidence: Rules of Civil Procedure Apply

The civil rules of procedure apply to probate proceedings "[e]xcept to the extent that this code provides applicable rules." Prob C §1000. The petitioner or party affirming is the plaintiff, and the one objecting or responding is the defendant. Prob C §1044. The rules of civil procedure govern both the discovery and the evidentiary hearing in a Prob C §11700 proceeding. As such, document requests, interrogatories, and depositions are available discovery tools and are admissible under the same rules that govern civil trials. See CCP §§2016.010-2036.050 (Civil Discovery Act).

One explicit exception is the provision of Prob C §11704(a) that the court "shall consider as evidence in the proceeding any statement made in a petition filed under Section 11700 and any statement of interest filed under Section 11702." If a petitioner has made a prima facie case in his or her petition, this provision allows the petitioner to rest on the petition and let the respondents prove their case. Although this would not appear to be a useful tactic in most cases, it remains an option in these proceedings.

In appropriate cases, the probate court may appoint a referee to take testimony and report back to the trial court with his or her findings. See *Estate of Busteed* (1951) 105 CA2d 14, 232 P2d 881. Each claimant must establish the facts that create his or her right to share in the estate and must disprove the allegations of hostile claimants. *O'Day v Superior Court* (1941) 18 C2d 540, 544, 116 P2d 621.

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§18.21 VI. PROVING CLAIMS UNDER PROB C §11700

Given the wide variety of claims that might be litigated in a proceeding under Prob C §11700, the range of litigation issues that a practitioner might face begins to resemble the range of issues faced in a civil trial court (absent, of course, issues relating to juries). There are certain issues, however, that regularly recur in proceedings to determine entitlement to estate distribution more frequently than in civil litigation in general.

The issues that face counsel can be divided into two types: issues arising from contested testamentary dispositions, and issues arising from contested nontestamentary dispositions. In other words, different issues arise depending on whether the dispute is over who takes what under the decedent's will or whether the dispute involves dispositions under the decedent's estate outside of his or her will. Often both issues arise in a single proceeding, with some claimants seeking to establish rights under the will and others seeking distribution of the decedent's estate through nontestamentary vehicles, such as intestacy or a pretermitted heir statute.

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§18.22 A. Litigating Entitlement Claim Based on Will

When entitlement is claimed under a will, the source of the right of entitlement is a written document. Disputes over distribution under a written document may involve the identity of the beneficiaries, the assets being distributed, the effect of a tax clause, or any matter set forth by the testator in his or her will—but they always involve the interpretation of a written document. Thus, the litigation issues common to entitlement disputes under a will involve questions of construction and interpretation of the written will. Statutory and common-law rules of construction are helpful, and extrinsic evidence may be decisive, but the words are always the starting point. Often the litigation focuses on the tension between the words used in the will and extrinsic evidence of the testator's intent that may suggest a contrary result.

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§18.23 1. Testator's Words Versus Testator's Intent

The clash between the intent of the testator and the words used in the will is seen immediately. Probate Code §21102(a) provides: "The intention of the transferor as expressed in the instrument controls the legal effect of the dispositions made in the instrument." Thus, although the intent of the testator is paramount, that intent must be reflected by some words in the will. See, *e.g., Estate of Dye* (2001) 92 CA4th 966, 976, 112 CR2d 362 ("[c]ourts discern testamentary intent by applying a will's terms and the applicable law… , not by discerning the *unexpressed* wishes of decedents") (emphasis in original); *Estate of Kaseroff* (1977) 19 C3d 272, 275, 137 CR 644 ("[t]estator's will in the instant case unambiguously demonstrates an intent to disinherit"), and *Estate of Simoncini* (1991) 229 CA3d 881, 889, 280 CR 393 ("[t]he intention which an interpretation of a will seeks to ascertain is the testator's intention as expressed in the words of the will, not some undeclared intention which may have been in his [or her] mind"). To the extent otherwise authorized by law, however, §21102 does not limit the use of extrinsic evidence to determine the testator's intent. Prob C §21102(c). For discussion of extrinsic evidence, see §§18.27-18.31.

In proceedings under Prob C §11700 involving interpretation of a will, often one party argues vigorously based on extrinsic evidence that its proffered interpretation is what the testator intended either because it is the only interpretation consistent with common sense or because of the testator's supposed feelings about the contesting beneficiaries. The other party attempts to use the language of the will to restrict the ability of its adversary to raise these considerations external to the will.

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§18.24 2. Statutory Rules of Construction of Language in Instrument

The basic rules of interpretation of wills, trusts, deeds, and other instruments are set forth in Prob C §§21101-21140. Several of the rules specifically apply when the transferor's intention is not unambiguously expressed in the instrument. These rules, easily stated but not always easily applied, include the following:

- The words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative. Prob C §21120.
- All parts of an instrument are to be construed in relation to each other and so as, if possible, to form a consistent whole. Prob C §21121.
- If the meaning of any part of an instrument is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the instrument. Prob C §21121.
- When a devise to a protected transferee would otherwise lapse because of the transferee's death, that devise passes by right of representation to his or her descendants under the antilapse statute. Prob C §21110. See *Estate of Mooney* (2008) 169 CA4th 654, 87 CR3d 115.
- Preference is to be given to an interpretation of an instrument that will prevent intestacy or failure of a transfer, rather than one that will result in an intestacy or failure of a transfer. Prob C §21120.
- The words of an instrument are to be given their ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended meaning can be ascertained. Prob C §21122.
- Technical words in an instrument are to be considered as having been used in their technical sense unless (a) the context clearly indicates a contrary intention or (b) it satisfactorily appears that the instrument was drawn solely by the transferor (testator) and that the transferor (testator) was unacquainted with the technical sense. Prob C §21122.

Other rules of construction that are particularly applicable in Prob C §11700 proceedings include the following:

- How to treat "half-bloods" and adoptees (Prob C §21115).
- Rules governing ademption (Prob C §21135).
- Rules governing exoneration (Prob C §21131).

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§18.25 3. Some Applicable Rules of Evidence

Certain evidentiary problems tend to recur in heirship proceedings. For example, Evid C §957 eliminates the attorney-client privilege after the client's death if an issue arises between parties all of whom claim through a deceased client. Evidence Code §960 eliminates the attorney-client privilege for issues concerning the testator's intentions with regard to his or her will. Under Evid C §1242, dying declarations relating to circumstances of impending death are admissible as an exception to the hearsay rule. Under Evid C §1261(a), there is an exception to the hearsay rule for statements made by the decedent if the statement was made on the decedent's personal knowledge when the matter had been recently perceived by the decedent and while the decedent's recollection was clear. If the circumstances of a statement indicate a lack of trustworthiness, it is not admissible. Evid C §1261(b).

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§18.26 4. Proceedings in Absence of Extrinsic Evidence

Often the issues raised by the Prob C §11700 petition are based on rival interpretations of the language of a will without any dispute about the underlying facts. In these circumstances, when there is no contested extrinsic evidence, the hearing on the Prob C §11700 petition is like a hearing on a motion. The evidence submitted by declaration is the basis of a judicial determination, even though the court may hear argument of counsel before making the order.

There are numerous reported opinions that interpret words and phrases commonly used in wills and other testamentary documents without resort to extrinsic evidence. Although the meaning to be ascribed to individual words and phrases often turns on the context in which the language is used in the will in question, one can hardly argue an interpretation of the word or phrase used in the specific will at issue without knowing how courts have interpreted that language in the past. A careful combination of appellate interpretations of various words and phrases that form the sentence or paragraph at issue can be an effective and persuasive advocacy tool.

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§18.27 5. Extrinsic Evidence

Despite the oft-repeated admonition that the court is charged with determining the testator's intent *as expressed in the language of the will,* one or more parties advancing contesting interpretations of a will often seek to introduce extrinsic evidence in support of their position. "Extrinsic evidence" is any evidence other than the language of the testamentary document, *i.e.,* evidence "extrinsic" to the will. It can be the testimony of the drafting attorney, documentary evidence of drafts of the will, evidence of other communications by the testator, evidence concerning the relationship of the testator to competing putative beneficiaries, or any other evidence that might shed light on the intent of the testator when he or she used the language contained in the will.

Once the parties venture into the world of extrinsic evidence, the Prob C §11700 proceeding becomes virtually indistinguishable from general civil litigation. The civil discovery rules, which apply to probate proceedings under Prob C §1000, become an important (and often expensive) device for seeking extrinsic evidence from adversaries and third parties. The evidentiary hearing begins to resemble a civil trial with the standard rules of evidence.

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§18.28 a. Use of Extrinsic Evidence to Resolve Ambiguities

Extrinsic evidence can often be a very powerful device to resolve ambiguities in a testamentary instrument. It can also often be a powerful device to persuade a judge to rewrite part of a will. When an ambiguity is manifest on the face of a will, there is little dispute about the potential relevance of extrinsic evidence to resolve the ambiguity. In most cases, however, one side or the other (or both) will claim that the meaning of the language is clear. It is in the use of extrinsic evidence to identify and resolve ambiguities that might not be apparent on the face of the document that the tension between the testator's intent and the language of the will is most evident.

The idea that evidence outside the "four corners" of the will might be used to reach a result contrary to the apparent language of the will has long faced resistance. The clear trend in the law has been to allow the introduction of extrinsic evidence, at least on a preliminary basis, to show the testator's understanding of the words used in the will even though there is no obvious ambiguity or the evidence might seem at first blush to contradict the language of the will.

The basic conceptual framework for the proffering of extrinsic evidence was set forth in *Estate of Russell* (1968) 69 C2d 200, 70 CR 561. In *Estate of Russell*, the supreme court held that extrinsic evidence was admissible, not only to explain ambiguities that were apparent on the face of the will, but also to determine whether the language of the will was ambiguous in the first place (69 C2d at 212):

> [E]xtrinsic evidence of the circumstances under which a will is made (except evidence expressly excluded by statute) may be considered by the court in ascertaining what the testator meant by the words used in the will. If in the light of such extrinsic evidence, the provisions of the will are reasonably susceptible of two or more meanings claimed to have been intended by the testator, "an uncertainty arises upon the face of the will" ([former Prob C] §105) and extrinsic evidence relevant to prove any of such meanings is admissible (see [former Prob C] §106), subject to the restrictions imposed by statute ([former] §105).

NOTE: Former Prob C §105, referred to in *Russell*, has been repealed. The current governing provision, Prob C §21102, contains no restrictions on potentially admissible evidence, specifically providing that it does not limit the use of extrinsic evidence to determine the transferor's intent. Prob C §21102(c).

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§18.29 b. Procedure for Determining Admissibility of Extrinsic Evidence

Following *Estate of Russell* (1968) 69 C2d 200, 70 CR 561, the proper procedure for the probate court in considering extrinsic evidence is to admit it provisionally to see if the language of the will is reasonably susceptible to two or more meanings in light of the extrinsic evidence. *Wells Fargo Bank v Marshall* (1993) 20 CA4th 447, 453, 24 CR2d 507. If not, the extrinsic evidence is inadmissible and subject to a motion to strike. *Estate of Dye* (2001) 92 CA4th 966, 977, 112 CR2d 362. If the extrinsic evidence does gives rise to two meanings, it is admissible to explain either competing meaning. See generally Jefferson's California Evidence Benchbook §32.11 (3d ed CJA-CEB 1997).

Despite the wide latitude granted to litigants to put forth interpretations of wills based on extrinsic evidence, some limits remain. First, the evidence must relate to "the circumstances under which a will is made." *Estate of Russell* (1968) 69 C2d 200, 212, 70 CR 561. Second, a party cannot create a will by extrinsic evidence. The foundation of will construction remains the language of the will itself. No matter how powerful the extrinsic evidence of the testator's intent might be, the court cannot rewrite a will to implement that intent if the language of the testator in the will cannot in any way reasonably permit it. *Estate of Dye* (2001) 92 CA4th 966, 976, 112 CR2d 362. As the court in *Estate of Becker* (1969) 270 CA2d 31, 34, 75 CR 359, poetically put it: "While judges may pan the stream for golden nuggets of intent, they are required to stay within the banks of the testator's actual expression."

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§18.30 c. Issues on Which Extrinsic Evidence Has Been Admitted

The range of issues on which extrinsic evidence has been offered and admitted, either generally or provisionally, is as broad as the range of words, phrases, and subjects contained in wills. The following list is illustrative only, and does not purport to cover all the reported decisions in which extrinsic evidence was considered in connection with testamentary documents:

- Abatement—*Estate of Jenanyan* (1982) 31 C3d 703, 183 CR 525;
- Allocation among residual beneficiaries—*Estate of Edwards* (1988) 203 CA3d 1366, 250 CR 779;
- Conflicting distributive provisions—*Ike v Doolittle* (1998) 61 CA4th 51, 70 CR2d 887;
- Disinheritance clauses—*Estate of Flint* (1972) 25 CA3d 945, 102 CR 345;
- "Heirs"—*Estate of Taff* (1976) 63 CA3d 319, 133 CR 737;
- Identity of beneficiaries—*Estate of Cleaver* (1981) 126 CA3d 341, 178 CR 729;
- Identity of species of beneficiary—*Estate of Russell* (1968) 69 C2d 200, 70 CR 561;
- "Living at the time of" trustor's death—*Wells Fargo Bank v Marshall* (1993) 20 CA4th 447, 24 CR2d 507;
- "Monies"—*Estate of Verdisson* (1992) 4 CA4th 1127, 6 CR2d 363;
- "My"—*Estate of Webb* (1977) 76 CA3d 169, 142 CR 642;
- "Personal property"—*Estate of Dodge* (1971) 6 C3d 311, 98 CR 801;
- Pretermitted heir—*Estate of Kime* (1983) 144 CA3d 246, 193 CR 718; and
- "Properties"—*Estate of Verdisson, supra*.

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§18.31 d. Strategic Concerns Involving Use of Extrinsic Evidence

Because extrinsic evidence will generally be admitted by the court, at least provisionally, the proponent of a sympathetic position that is not readily apparent from the face of the will should have a tactical advantage. That party can get the evidence before the court to stir whatever equitable sympathies counsel can generate. Any attempt by the adverse party to keep the evidence from the eyes and ears of the court is likely to be futile. A better tactic would be to stress to the court that the evidence presented is provisional in nature only, must be related to the testator's intent at the time he or she made the will, and cannot be used to upset clear language that leads to a result totally contrary to any reasonable interpretation of the will. As a practical matter, parties relying on the language of the will are often better served by trying to generate extrinsic evidence of their own concerning the testator's intent.

Litigants who rely solely on the language of the will face a second obstacle. Because the hearing may involve days of taking live testimony, cross-examining witnesses, and receiving and analyzing exhibits, most of which time is devoted to seeking to explain the language of the will through extrinsic means, the will itself, and its operative language may get lost in the process.

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§18.32 B. Litigating Entitlement Claim Not Based on Will

The most basic entitlement issue that arises in a non-will context is the issue of who is entitled to distribution if there is no testamentary instrument. That situation, of course, is governed first by the laws of intestate succession. The basic laws of intestate succession are spelled out in Prob C §§6400-6414. Generally speaking, if there is a surviving spouse or registered domestic partner, he or she is entitled to all of the community property and quasi-community property included in the decedent's intestate estate and between one-third and 100 percent of the decedent's separate property, depending on the number and relationship of the other relatives who survive the decedent. Prob C §6401. The various permutations of the basic distribution patterns of intestate succession are set forth in Prob C §§6401-6402.

The rules of intestate succession also often arise in situations in which the decedent left a will but the will does not dispose of the decedent's entire estate, either because there is no residuary clause or because a gift or residuary clause fails. *Estate of Barnes* (1965) 63 C2d 580, 47 CR 480; *Estate of Dillingham* (1971) 15 CA3d 707, 93 CR 351. In addition, other statutory provisions, *e.g.,* the rights of pretermitted heirs (Prob C §§21610-21630) also give rise to application of the rules of intestacy.

The disputes arising in contested claims under the various distribution statutes in the Probate Code often involve questions of marriage, paternity, and genealogy, insofar as the identity of beneficiaries is concerned. Property disputes that arise under the Probate Code distribution statutes generally involve the characterization of the decedent's property as community property or separate property. See §§18.41-18.46.

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Source: Estate Planning/California Trust and Probate Litigation/18 Proceedings to Determine Entitlement to Estate Distribution/§18.33 1. Intestacy Rights of Heirs of Predeceased Spouse or Domestic Partner

§18.33 1. Intestacy Rights of Heirs of Predeceased Spouse or Domestic Partner

Marital relationships or domestic partnerships generally do not create intestate rights beyond the spouse or partner. That is, the children by a prior marriage or domestic partnership of a spouse or partner of a decedent have no intestate rights unless they can establish that they were adopted (see §18.40).

One exception to the exclusion of heirs of spouses or partners as intestate heirs of a decedent is the limited right of inheritance of heirs of predeceased spouses or partners set forth in Prob C §6402.5. If the decedent is not survived by a spouse or issue but had a predeceased spouse or partner, then the heirs of the predeceased spouse or partner may have an intestate interest in the real property of the decedent (if the predeceased spouse or partner died not more than 15 years before the decedent) or the personal property of the decedent (if the predeceased spouse died not more than 5 years before the decedent). The interests of the heirs of the predeceased spouse or partner vary depending on their relationship to the predeceased spouse or partner, the relationship of the surviving heirs of the decedent, if any, to the decedent, the nature of the property in the decedent's estate, and the laws of intestate succession.

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§18.34 2. Intestacy Rights of Omitted Spouse, Domestic Partner, or Child

If a testator fails to provide for his or her surviving spouse or registered domestic partner in a will executed before their marriage or domestic partnership, that spouse or partner may have statutory rights to inherit as an omitted or "pretermitted" spouse or partner if he or she meets the criteria of Prob C §§21610-21612. Likewise, omitted issue have limited rights of inheritance under Prob C §§21620-21623. These rights are usually determined in a Prob C §11700 entitlement proceeding. *Estate of Rawnsley* (1951) 106 CA2d 500, 503, 235 P2d 223.

If a spouse, domestic partner, or child of the decedent meets the statutory requirements, a portion of the decedent's estate will pass to the qualifying heir as determined under the law of intestacy. In the case of an omitted spouse or partner, this includes the decedent's interest in their community property. Thus, the laws of intestacy and community property can become a factor even if all of the assets of the decedent's estate are distributed under the will.

A child omitted from a will who claims intestacy rights under Prob C §§21620-21623 bears the burden of proof on all essential elements of the claim. See *Estate of Della Sala* (1999) 73 CA4th 463, 86 CR2d 569 (child bears burden of proving that father believed child was dead at time father executed will).

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§18.34A 3. Intestacy Rights of Remote Relatives

Under Prob C §6402(d), if there is no surviving spouse, domestic partner, issue, parent, or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, the intestate estate passes to the grandparent or grandparents equally, or to the issue of those grandparents if there is no surviving grandparent, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take in the manner provided in Prob C §240. In *Estate of Beckel* (2009) 174 CA4th 34, 93 CR3d 890, the intestate decedent was survived by no grandparents or children of grandparents, but the branches of descendants of the various grandparents included branches in which the oldest generation having surviving members were the decedent's first cousins, first cousins once removed (children of predeceased first cousins), first cousins twice removed (children of predeceased first cousins once removed), and first cousins thrice removed (children of predeceased first cousins twice removed). The surviving issue in each generation level were entitled to a share calculated by application of Prob C §240, construed in accordance with Prob C §50, at each level.

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4. Proof of Issues

a. Issues Involving Relationship to Decedent or Predeceased Spouse or Domestic Partner

§18.35 (1) Spouse or Domestic Partner

Complicated factual issues sometimes arise in resolving the question of whether an individual takes as a spouse or registered partner (or as an heir of a predeceased spouse or partner under Prob C §6402.5). As a general rule, persons claiming as spouse or partner, or under the spousal rights of others, usually need only prove the validity of the marriage or partnership under the law of the jurisdiction in which the marriage took place. Fam C §308; *Marriage of Smyklo* (1986) 180 CA3d 1095, 226 CR 174.

NOTE: Same-sex marriages validly contracted in another jurisdiction before November 5, 2008 are valid marriages in California. Fam C §308(b). Same-sex couples who contracted a marriage after November 4, 2008 that is valid in another jurisdiction have all the rights, protections, and benefits, and are subject to the same responsibilities, obligations, and duties as spouses except the designation of "marriage." Fam C §308(c).

If the claimant was not married to the decedent, the claimant generally has no testamentary rights as a spouse but may make a claim against the decedent's estate based on a quasi-contractual agreement that might have arisen during their relationship. *Marvin v Marvin* (1976) 18 C3d 660, 134 CR 815.

Issues concerning bigamists generally arise in the context of whether the second "spouse" is a "putative" spouse with inheritance rights. See §§18.36-18.37. However, for a case in which a bigamist lost his inheritance rights as to his deceased first spouse by application of principles of estoppel, see *Estate of Anderson* (1997) 60 CA4th 436, 70 CR2d 266.

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(2) Putative Spouse

§18.36 (a) Extent of Rights

If the survivor of the relationship believed that he or she was married to the decedent, under certain limited circumstances, the survivor can claim rights under the decedent's estate as a "putative" spouse. *Estate of Leslie* (1984) 37 C3d 186, 197, 207 CR 561. The rights of a putative spouse extend to the spousal interest in the decedent's community property (*Estate of Krone* (1948) 83 CA2d 766, 189 P2d 741), the spousal interest in decedent's separate property (*Estate of Leslie, supra*), and the spousal interest as a pretermitted heir (*Estate of Sax* (1989) 214 CA3d 1300, 263 CR 190). This property is considered "quasi-marital" property and is treated like community property in an estate proceeding. *Estate of Leslie*, *supra*. Proceedings under Prob C §11700 have even been used to determine the respective rights of the legal spouse and the putative spouse of a bigamist, holding that the legal spouse and the putative spouse should each succeed to one half of the decedent's estate. *Estate of Hafner* (1986) 184 CA3d 1371, 229 CR 676.

By extension, these quasi-marital-property principles may also apply to "putative domestic partners" under the broad terms of Fam C §297.5. *Ellis v Arriaga* (2008) 162 CA4th 1000, 1009, 76 CR3d 401. In *Ellis*, the court disapproved *Velez v Smith* (2006) 142 CA4th 1154, 48 CR3d 642, to the extent it is inconsistent with the *Ellis* holding. *Velez* involved domestic partners who registered with a local government but not with the Secretary of State; the court rejected the premise that domestic partners are eligible to claim a putative domestic partner status. 142 CA4th at 1173. *Ellis* limits the *Velez* holding to its specific factual circumstances. See California Domestic Partnerships, chap 7 (Cal CEB 2005).

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§18.37 (b) Issues of Proof

The status of a putative spouse does not arise merely from cohabitation. It generally requires an invalid or defective marriage. To qualify as a putative spouse, the claimant must show that he or she believed in good faith that the marriage was valid under California law and the belief must be objectively reasonable. *Marriage of Vryonis* (1988) 202 CA3d 712, 248 CR 807; *Centinela Hosp. Med. Ctr. v Superior Court* (Willis) (1989) 215 CA3d 971, 975, 263 CR 672. These questions are questions of fact that must be determined in light of the circumstances present at the time the claimant believed he or she was "married."

Any determination of whether a claimant's belief was in good faith and objectively reasonable potentially requires an evidentiary hearing. Thus, counsel for parties to a dispute over whether a surviving partner was a "putative spouse" should take care to develop all of the facts surrounding the survivor's reasons for believing or disbelieving that he or she was validly married, including the cultural background and education of the claimant, the circumstances of the ceremony that supposedly "solemnized" the marriage, and any differences in the relationship of the parties before and after the ceremony.

Examples of fact situations that have been subjects of litigation and the outcomes in those cases follow:

- A "widow" of a bigamist who led a double life for 24 years before dying in a car accident was determined to be the putative spouse. *Estate of Vargas* (1974) 36 CA3d 714, 111 CR 779.
- A trial court found that a woman's reasonable and good faith belief that her Mexican marriage was valid was sufficient to make her a putative spouse even though no records existed of the marriage, the man's divorce was not yet final, and the woman had married another man three weeks earlier in Orange County but claimed the marriage had been annulled, although she could not identify any Orange County records to support the supposed annulment. *Estate of Goldberg* (1962) 203 CA2d 402, 21 CR 626.
- A woman who claimed to have been married in a private ceremony in her apartment under tenets of her Moslem sect, but failed to cohabit, inform the family of her "marriage," or commingle assets, could not be considered a putative spouse. *Marriage of Vryonis* (1988) 202 CA3d 712, 248 CR 807.

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§18.38 (3) Effect of Annulment, Dissolution, Separation, or Termination of Domestic Partnership

The annulment or dissolution of a marriage revokes the rights of a spouse as a beneficiary of the divorced decedent's estate. Not only are the surviving former spouse's intestate rights cut off (see Prob C §78(a)), but provisions in the deceased divorced spouse's will, executed before the dissolution or annulment, that name the surviving former spouse as a beneficiary are revoked by operation of Prob C §6122 unless the will expressly provides otherwise. *Estate of Coleman* (2005) 129 CA4th 380, 28 CR3d 282. See *Estate of Jones* (2004) 122 CA4th 326, 18 CR3d 637 (Prob C §6122 does not address effect of dissolution of marriage on bequests to children of former spouse; normally, testator intends to exclude children of ex-spouse after dissolution unless contrary intention is indicated elsewhere in will or by extrinsic evidence (*e.g.,* a continued relationship between testator and ex-spouse's child after dissolution)). Termination of a domestic partnership similarly cuts off the rights of the former registered domestic partner, both intestate (see Prob C §37(a)) and under the deceased former domestic partner's will (Prob C §6122.1).

Survivorship rights can also be waived by agreement if the agreement complies with Prob C §§140-147. The termination of spousal or partnership rights in a property settlement agreement, when incorporated in a judgment of dissolution or termination, is exempt from §§140-147, even if the marital termination date was continued indefinitely. *Estate of Gibson* (1990) 219 CA3d 1486, 269 CR 48.

A spouse or partner who obtains a judgment of legal separation is not a surviving spouse or partner for intestate succession purposes under Prob C §6401. *Estate of Lahey* (1999) 76 CA4th 1056, 91 CR2d 30. A "surviving spouse" does not include a party to a proceeding concluded by an order purporting to terminate all marital property rights. Prob C §78(d). In *Lahey* the spouse's petition for legal separation stated that there was no community property to divide. The subsequent judgment of separation stating that there was no community property was an order that purported to terminate all marital property rights, and thus terminated the spouse's inheritance rights as well. *Estate of Lahey* (1999) 76 CA4th 1056, 91 CR2d 30.

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Source: Estate Planning/California Trust and Probate Litigation/18 Proceedings to Determine Entitlement to Estate Distribution/§18.39 (4) Child

§18.39 (4) Child

Parentage may be an issue in entitlement proceedings. Initially, it makes no difference whether a child was born in or out of wedlock. For purposes of intestate succession, the relationship of parent and child exists between a person and that person's natural parents, regardless of the marital status of the natural parents. Prob C §6450(a). As to establishing parentage, Prob C §6453 governs. This section in turn refers to the Uniform Parentage Act codified in Fam C §§7600-7730. With limited exceptions, these provisions form the basis for establishing parentage for purposes of intestate succession.

Presumably, maternity is relatively easy to establish, although with advances in science that allow the implantation of an embryo of one woman in a womb of another, an heirship proceeding that turns on maternity may not be not far off. See, *e.g., Johnson v Calvert* (1993) 5 C4th 84, 19 CR2d 494 (determining maternity for purposes of parental rights; held that genetic parents were natural parents of child carried by surrogate). In the context of determining maternity for purposes of parental rights, courts have held that the presumption of Fam C §7611(d) (*i.e.,* man is presumed to be the father if he receives child into his home and openly holds out child as his natural child) applies to same-sex partners. See *Elisa B. v Superior Court* (2005) 37 C4th 108, 33 CR3d 46 (same-sex partner who encouraged partner to give birth via artificial insemination and then held out child as her own is parent under Uniform Parentage Act and can establish presumption of paternity by proving she received child into her home and held out child as her own). See also *K.M. v E.G.* (2005) 37 C4th 130, 33 CR3d 61 (egg donor same-sex partner was parent because of genetic consanguinity and thus responsible for support and entitled to custody and visitation of female partner's children after separation; Fam C §7613(b) did not apply to exclude egg donor as parent because egg was to be used to impregnate lesbian partner with understanding that resulting children would be raised in their joint home; court did not address Fam C §7611(d) (presumption); *Kristine H. v Lisa R.* (2005) 37 C4th 156, 33 CR3d 81 (child can have two parents both of whom are women); *Charisma R. v Kristina S.* (2009) 175 CA4th 361, 96 CR3d 26 (evidence sufficient to support finding of parentage in context of same-sex couple).

Paternity is still the more common issue. Under Prob C §6453(a), paternity is established when it is presumed under Fam C §7611 and not rebutted under Fam C §7612. This presumption applies if:

- A man is married to the mother of the child when the child is born or the child is born within 300 days of the termination of the marriage (Fam C §7611(a));
- The man and woman have attempted to marry before the child's birth or the child is born within 300 days of the termination of the attempted marriage (Fam C §7611(b)); see *Lisa I. v Superior Court* (2005) 133 CA4th 605, 34 CR3d 927 (woman's ex-husband was presumed father of child born within 300 days of termination of marriage under Fam C §7611(a) and alleged biological father who had no existing personal relationship with child lacked standing to bring paternity action));
- The man and woman have married or attempted to marry after the child's birth and the man either agrees to be named on the child's birth certificate or is obligated to support the child under a written voluntary promise or a court support order (Fam C §7611(c));
- The man receives the child into his home and openly holds out the child as his natural child (Fam C §7611(d); see *Elisa B. v Superior Court* (2005) 37 C4th 108, 33 CR3d 46, for gender-neutral application of §7611(d)); or
- The child is in utero after the decedent's death and the conditions of Prob C §249.5 are satisfied (Fam C §7611(f)).

Paternity can be proven in the absence of the presumption of paternity, but only if a court order was entered during the father's lifetime declaring that paternity or paternity is established by clear and convincing evidence that the father has openly held out the child as his own. Prob C §6453(b); *Estate of Chambers* (2009) 175 CA4th 891, 96 CR3d 651.

In the case of posthumous conception, a natural parent and child relationship may be established under Prob C §249.5. Prob C §6453(c). Effective January 1, 2005, the decedent's heirs may include posthumously conceived children who are in utero within 2 years of the issuance of the decedent's death certificate (or entry of judgment determining the

fact of decedent's death, whichever occurs first) if the decedent expressly authorized the posthumous conception of a child in a signed and dated writing. See *Vernoff v Astrue* (9th Cir 2009) 568 F3d 1102 (decedent had not consented in writing; therefore, intestacy rights not established). If the decedent's personal representative receives notice or has actual knowledge within 4 months after issuance of the decedent's death certificate (or the earlier entry of judgment determining the fact of decedent's death) that the decedent's genetic material is available for purposes of posthumous conception, the personal representative may not make a distribution until 2 years after the decedent's death, unless (Fam C §7611(f); Prob C §§249.5-249.8, effective January 1, 2005):

- The personal representative has received written notice that the person designated by the decedent does not intend to use the material for the posthumous conception of a child of the decedent; or
- The birth of a child of the decedent conceived after death will have no effect on the proposed distribution.

The restrictions of Prob C §6453 make it most unlikely that DNA testing can be used in establishing paternity. In *Estate of Sanders* (1992) 2 CA4th 462, 3 CR2d 536, the court refused to permit DNA testing of the claimant and her mother and the acknowledged children of the decedent and their mothers, which together might prove that the claimant was the child of the decedent. As paternity had not been established by court order and the decedent had not openly held out the claimant as his own child, DNA testing could not provide sufficient evidence of paternity, no matter how convincing it might be. 2 CA4th at 475.

The natural parent or a relative of that parent does not inherit from or through a child born out of wedlock unless that parent or a relative of the parent both acknowledged and contributed to the care or support of that child. Prob C §6452. Whether the child has been acknowledged is decided on the circumstances of each case. *Estate of Griswold* (2001) 25 C4th 904, 108 CR2d 165 (although no contact between decedent and father, because father admitted paternity in legal proceeding and contributed to child's support, decedent's half siblings entitled to inherit under Prob C §6452). See also *Estate of Shellenbarger* (2008) 169 CA4th 894, 86 CR3d 862 (failure to pay child support and lack of meaningful parent-child relationship did not cut off natural father's right to inherit from son's intestate estate, when son had been conceived during marriage and father had effectively acknowledged paternity in out-of-state divorce decree that awarded child support against father).

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Source: Estate Planning/California Trust and Probate Litigation/18 Proceedings to Determine Entitlement to Estate Distribution/§18.40 (5) Adoptee

§18.40 (5) Adoptee

Adoptees can take through intestate succession in the same manner as naturally born children. Prob C §6450(b). Adoption severs the natural parent-child relationship unless both of the following conditions are met: (1) The natural parent and the adopted person lived together at any time as parent and child, and (2) the adoption was by the spouse of either of the natural parents or after the death of either of the natural parents. Prob C §6451(a). If the requirements of Prob C §6451(a) are met, adoptees may also inherit through their natural parents as well as their adoptive parents. This is true even when the adoptee inherits by reason of a lapse of the natural parent's devise to a predeceased spouse. *Estate of Dye* (2001) 92 CA4th 966, 112 CR2d 362.

Persons raised by foster parents or stepparents can take through intestate succession only if the relationship began during the person's minority and continued through the joint lives of the person and the foster parent or stepparent *and* it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person except for a legal barrier (such as the refusal of the natural parent to consent). Prob C §6454. The legal barrier to adoption must exist throughout the lives of both the foster stepparent and foster stepchild, even through the child's adulthood. *Estate of Joseph* (1998) 17 C4th 203, 70 CR2d 619.

The courts have also recognized the concept of "equitable" adoptions in Prob C §11700 proceedings. Prob C §6455. A so-called equitable adoption is a legal fiction that allows the specific performance of a contract to adopt. See *Estate of Stewart* (1981) 122 CA3d 625, 627, 176 CR 142. To prove equitable adoption, the claimant must show by clear and convincing evidence the direct expression of an intent to adopt, together with conduct indicating mutual recognition of an adoptive parent-and-child relationship. *Estate of Ford* (2004) 32 C4th 160, 171, 173, 8 CR3d 541. Establishing equitable adoption under Prob C §6455 would allow a child to inherit without showing the legal barrier required under Prob C §6454, but it would allow the child to inherit only from, not through, that parent. *Estate of Furia* (2002) 103 CA4th 1, 126 CR2d 384 (equitably adopted grandchild had no right to inherit property of grandparent).

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§18.41 b. Issues Involving Characterization of Property at Issue

In addition to disputes about the relationship of individuals to the decedent, the assertion of statutory rights of inheritance often raises disputes about the characterization of property as community property or separate property. The effect of such a characterization has a marked impact, not only on the claims of spouses and putative spouses or domestic partners but on people claiming by or through spouses or partners, against spouses or partners, or against the heirs of spouses or partners. In a substantial estate, the determination of whether a real estate or business asset is community or separate property (or whether it is comprised of both and, if so, in what percentages) can give rise to dramatic swings in the value of the assets to be distributed to the claimants. Now, with the ever-increasing accumulation of wealth in various forms of retirement funds, often built up over many years and several marriages, the characterization of those funds may be the most important determination in an estate proceeding.

Proceedings under Prob C §11700 are not the only procedural mechanism for raising characterization issues. Often such claims arise under proceedings to determine title to property claimed by the estate under Prob C §§850-859. See, *e.g., Estate of Gallio* (1995) 33 CA4th 592, 39 CR2d 470; *Estate of Petersen* (1994) 28 CA4th 1742, 34 CR2d 449. However, characterization questions also arise in entitlement proceedings. See generally *Estate of Russ* (1965) 231 CA2d 917, 919, 42 CR 471; *Estate of Neilson* (1962) 57 C2d 733, 22 CR 1.

In resolving disputes over the characterization of property, the probate court will look to the Family Code—in particular, Fam C §§760-853, the provisions that govern characterization of marital property. A detailed presentation of this subject is beyond the scope of this book. See Practice Under the California Family Code: Dissolution, Legal Separation, Nullity, chap 5 (Cal CEB Annual) for a more complete description of the Family Code rules governing characterization and the substantial case law that has developed around marital property disputes. Sections 18.42-18.46 present a brief overview of the issues that may confront the probate litigator.

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§18.42 (1) General Characterization Rules

There are two separate sources that form the basis for characterization of property as community or separate. The first is found in the Family Code and specifies the nature of separate and community property. Separate property is defined in Fam C §770 as (1) all property owned by the person before marriage; (2) all property acquired by the person after marriage by gift, bequest, devise, or descent; and (3) the rents, issues, and profits of separate property. Community property is defined in Fam C §760 as all other property acquired during marriage. This presumption is rebuttable by a preponderance of the evidence. *Estate of Casella* (1967) 256 CA2d 312, 325, 64 CR 259.

The second, and sometimes competing basis for characterizing particular property as community or separate is the presumption of record title—that the owner of legal title to property is presumed to be the owner of full beneficial title. This presumption is codified in Evid C §662 and, according to the Code, can be overcome only by clear and convincing evidence. See also *Marriage of Brooks & Robinson* (2008) 169 CA4th 176, 86 CR3d 624. When, however, this presumption conflicts with the presumption of undue influence arising under Fam C §721 (spouses owe each other fiduciary duty in interspousal transactions), the presumption of undue influence will prevail. *Marriage of Delaney* (2003) 111 CA4th 991, 4 CR3d 378.

PRACTICE TIP: Do not assume that presumptions used to characterize property in dissolution and separation proceedings also apply in the testamentary context. Although the general characterization rules discussed above apply in both instances, the same is not true of all presumptions. For example, the presumption that property acquired in joint form during marriage is community property applies in dissolution and separation proceedings, but not when one spouse dies. Fam C §2581; *Dorn v Solomon* (1997) 57 CA4th 650, 67 CR2d 311.

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§18.43 (2) Tracing

The presumptions of Fam C §760 and Evid C §662, discussed in §18.42, are both rebuttable. One common method of rebutting the general presumption of Fam C §760 that property acquired during marriage is community property is by tracing the source of the funds used to purchase the property. Tracing, however, can only rebut the general presumption of §760; it cannot be used, standing alone, to rebut the presumption of legal title set forth in Evid C §662. *Marriage of Lucas* (1980) 27 C3d 808, 814, 166 CR 853, superseded by statute on other grounds in 87 CA4th at 1061; *Marriage of Brooks & Robinson* (2008) 169 CA4th 176, 86 CR3d 624. It is, however, a recognized form of determining separate and community property interests in Prob C §11700 proceedings. *Estate of Murphy* (1976) 15 C3d 907, 917, 126 CR 820, superseded by statute on other grounds in *Estate of Scott* (1987) 197 CA3d 913, 919, 243 CR 93.

Tracing is not always a simple exercise. If the property was purchased many years ago, or if periodic payments were made, tracing may require an extensive factual inquiry, entailing significant discovery and perhaps some form of forensic accounting. Before such an effort is made, counsel should consider whether the benefits (tracing may limit a spousal claim to half of the property in question instead of the entire property) outweigh the costs. Given the fact that tracing is of limited value in challenging legal title (which covers most, though not all, property of value), and the legal principle that, if the source of acquisition of property acquired during marriage is not traceable, the property retains its community characterization (*Marriage of Mix* (1975) 14 C3d 604, 611, 122 CR 79), litigation of complicated tracing cases should be the exception rather than the rule.

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§18.44 (3) Rents, Issues, and Profits—*Pereira/Van Camp*

Another issue that may call for (and actually justify, cost-effectively) forensic accounting arises from Fam C §770's characterization of the rents, issues, and profits of separate property as separate property. In determining the characterization of closely held, highly appreciated businesses that were acquired by one spouse before the marriage (a separate property contribution) and to which one or both spouses devoted labor during the marriage (essentially a community contribution), the question arises as to how to apportion between the separate property capital investment and the community property labor. There are two competing methods of analyzing such a problem, depending on whether the separate property capital contribution or the community labor was the primary source of the appreciation. This is commonly known as a *Pereira/Van Camp* issue, after the two seminal cases in this area.

Pereira v Pereira (1909) 156 C 1, 103 P 488, employed an allocation method that calculated a fair rate of return to the person who contributed the separate property to the venture, considered that to be the "rents, issues, and profits" attributable to the separate property, and characterized the remaining appreciation as derived from the community labor contribution. *Van Camp v Van Camp* (1921) 53 CA 17, 199 P 885, took a different approach. It determined the reasonable value of the community services, subtracted the amount that had already been paid to the spouse supplying those services during the marriage, considered the difference as the remaining community interest in the venture, and allocated the rest to the separate property contribution.

These approaches can lead to dramatically different results when the business venture has appreciated rapidly, particularly when that growth has occurred over a relatively short period of time. Generally speaking, *Pereira* is employed when the community effort is the prime factor in causing the appreciation (*e.g.,* a computer software company or a personal services business), while *Van Camp* is more suitable to a venture based on the capital contribution (*e.g.,* passive management of a real estate portfolio). *Marriage of Dekker* (1993) 17 CA4th 842, 853, 21 CR2d 642.

Both approaches are recognized by the probate courts. *Estate of Neilson* (1962) 57 C2d 733, 740, 22 CR 1; *Estate of Nerenson* (1987) 194 CA3d 865, 876, 239 CR 865. The court is not limited to one or the other of the methods of apportionment; it "may select whatever formula will achieve substantial justice between the parties." 194 CA3d at 876.

As a result of the lack of boundaries in analyzing a dispute over the allocation of appreciation of a business venture between community and separate property, both sides may be required to employ forensic accountants who may need to review years of business records and prepare analyses under both *Pereira* and *Van Camp*. Although this expense may be justified when valuing a highly appreciated business asset, the result is likely only to set boundaries for settlement—there is no assurance where within the ranges set forth by the attorneys and accountants a court will ultimately fix the apportionment.

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Source: Estate Planning/California Trust and Probate Litigation/18 Proceedings to Determine Entitlement to Estate Distribution/§18.45 (4) Transmutation

§18.45 (4) Transmutation

Determining the characterization of assets in a probate estate as community or separate property does not necessarily end the inquiry. Spouses can transfer or transmute community property assets to separate property or separate property assets to community. Their ability to do so, at least for transmutations made after January 1, 1985, is governed and limited by the transmutation statutes of Fam C §§850-853. Simply put, for a transmutation after January 1, 1985 to be effective, it must be by express written declaration that is made or agreed to by the person whose interests are being adversely affected. For a fuller discussion see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity, chap 5 (Cal CEB Annual).

Much of the litigation in this area concerns what type of language constitutes an express written declaration. In *Estate of MacDonald* (1990) 51 C3d 262, 272 CR 153, the supreme court held that a wife's written consent to a beneficiary designation of her husband's pension funds and IRA funds was *not* sufficient to qualify as an express written declaration needed to effectuate a transmutation of community property to separate property under Fam C §852. Although the terms "transmutation," "community property," or "separate property" were not necessarily required, some language that expressly stated that the wife "was effecting a change in the character or ownership of her interest" was required. 51 C3d at 273. See also *Estate of Bibb* (2001) 87 CA4th 461, 104 CR2d 415 (deed signed by decedent conveying his separate real property to both spouses as joint tenants satisfies "express declaration" requirement of Fam C §852, but unsigned DMV printout showing change of automobile title from husband to "husband or wife" does not); *Marriage of Barneson* (1999) 69 CA4th 583, 81 CR2d 726 (written request to "transfer" separate property security from one spouse to other does not satisfy "express declaration" requirement).

Several cases have dealt with what constitutes an express written declaration specifically in the context of transfers to a revocable trust. See *Marriage of Lund* (2009) 174 CA4th 40, 94 CR3d 84 (revocable trust language that recited that husband's separate property was "hereby converted to community property" with spouse, "each having a present existing and equal interest," was not rendered ambiguous by additional language in trust disclaiming present transfer and referring to estate planning purposes, and was sufficient to cause transmutation); *Marriage of Holtemann* (2008) 166 CA4th 1166, 83 CR3d 385 (spouses' written agreement expressly stating that husband was "transmuting" his separate property to community property was not rendered ambiguous by language in agreement or revocable trust that they were executed solely for estate planning purposes; Fam C §853, providing that statement in will regarding character of property is not admissible to show transmutation in a proceeding commenced before the testator's death, does not govern revocable trusts); *Marriage of Starkman* (2005) 129 CA4th 659, 28 CR3d 639 (husband's transfer of separate property to family revocable trust did not transmute separate property to community property, even though trust contained a paragraph providing that property transferred to trust was community property unless identified as separate property, and husband did not identify his transfers as separate property; purpose of trust was estate planning, not property transmutation, and trust contained no express transmutation language); *Cecconi v Cecconi* (Bankr ND Cal 2007) 366 BR 83 (wife's transfer of separate property to revocable trust not transmutation, even though trust stated that all assets listed on attached schedule were community property, because recital did not expressly state that wife was effecting change in character or ownership of her interest in property).

Whatever the language employed, it must be "express" and "written." If not, it cannot be clarified by evidence outside the document itself. Thus, according to *Estate of MacDonald,* extrinsic evidence is *inadmissible* to prove the express written declaration needed to prove a transmutation after January 1, 1985. 51 C3d at 273. See *Marriage of Campbell* (1999) 74 CA4th 1058, 88 CR2d 580 (doctrine of equitable estoppel cannot be used to circumvent Fam C §852 and make extrinsic evidence admissible). Furthermore, a party cannot satisfy the writing requirement of Fam C §852 with the part-performance exception that may apply under the more general statute of frauds. *Marriage of Benson* (2005) 36 C4th 1096, 32 CR3d 471.

In response to the type of problem raised by *Estate of MacDonald*, the legislature enacted Prob C §§5010-5032, governing nonprobate transfers of community property. These provisions were tested in *Estate of Petersen* (1994) 28 CA4th 1742, 34 CR2d 449. That case reaffirmed that there must be an "express written declaration" to transmute

property under Fam C §852, and found that the establishment of a joint tenancy account by a husband and wife was insufficient to constitute a transmutation of the community property that funded the account. However, it held that the execution of the joint tenancy documents constituted a valid nonprobate transfer under Prob C §§5010-5032 that became effective on the death of the first spouse. *Estate of Petersen* (1994) 28 CA4th 1742, 1754, 34 CR2d 449.

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§18.46 (5) Effect of ERISA on Community Property Determinations

All of the foregoing issues concerning the characterization of assets as community or separate property must be viewed in light of the federal preemption of Employee Retirement Income Security Act of 1974 (ERISA) (Pub L 93-406, 88 Stat 829) (29 USC §§1001-1461) benefits as set forth in *Boggs v Boggs* (1997) 520 US 833, 138 L Ed 2d 45, 117 S Ct 1754. *Boggs* held that ERISA preempts California's community property law to the extent that California law allows a spouse who does not participate in funding the ERISA retirement plan of the other spouse to transfer by testamentary devise any interest in the pension plan benefits that have not been distributed at the time of the nonparticipating spouse's death. Even though California creates a community property interest in the accumulation of those retirement benefits, federal law provides that the nonparticipant spouse's interest in the ERISA-regulated funds terminates if that spouse dies first.

This rule applies to undistributed qualified pension and profit-sharing plan benefits, IRC §401(k) plan benefits, and plans under IRC §403. It is *not* clear whether it will also apply to distributed benefits, or to undistributed IRA accounts or SEP-IRA accounts, which are not covered by ERISA, but for which the logic of the majority opinion in *Boggs v Boggs* might apply. The rule announced in *Boggs v Boggs* may have a significant effect on determining entitlement to probate assets as funds build up in pension and retirement accounts.

See also *In re Lowenschuss* (9th Cir 1999) 170 F3d 923 (no ERISA preemption when pension plan is not ERISA-qualified). See generally §5.37.

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VII. ORDER DETERMINING ENTITLEMENT

§18.47 A. Order

The culmination of a petition to determine entitlement to estate distribution is an order by the court "that determines the persons entitled to distribution of the decedent's estate and specifies their shares." Prob C §11705(a). Such an order is akin to a judgment. Because the rules of civil procedure govern (see Prob C §1000), any party who participates has a right to request a statement of decision under CCP §632. See also Cal Rules of Ct 3.1590. Particularly if extrinsic evidence plays a role in the court's decision, the losing party should request a statement of decision for appellate purposes unless overriding strategic reasons dictate to the contrary.

PRACTICE TIP: If the court issues a tentative decision and requests proposed statements of decision, the prevailing party should carefully consider proposing modifications to the tentative decision to respond to points raised by the losing party. In particular, if the losing party raises fact issues not addressed in the court's tentative decision, the prevailing party should propose findings of fact in critical areas, lest the matters go unmentioned and the prevailing party lose a critical advantage on appeal. This may involve a sensitive balancing act, as one does not want to alienate a judge who has just issued a favorable decision. If the prevailing party does not overreach, however, most judges welcome additional reasonable factual findings that support their decision.

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Source: Estate Planning/California Trust and Probate Litigation/18 Proceedings to Determine Entitlement to Estate Distribution/§18.48 B. Form: Order Determining Entitlement to Estate Distribution

§18.48 B. Form: Order Determining Entitlement to Estate Distribution

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[*Title of court*]

Estate of _ _[*name*]_ _,	)	**No. _ _ _ _ _ _**
Deceased	)	
	)	**ORDER DETERMINING**
	)	**ENTITLEMENT TO ESTATE**
_____	)	**DISTRIBUTION**

1. The petition of _ _[*name of petitioner*]_ _ for determination of entitlement to distribution of the estate of the above-named decedent, which is in progress of settlement before this court, together with the statement(s) of interest of _ _[*name(s) of claimant(s)*]_ _, came on regularly for hearing on _ _[*date*]_ _ at _ _[*time*]_ _ in Department _ _[*number/letter*]_ _.

2. The court finds from proof made to the satisfaction of the court that all notices of the time and place of hearing were given as required by law.

3. Evidence having been introduced and the matter having been submitted to the court for decision, the court finds: _ _[*State court's findings*]_ _.

4. WHEREFORE, it is ordered and adjudged:

The above-named decedent died _ _[*testate/intestate*]_ _ on _ _[*date*]_ _, leaving surviving as _ _[*his/her*]_ _ only heirs the persons whose name and relationships to the decedent are as follows: _ _[*State name(s) and relationship(s)*]_ _. The estate is now vested in these heirs, subject to administration, in the following proportions: _ _[*State name and shares of estate*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Judge/Commissioner*]_ _/_ _[*title of court*]_ _

Copies: Original for filing; office copies; additional copies as required, *e.g.,* for persons filing statement of interest; office copies.

Comment: For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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§18.49 VIII. ATTORNEY FEES AND COSTS

An award of costs in Prob C §11700 proceedings is generally discretionary, not mandatory. Prob C §1002. Costs are generally awarded to the prevailing party (*Lindy v McChesney* (1903) 141 C 351, 74 P 1034), but payment can be awarded from "any party to the proceedings, or out of the assets of the estate, as justice may require." Prob C §1002. If a party fails to request an award of costs and an order determining entitlement is entered, then the court lacks jurisdiction to award costs after a notice of appeal is filed. *Estate of McCormack* (1969) 2 CA3d 492, 499, 82 CR 651. It is not clear that this general rule applies to awards of costs mandated by other specific statutory provisions, particularly if those costs awards are dependent on the form of final order entered (for instance, a cost award based on CCP §998).

There is no statutory right of a prevailing party to an award of attorney fees against the losing party on a Prob C §11700 petition. However, in an analogous setting—a proceeding to construe a trust instrument under Prob C §17200(b)(1)—the court of appeal has ruled that it was within the probate court's discretion to award payment of the prevailing party's attorney fees from the trust. *Wells Fargo Bank v Marshall* (1993) 20 CA4th 447, 458, 24 CR2d 507. The same reasoning may well apply to awards of attorney fees to prevailing parties in entitlement proceedings from the assets of the estate.

Although a personal representative may be able to recover the fees paid to his or her attorney for participating in the Prob C §11700 proceeding as an extraordinary expense of the estate (*Estate of Harvey* (1951) 103 CA2d 192, 229 P2d 68), the ability to obtain reimbursement for substantial fees may be constrained by the limited role usually accorded to the personal representative in entitlement proceedings. See §18.6.

There is no general right to interest on an award under Prob C §11700. *Estate of Neilson* (1962) 57 C2d 733, 748, 22 CR 1.

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§18.50 IX. EFFECT OF ORDER

If proper notice is given, the court's order determining what assets of an estate should pass to whom are binding on the entire world. Unlike a general civil action, in which only the rights of the parties properly before the court are determined, probate jurisdiction, including the jurisdiction over heirship proceedings, is in rem. *Estate of Wise* (1949) 34 C2d 376, 383, 210 P2d 497; *Estate of Fincher* (1981) 119 CA3d 343, 348, 174 CR 18. An order that becomes final binds and is conclusive as to the rights of all interested persons (Prob C §11705(b)), whether or not they filed a written statement (Prob C §11702(b)(3)). It also is binding on all interested persons whether or not they appeared. *Estate of Wise* (1949) 34 C2d 376, 383, 210 P2d 497; *Estate of Radovich* (1957) 48 C2d 116, 122, 308 P2d 14.

The order is binding in any subsequent proceeding for distribution. See, *e.g., Estate of Roberts* (1945) 27 C2d 70, 162 P2d 461, superseded by statute on other grounds as stated in *Estate of Heller* (1992) 7 CA4th 862, 9 CR2d 274; *Estate of Anderson* (1958) 166 CA2d 39, 332 P2d 785.

NOTE: Counsel should be aware that the Internal Revenue Service contends that it is not bound by an order rendered in Prob C §11700 proceedings, even though the order establishes the portion of the estate that is community property or the values in connection with assets in an estate. See *Commissioner v Estate of Bosch* (1967) 387 US 456, 18 L Ed 2d 886, 87 S Ct 1776.

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X. CHALLENGING ORDER

§18.51 A. Appeal

Although there is no right to seek a new trial after an adverse determination on an entitlement petition (Prob C §7220), there is an express right of appeal from an order determining entitlement to estate distribution (Prob C §1303(f)). The filing of a notice of appeal ordinarily stays the operation and effect of an order determining entitlement. Prob C §1310(a).

A person who has received notice but has failed to file a written statement of interest may lack standing to appeal under Prob C §11702(b)(2), which provides that a person who fails to file a written statement of interest "may not participate further in the proceeding," and §11702(b)(3), under which that person remains "bound by the decision in the proceeding." However, some cases decided before the passage of the current statute preserved the right to appeal despite the failure to file a statement of interest. *Estate of Barber* (1957) 49 C2d 112, 315 P2d 317.

The personal representative, in his or her representative capacity, has no standing to appeal from a judgment determining interest in an estate. *Estate of Babb* (1927) 200 C 252, 252 P 1039; *Estate of Smith* (1966) 241 CA2d 205, 50 CR 374 (ex-wife appealed judgment determining heirship individually and as administratrix of estate; court dismissed appeal as administratrix). In such capacity, the personal representative has no interest or claim to the estate. *Estate of Conklin* (1956) 139 CA2d 532, 293 P2d 794.

If the appeal is from an interpretation of a will or testamentary trust, the appellate court will independently review the decision. *Estate of Dodge* (1971) 6 C3d 311, 318, 98 CR 801; *Newman v Wells Fargo Bank* (1996) 14 C4th 126, 134, 59 CR2d 2. Thus, it would seem that the parties will have to relitigate the interpretation question de novo in the appellate court. There is, however, a fundamental exception to this rule. If the interpretation question turns on the credibility of extrinsic evidence or requires resolution of a conflict in that evidence, the appellate court will defer to the trial court's factual determination concerning those issues if the record contains "substantial evidence in support of it." *Estate of Dodge, supra*. For discussion of the substantial evidence rule, see §23.34.

PRACTICE TIP: As discussed in §18.47, a statement of decision that articulates the trial court's conclusions on the factual issues raised in the proceeding can go far to limit the scope of appellate review. Even if the appellate court can independently interpret "my close friend Henry" in more than one way, it becomes rather difficult for the appellate court to rule in favor of "Henry A" if the trial court has made a factual finding that "the decedent despised Henry A and felt that he owed his life to Henry B."

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§18.52 B. Relief Based on Mistake, Inadvertence, Surprise, or Excusable Neglect

If a known heir or devisee is not given proper notice and is unaware of the proceeding, that person has a claim that the proceeding is not binding on him or her. If a long lost unknown heir surfaces within 6 months of the entry of the entitlement order, relief may be available under CCP §473(b), which allows orders to be set aside in certain cases of "mistake, inadvertence, surprise, or excusable neglect." Section 473(b) has been applied to orders of distribution in probate proceedings. *Edlund v Superior Court* (1930) 209 C 690, 289 P 841. Its application to any particular situation, however, is inherently fact-dependent. One restriction is absolute: A motion under CCP §473(b) must be made within 6 months "after the judgment, dismissal, order, or proceeding was taken." But see *Estate of Beard* (1999) 71 CA4th 753, 775, 84 CR2d 276, in which the court of appeal affirmed the trial court's rescission of orders over a year old on the basis of "extrinsic mistake" without citation of CCP §473(b), as well as on the basis of extrinsic fraud (see §18.53).

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§18.53 C. Relief Based on Extrinsic Fraud

A person claiming entitlement to distribution may seek to have the order set aside based on "extrinsic fraud" even if more than 6 months have passed since the entry of the entitlement order. See *Chiarodit v Chiarodit* (1933) 218 C 147, 152, 21 P2d 562 (court has inherent power to set aside judgment regardless of time limit of CCP §473). The most common basis of a claim of extrinsic fraud—intentional withholding of notice—has been applied to probate proceedings. *Estate of Carter* (2003) 111 CA4th 1139, 1155, 4 CR3d 490 (order of final distribution set aside for extrinsic fraud when personal representative failed to give statutory notice of initial petition to administer estate because he concluded unilaterally that claimants born out of wedlock were not decedent's heirs); *Estate of McGuigan* (2000) 83 CA4th 639, 99 CR2d 887 (distant heir's deliberate concealment of more deserving claimant qualified as extrinsic fraud in proceeding to claim escheated property); *Zaremba v Woods* (1936) 17 CA2d 309, 318, 61 P2d 976 (extrinsic fraud consisted in deception practiced by successful party in keeping opponent in ignorance of proceeding). See *Estate of Sanders* (1985) 40 C3d 607, 221 CR 432.

The doctrine of extrinsic fraud has been applied expansively to reopen a final order of distribution in *Estate of Carter, supra,* and a final order of entitlement in *State v Broderson* (1967) 247 CA2d 797, 56 CR 58. The decedent died intestate. The heirs of her predeceased husband filed a petition under former Prob C §1080 alleging that they were the relatives of the predeceased husband of the decedent, that all of the predeceased husband's property had passed to the decedent on his death as community property, that the decedent had died with no known heirs, and that they were entitled to the entire estate by their relationship to the decedent's predeceased husband. An order was entered to that effect. More than six months after that order became final, the state filed suit, seeking an escheat of the half of the community property belonging to the decedent and claiming extrinsic fraud. Even though the underlying petition was true in every material respect, the court affirmed a judgment in favor of the state, holding that there was extrinsic fraud in the fact that the heirs of the husband knew that half the estate should have passed to the state. The court reasoned that the ultimate purpose of the probate proceeding, to distribute the decedent's estate to those lawfully entitled to it, "cannot be attained where the whole truth, so far as known to petitioners, is not set forth in the petition to determine heirship." 247 CA2d at 804.

An inventive pleader can structure a claim to reopen a Prob C §11700 proceeding by alleging that the petitioning beneficiaries knew of the rights of the claimant and failed to disclose them in their petition. Whether a court will countenance all such claims, particularly in light of the strong interest in finality of entitlement and distribution orders entered in probate proceedings (see §18.50), is unclear.

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19

Resolving Disputed Property Claims

Maria I. Lawless

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I. JURISDICTION

§19.1 A. Historical Development of Probate Court Jurisdiction

Traditionally, the probate court (*i.e.*, the superior court acting in exercise of its statutory probate jurisdiction) generally lacked power to determine adverse claims to the properties of an estate when asserted by a stranger to the estate (*i.e.,* a person not in "privity" with the probate proceeding). *Estate of Dabney* (1951) 37 C2d 672, 676, 234 P2d 962; *Schlyen v Schlyen* (1954) 43 C2d 361, 372, 273 P2d 897. In 1972, the legislature granted, and subsequently gradually expanded, statutory probate jurisdiction to allow the probate court to try property claims made by strangers against an estate. See former Prob C §851.5 (Stats 1965, ch 1901, §1, amended by Stats 1972, ch 641, §1, Stats 1979, ch 731, §23, Stats 1983, ch 99, §9, Stats 1986, ch 783, §13) and former Prob C §9860 (Stats 1987, ch 923, §93, Stats 1990, ch 79, §14). Probate court jurisdiction over disputed property claims is now found in Prob C §§850-859, which restates and consolidates into a single place former similar, but not identical, provisions relating to decedents estates (former Prob C §9860-9869), trusts (former Prob C §§17200.1 and 17200.2), and guardianships and conservatorships (former Prob C §§2520-2529).

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§19.2 B. Scope of Prob C §850(a)(2) Jurisdiction

Contract to convey property. Probate Code §850(a)(2)(A)-(B) covers situations in which the decedent (1) while living was bound by a written contract to convey property and died before making the conveyance, or (2) bound himself or herself by written contract to convey property on or after death and the contracts could be specifically enforced. For further discussion, see California Decedent Estate Practice, chap 27 (2d ed Cal CEB 2009).

Decedent held another's property. Probate Code §850(a)(2)(C) covers disputes in which the decedent died in possession of, or holding title to, property claimed to belong to another.

Decedent had claim to another's property. Probate Code §850(a)(2)(D) applies when a decedent died having a claim to property held by another.

Ancillary matters. If jurisdiction is established under Prob C §850(a)(2), other claims that are factually related to the subject matter may also be included, even though they would normally be raised in a civil action. Prob C §855.

Any interested person. Once a probate proceeding has been opened, a petition to determine property rights may be filed by the representative or any interested person. Prob C §850(a)(2).

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Source: Estate Planning/California Trust and Probate Litigation/19 Resolving Disputed Property Claims/§19.3 C. Concurrent Jurisdiction

§19.3 C. Concurrent Jurisdiction

Probate Code §850(a)(2) jurisdiction over property disputes is generally concurrent, not exclusive. *O'Donnell v Lutter* (1945) 68 CA2d 376, 385, 156 P2d 958 (regarding former Prob C §850); *Heiser v Superior Court* (1979) 88 CA3d 276, 278, 151 CR 745 (regarding former Prob C §851.5). Disputed property claims between the estate and third parties may be litigated either by a Prob C §850(a)(2) proceeding or by a civil action.

Under Prob C §17200.1, a trustee or person interested in a trust *must* file a Prob C §850 petition when the proceeding concerns the transfer of property. *Mota v Superior Court* (2007) 156 CA4th 351, 67 CR3d 303. However, a trust beneficiary who objects to an account and seeks an offset in distribution because of an alleged theft of funds by other beneficiaries does not seek a transfer of property and need not proceed by a Prob C §850 petition. *Mota v Superior Court, supra*.

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Source: Estate Planning/California Trust and Probate Litigation/19 Resolving Disputed Property Claims/§19.3A D. Tactical Considerations Arising From Concurrent Jurisdiction

§19.3A D. Tactical Considerations Arising From Concurrent Jurisdiction

Given the possibility that some types of property disputes may be tried either by civil action or by a Prob C §850(a)(2) proceeding, differences between these two alternatives give rise to tactical considerations.

Availability of trial by jury. Some types of property disputes (*e.g.,* actions for the recovery of specific, real, or personal, property, with or without damages) entail a right to jury trial when brought in a civil action. CCP §592. If such a claim were asserted under Prob C §850(a)(2) alone, however, trial by jury would seemingly be unavailable due to Prob C §825 (no right to jury trial in proceedings under the Probate Code except as otherwise provided in the code).

Availability of double liability for bad faith taking. Probate Code §859 provides that any person who has in bad faith wrongfully taken, concealed, or disposed of property of the estate "shall be liable for twice the value of the property recovered by an action under this part." This double liability provision might not apply if a disputed property claim is asserted in a civil action rather than a Prob C §850(a)(2) proceeding. Furthermore, this provision only applies if a fiduciary or successor in interest brings the petition; when there is a fiduciary in place, beneficiaries and heirs do not have standing to request double liability. See Prob C §859.

Availability of in rem jurisdiction. Probate proceedings generally invoke in rem jurisdiction rather than in personam jurisdiction, such that a judgment in a probate proceeding after the required statutory notice is conclusive against "the whole world" and not just the parties to the litigation. *Heiser v Superior Court* (1979) 88 CA3d 276, 278, 151 CR 745.

Forum shopping. In some counties, the choice between a civil action and a probate proceeding might affect which judge is likely to try the matter. This, in turn, may involve considerations such as differences in familiarity with probate matters in general or with this estate in particular, differences in speed to trial, and differences in judicial attitude to the type of claim.

Abatement of probate proceeding if civil action already pending. If the summons and complaint have already been served in a civil action regarding the subject matter of a subsequent Prob C §850(a)(2) proceeding, a responding party may seek abatement of the probate proceeding on the ground that jurisdiction in the civil action was obtained first. The probate court generally must abate the probate proceeding unless it determines that the civil action was filed for the purpose of delay. Prob C §854. See *Richer v Superior Court* (1976) 63 CA3d 748, 756, 134 CR 52, disapproved on other grounds in 3 C4th at 899 (pendency of civil action does not automatically abate probate petition, but places power to abate in probate court).

Race to the courthouse. In light of the general priority of a previously served civil action over a related subsequent probate proceeding under Prob C §850(a)(2), prospective litigants who want to influence the choice of forum, or the availability of a jury or double liability, have an incentive to race to the courthouse to be the first to file and serve.

Availability of other claims and relief. Although litigation under Prob C §850 must concern the disposition of property, the claimant may include other claims, causes of action, or matters that are normally raised in a civil action, to the extent that they are related to the subject matter of the §850 petition. Prob C §855. Furthermore, instead of directing a conveyance the court can grant other appropriate relief. Prob C §856. This would seem to make Prob C §850 a flexible mechanism for litigation, but expanding the scope of the proceeding carries its own risks. Asserting other claims and demanding relief other than a conveyance may suggest to the court that the matter would best be determined as a civil action, which could result in dismissal. See Prob C §856.5.

Civil action if venue improper in probate court or if matter should be tried by civil action. Even if a litigant who prefers a probate proceeding wins the race to file and serve first, an adversary may still be able to force the dispute to a civil action if:

- Venue is not proper in the probate court (Prob C §853; see CCP §§392-403); or
- The probate court determines that the matter "should be" determined by a civil action (Prob C §856.5).

Statutory and case authority provide little guidance regarding when a civil action rather than a probate proceeding is the appropriate avenue for relief. The gradual legislative expansion of probate court jurisdiction, including, as of January 2002, explicit ancillary jurisdiction over factually related claims that would normally be raised in a civil action (Prob C

§855), suggests that old case authority may have waning applicability. For example, whether a claim is "free from doubt" as opposed to adversarial, a factor noted in *O'Donnell v Lutter* (1945) 68 CA2d 376, 156 P2d 958 (citing *Estate of Garnier* (1905) 147 C 457, 459, 82 P 68, regarding former Prob C §850), might now be unimportant.

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§19.4 II. EXAMPLES OF PROPERTY CLAIMS THAT CAN BE TRIED IN PROBATE PROCEEDINGS

Spousal property claims. Probate Code §850(a)(2) can be used to resolve claims between an estate and a surviving spouse. See *Heiser v Superior Court* (1979) 88 CA3d 276, 151 CR 745 (predeceased husband's executor asserts community property interest in wife's estate under former Prob C §851.5). But see *Estate of Scott* (1987) 197 CA3d 913, 243 CR 93 (probate court lacked jurisdiction to adjudicate surviving spouse's claim against third person for recovery of surviving spouse's half interest in community property given away by decedent before death; estate had no claim to property). Thus, the surviving spouse could only rely on a Prob C §850 proceeding if the spouse has a claim against the decedent's assets (or elects to have his or her community property administered in the decedent's estate). Because the probate court is a court of general jurisdiction under Prob C §800, *Scott* probably is no longer good law.

Joint tenancy disputes. See *Estate of Gebert* (1979) 95 CA3d 370, 157 CR 46 (beneficiaries under will petition for determination that joint tenancy was terminated before decedent died).

Totten trust disputes. See *Estate of Fisher* (1988) 198 CA3d 418, 244 CR 5 (dispute between Totten trust account beneficiaries and surviving joint tenant).

***Marvin* rights**. Because the Family Code and Probate Code provide no entitlement to support for unmarried cohabitants, *Marvin* claims (*Marvin v Marvin* (1976) 18 C3d 660, 134 CR 815) are often brought under Prob C §850(a)(2). See *Estate of Black* (1984) 160 CA3d 582, 206 CR 663 (decedent's unmarried cohabitant petitions to enforce *Marvin* contract right in estate). For a discussion of *Marvin* claims, see §7.11.

Creditor rights. A creditor can have standing to petition under Prob C §850. Prob C §§850(a)(2), 48(a); *Estate of Myers* (2006) 139 CA4th 434, 42 CR3d 753 (decedent's creditor has standing to petition for determination that estate owned proceeds from resale of real property that decedent had fraudulently transferred). A creditor of the decedent or estate does not have to exhaust the remedy available under Prob C §9653 before petitioning under Prob C §850. 139 CA4th at 442.

Title by adverse possession. See *Estate of Williams* (1977) 73 CA3d 141, 140 CR 593 (property claimant was awarded ownership of probate estate real property by adverse possession ahead of any claim by estate).

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III. GENERAL CONSIDERATIONS

§19.5 A. Statutes of Limitation

Although the Probate Code does not prescribe a time limit for filing a Prob C §850(a)(2) proceeding, the petition logically should be brought before the estate is closed (and disappears as a legal entity). Moreover, it must be filed before expiration of any applicable statute of limitations.

For a claim by the estate, the limitations period expires at the later of 6 months after the decedent's death or the end of the limitations period on the underlying claim that would have applied if the decedent had not died. CCP §366.1. The nature of the action is determined by the basic facts of the claim, not by the caption, form of the action, or relief demanded. *Estate of Young* (2008) 160 CA4th 62, 77, 72 CR3d 520. When breach of fiduciary duty or undue influence is adequately alleged, a date-of-discovery rule may apply. *Estate of Young, supra* (delayed discovery rule applied to petition to recover real property when fraud and undue influence allegations were pivotal).

For a claim against the estate, the limitations period is determined by the nature of the claim on which the Prob C §850(a)(2) action is based. *Parker v Walker* (1992) 5 CA4th 1173, 6 CR2d 908 (statute of limitations for the enforcement of oral agreements was 2 years under CCP §339(1)). That period is shortened to 1 year after date of death if the action is (1) to enforce a decedent's promise to distribution from an estate or trust (CCP §366.3) or (2) on the liability of a person who dies before the expiration of the applicable limitations period (CCP §366.2). If the action is not "on a liability of the person," CCP §366.2 does not apply. *Estate of Yool* (2007) 151 CA4th 867, 875, 60 CR3d 526 (petition to impose resulting trust on specific property alleged to be included in decedent's estate did not state claim on liability of the person; CCP §343 applies).

A party may, however, be equitably estopped from raising the limitations defense. See *Battuello v Battuello* (1998) 64 CA4th 842, 75 CR2d 548 (defendants equitably estopped from asserting statute of limitations defense after they led plaintiff to believe that he would receive disputed property).

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§19.6 B. Impact of No-Contest Clauses

Evaluate no-contest clause. Before filing a proceeding to determine property rights under Prob C §850(a)(2), counsel should carefully evaluate whether the petition might violate a no-contest clause. A no-contest clause may have substantial adverse consequences, resulting in a loss of all of the petitioner's interest in the estate, regardless of the underlying merits of the Prob C §850(a)(2) petition.

Determination under Prob C §21320. If a trust or will has become irrevocable, a beneficiary can apply to the probate court for a determination that the planned Prob C §850(a)(2) proceeding (or other proposed action) will not constitute a contest within the terms of the clause in question. Prob C §21320. Given the potential outcome and risk associated with triggering a no-contest clause, it is generally advisable to make use of the procedure set forth in Prob C §21320. See, *e.g., Varney v Superior Court* (1992) 10 CA4th 1092, 12 CR2d 865 (former Prob C §9860 (now Prob C §850(a)(2)) petition for transfer of real property and corporate stock did not constitute will contest); *Jacobs-Zorne v Superior Court* (1996) 46 CA4th 1064, 54 CR2d 385 (former Prob C §9860 (now Prob C §850(a)(2)) petition seeking determination that bank accounts were joint tenancy rather than community property did not constitute will contest). In *Varney* and *Jacobs-Zorne,* the court based its decision on the specific language of the no-contest clause in question. For further discussion of no-contest clauses, see §§5.2-5.14A.

NOTE: The current statutes governing no-contest clauses (Prob C §§21300-21322) will be repealed effective January 1, 2010, and replaced by statutes that do not have a comparable declaratory relief mechanism. Prob C §§21310-21315. This new scheme will apply to any instrument that became irrevocable on or after January 1, 2001. Prob C §21315. See §5.12I. Whether the repealed statutes will continue to govern instruments that became irrevocable before January 1, 2001, is uncertain.

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Source: Estate Planning/California Trust and Probate Litigation/19 Resolving Disputed Property Claims/§19.7 C. Civil Litigation as Alternative [Deleted]

§19.7 C. Civil Litigation as Alternative [Deleted]

See now §19.3A regarding tactical considerations arising from concurrent jurisdiction.

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Source: Estate Planning/California Trust and Probate Litigation/19 Resolving Disputed Property Claims/§19.8 D. Summary Determination

§19.8 D. Summary Determination

Parties to a Prob C §850(a)(2) proceeding can agree to summary disposition of the case. In straightforward, noncomplex title disputes in which no discovery is necessary, the parties may seek a summary determination of their respective property rights and interests vis-à-vis those of the estate by either (1) stipulating to the submission of the matter to a temporary judge or (2) stipulating that the matter be resolved by binding arbitration. Prob C §§9620-9621. On alternate dispute resolution generally, see chap 11.

These procedures are likely to be more efficient when the parties are primarily seeking a determination of legal issues such as those that may arise in connection with the interpretation of a contract.

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Source: Estate Planning/California Trust and Probate Litigation/19 Resolving Disputed Property Claims/§19.9 E. Lis Pendens

§19.9 E. Lis Pendens

Counsel should evaluate the feasibility of recording a lis pendens while title to real property is being litigated under Prob C §850(a)(2). See Prob C §1004. Although there are tactical advantages to imposition of a lis pendens (*e.g.,* cutting off the claims of a bona fide purchaser by giving constructive notice of the pendency of the proceeding), because a lis pendens effectively ties up title to the property, caution should be exercised with respect to possible exposure caused by use of this device. See generally CCP §§405-405.61. For a form of notice and a discussion of the procedures to be followed when recording the notice, see California Real Property Remedies and Damages, chap 13 (2d ed Cal CEB 2002).

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IV. PROCEDURE

§19.10 A. Time and Notice

Probate Code §850(a)(2) proceedings are initiated by the filing of a verified petition stating the facts on which the adverse party's claim is based. Prob C §850(b). On the need for verification, see Prob C §1021; Cal Rules of Ct 7.103.

30-day notice. At least 30 days before the hearing on the petition, notice of the hearing must be given to a nonpetitioning personal representative and any person claiming an interest in, title to, or possession of the property in the same manner prescribed for service of a civil summons in CCP §§413.10-417.40 (*e.g.,* by personal service or by mail accompanied by notice and acknowledgment form). Prob C §851(a). The 30-day notice requirement may not be shortened by the court. Prob C §851(c).

15-day notice. A minimum of 15 days' notice of hearing must be given by mail or by personal delivery to anyone else, including beneficiaries and heirs, whose interests in the estate might be affected by the outcome of the proceeding, as well as those who have requested special notice under Prob C §1250. Prob C §§851(b), 1216, 1220.

Local rules. Several counties require the notice to contain a description of the property in dispute, sufficient to provide adequate notice to any party who might be interested in the property, including the street address or, if none, a description of the location of real property. See, *e.g.,* Los Angeles Ct R 10.24; San Francisco Ct R 14.83; San Mateo Ct R 4.72. Orange County requires this in the petition itself. Orange Ct R 607.03. Los Angeles County requires the notice to contain a statement advising that any person interested in the disputed property may file an answer to the petition. Los Angeles Ct R 10.24.

Copy of petition. In all cases, a copy of the petition must accompany the notice. Prob C §9861(a)-(b).

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§19.11 B. Response to Prob C §850 Petition

Form of response. Anyone asserting an interest in the property that is the subject of the Prob C §850(a)(2) petition may oppose the petition by filing a response. See Prob C §852. The opposition takes the form of standard probate written objections. Anyone claiming an interest in the property, adverse to the petitioner's, who consents to having the dispute heard in the probate court should file a separate Prob C §850(a)(2) petition in addition to filing written objections to the original petition. For form objections, see §19.18.

Time for filing. Probate Code §850(a) does not establish a deadline for opposing the petition. Hence, the deadline for filing a response may either be at or before the hearing, under Prob C §1043, or within 30 days after service under CCP §§415.10-415.50. See CCP §412.20 and Prob C §1000.

Continuance. Because of the likelihood that 30 days will not provide adequate time to conduct discovery and otherwise prepare for the hearing on the Prob C §850(a)(2) petition, Prob C §852 contains mandatory language, requiring the probate court to continue the hearing if any party to the proceeding needs additional time to prepare.

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Source: Estate Planning/California Trust and Probate Litigation/19 Resolving Disputed Property Claims/§19.12 V. TRIAL

§19.12 V. TRIAL

Although some types of property claims trigger a right to jury trial when asserted in a civil action (CCP §592), trial by jury is seemingly no longer available for property disputes brought solely under Prob C §850(a)(2). See Prob C §825 (no right to jury trial in proceedings under probate code). A litigant who prefers a jury trial may need to persuade the court that the matter should be resolved by a general civil action rather than a probate petition. Prob C §856.5

For trial procedures generally, see §§10.56-10.87.

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Source: Estate Planning/California Trust and Probate Litigation/19 Resolving Disputed Property Claims/§19.13 VI. ORDER AND APPEAL

§19.13 VI. ORDER AND APPEAL

The court may grant an order directing the person in possession of the property to convey it to the person entitled to it, as well as any other "appropriate relief." Prob C §856. If real property is involved, a certified copy of the order should be recorded in the county in which the property is located. Prob C §7263.

The order is prima facie evidence of the correctness of the proceedings and of the authority of the personal representative or other person to make the conveyance or transfer. Prob C §857(a). After the order is entered, the person entitled under the order has the right to possession of the property and the right to hold the property, according to the terms of the order, as if the property had been conveyed or transferred in accordance with the terms of the order. Prob C §857(b).

An order following a Prob C §850(a)(2) proceeding is in rem and conclusive against "the whole world," not just the parties to the litigation. *Heiser v Superior Court* (1979) 88 CA3d 276, 278, 151 CR 745. However, the order may be appealed under Prob C §1300(k).

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Source: Estate Planning/California Trust and Probate Litigation/19 Resolving Disputed Property Claims/ VII. FORMS/ §19.14 A. Form: Petition by Third Party Claimant to Determine Ownership of Estate Property

VII. FORMS

§19.14 A. Form: Petition by Third Party Claimant to Determine Ownership of Estate Property

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[*Title of court*]

Estate of _ _[*name*]_ _, Deceased	**No. _ _ _ _ _ _** **PETITION BY CLAIMANT TO DETERMINE OWNERSHIP OF ESTATE PROPERTY, FOR ORDER AUTHORIZING AND DIRECTING PERSONAL REPRESENTATIVE TO TRANSFER ESTATE PROPERTY TO PETITIONER,** _ _[*AND FOR _ _[SPECIFY ANY RELATED CLAIMS*]_ _]_ _ **(PROBATE CODE §850(a)(2))**

Petitioner, _ _[*name*]_ _, alleges:

1. Decedent died on _ _[*date*]_ _, _ _[*holding title to/in possession of*]_ _ the property described in Attachment A. On _ _[*date*]_ _, letters _ _[*testamentary/of administration*]_ _ were issued by the clerk of the above-titled court to _ _[*name of personal representative*]_ _. The _ _[*executor/administrator*]_ _ has included the property among the probate assets of decedent's estate as inventory item _ _[*specify*]_ _ with an appraised value of _ _[*dollar amount*]_ _. Petitioner is not aware of any other judicial proceeding to determine the ownership of the property.

2. Petitioner claims that the property in fact belongs to petitioner. The facts on which the claim of ownership is based are: _ _[*Set forth all facts on which the claim of ownership is based. Include copies of supporting papers as attachments, retaining the originals for presentation at the hearing. If the claim is to be supported by separately filed declarations, state that and offer a brief summary of their contents*]_ _**.**

[*If appropriate, add the following option*]

[*Option: Allegation for related claims*]

3. Besides petitioner's claim of ownership of the property, petitioner has claims against the estate based on the following facts: _ _[*Set forth all facts on which the related claims are based. Include copies of supporting papers as attachments, retaining the originals for presentation at the hearing. If the claim is to be supported by separately filed declarations, state that and offer a brief summary of their contents*]_ _**.**

[*Continue*]

[4.] The following is a list of the name(s) and address(es) of all persons known to petitioner to claim an interest in the property, all persons having an interest in decedent's estate that could be affected by a determination of ownership of the property, including the heirs and devisees, and each person who has filed a request for special notice, each of whom will be mailed or personally served with a copy of this petition and notice of the time and place of the hearing on this petition:

[*List of names and addresses*]

**WHEREFORE, petitioner requests the court to determine that petitioner is the true owner of the property, to authorize and direct the _ _[*executor/administrator*]_ _ to transfer the property to petitioner, _ _[*add any other*

relief sought]_ _**, and for such other orders as the court considers proper.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Petitioner

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Petitioner

[*Verification; see §17.61*]

Copies: Original for filing; one copy for each personal representative, each heir and beneficiary, each person who may have an interest in the property (see §19.10), and each person who has filed a request for special notice; office copies.

Comment: Form 19.14 should be used when the petitioning claimant is not the representative and claims an interest in property that the decedent held title to or possession of. The representative may initiate the proceeding. In such cases, the form should be modified to reflect that: (1) the representative has been presented with a claim that the property belongs to a third party; (2) the representative either (a) disputes the claim of ownership, or (b) has reviewed the facts on which the claim of ownership is based and believes them to be correct; and (3) the relief requested is a determination that the estate is the rightful owner of the property, or that the property be transferred to its rightful owner.

The optional clause regarding related claims is based on Prob C §855. A claimant need not sever and litigate a multifaceted claim in a separate proceeding when all the necessary parties are before the court. See *Estate of Baglione* (1966) 65 C2d 192, 195, 53 CR 139; *Estate of Fincher* (1981) 119 CA3d 343, 349, 174 CR 18 (court had jurisdiction to hear related claims in proceedings under predecessor to Prob C §11700 to determine entitlement to distribution).

The petition must be verified. Prob C §1021. Duplicate signing by the verifying party is not required because verification constitutes signing. Prob C §1020.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/19 Resolving Disputed Property Claims/§19.15 B. Form: Order Determining Ownership of Estate Property and Transferring Property to Claimant

§19.15 B. Form: Order Determining Ownership of Estate Property and Transferring Property to Claimant

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[*Title of court*]

Estate of _ _[*name*]_ _,	)	**No. _ _ _ _ _ _**
Deceased	)	
	)	**ORDER DETERMINING**
	)	**OWNERSHIP AND DIRECTING**
	)	**PERSONAL**
	)	**REPRESENTATIVE TO**
	)	**TRANSFER PROPERTY TO**
_____	)	**CLAIMANT**

The verified petition of _ _[*name*]_ _ to determine ownership of estate property and to direct the _ _[*executor/administrator*]_ _ of the _ _[*will/estate*]_ _ of _ _[*name of decedent*]_ _ to transfer property to claimant came on regularly for hearing this day. On proof made to the court's satisfaction, the court finds that notice has been given as required by law

[*Add one of the following alternatives*]

[*Alternative 1: If petition was not contested*]

and that the allegations in the petition are true.

[*Alternative 2: If petition was contested and a statement of decision was issued*]

and the court having issued its statement of decision,

[*Continue*]

IT IS ORDERED AND ADJUDGED:

1. As of _ _[*date of death*]_ _, the property described in Attachment A was owned by _ _[*name*]_ _ as _ _[*specify manner of holding title*]_ _.

2. _ _[*Name*]_ _, as personal representative of the estate of _ _[*name of decedent*]_ _, is authorized and directed to transfer all of decedent's interest in the property to _ _[*name*]_ _ and is directed to prepare, execute, and deliver all necessary documents of transfer.

3. _ _[*Specify order concerning any related claims*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Judge/Commissioner*]_ _ **of the** _ _[*title of court*]_ _

Copies: Original for filing; one copy for certification and recording in each county where real property is located; one copy for opposing party and any other party who appeared at the hearing; one copy for each person who has requested a copy; one courtesy copy for client; office copies.

Comment: After a nonjury trial, any party may request a statement of decision within 10 days after the court announces its tentative decision. If trial is concluded in less than 1 day (or less than 8 hours over more than 1 day), the request for the statement of decision must be made before the matter is submitted for decision. CCP §632. The statement of decision explains the factual and legal basis for the decision on the principal controverted issues. See California Trial Practice: Civil Procedure During Trial §§23.23-23.26 (3d ed Cal CEB 1995). If the matter is uncontested,

a simple recitation that the allegations in the petition are true should suffice.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/19 Resolving Disputed Property Claims/§19.16 C. Form: Petition by Personal Representative to Establish Estate's Ownership of Property

§19.16 C. Form: Petition by Personal Representative to Establish Estate's Ownership of Property

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[*Title of court*]

Estate of _ _[*name*]_ _,	)	**No. _ _ _ _ _ _**
Deceased	)	
	)	**PETITION TO ESTABLISH**
	)	**ESTATE'S CLAIM OF**
	)	**OWNERSHIP TO PROPERTY,**
	)	**FOR ORDER DIRECTING ITS**
	)	**TRANSFER TO ESTATE,**
	)	**_ _[*AND FOR _ _[SPECIFY*
	)	*RELATED CLAIMS*]_ _]_ _**
_____	)	**(PROBATE CODE §850(a)(2))**

Petitioner, _ _ _ _ _ _, as _ _[*executor/administrator*]_ _ of the _ _[*will/estate*]_ _ of the above-named decedent, alleges:

1. Decedent died on _ _[*date*]_ _, having a claim of ownership to the property described in Attachment A. Petitioner has included decedent's claim to the property in the inventory as item _ _[*specify*]_ _ with an appraised value of $_ _[*amount*]_ _. Petitioner is not aware of any other judicial proceeding to determine ownership of the property.

2. At the time of decedent's death _ _[*title to/possession of*]_ _ the property was held by _ _[*name*]_ _. Petitioner has demanded the return of decedent's interest in the property to the estate but _ _[*name*]_ _ has refused. The facts on which the estate's claim of ownership is based are: _ _[*Set forth all facts on which the claim of ownership is based. Include copies of supporting papers as attachments, retaining the originals for presentation at the hearing. If the claim is to be supported by separately filed declarations, state that and offer a brief summary of their contents*]_ _.

[*If applicable, add the following option*]

[*Option: Allegation for related claims*]

3. Besides the estate's claim of ownership of the property, the estate has claims against _ _[*name*]_ _ based on the following facts: _ _[*Set forth all facts on which the related claims are based. Include copies of supporting papers as attachments, retaining the originals for presentation at the hearing. If the claim is to be supported by separately filed declarations, state that and offer a brief summary of their contents*]_ _.

[*Continue*]

[4.] The following is a list of the name(s) and address(es) of all persons known by petitioner to claim an interest in the property and all persons having an interest in decedent's estate that could be affected by a determination of ownership of the property, including the heirs and devisees, and each person who has filed a request for special notice, each of whom will be mailed or personally served with a copy of this petition and notice of the time and place of the hearing on this petition.

[*List of names and addresses*]

WHEREFORE, petitioner requests the court to determine that the decedent was the true owner of the property, to direct _ _[*name*]_ _ to transfer the property to petitioner as personal representative of the decedent's estate, _ _[*add any other relief sought*]_ _, and for such other orders as the court considers proper.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Petitioner

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Petitioner

[*Verification; see §17.61*]

Copies: Original for filing; one copy for each nonpetitioning personal representative, each heir and beneficiary, each person who claims an interest in the property (see §19.10), and each person who has filed a request for special notice; office copies.

Comment: Form 19.16 should be used when the representative petitions, claiming that estate property is held by a third party. See §19.14 for a petition by a third-party claimant to estate property. For a form of objections to a petition, see 3 California Decedent Estate Practice §25.13 (Cal CEB 1987).

The petition must be verified. Prob C §1021. Duplicate signing by the verifying party is not required because verification constitutes signing. Prob C §1020.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/19 Resolving Disputed Property Claims/§19.17 D. Form: Order Establishing Estate's Ownership of Property and Directing Transfer

§19.17 D. Form: Order Establishing Estate's Ownership of Property and Directing Transfer

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[*Title of court*]

Estate of _ _[*name*]_ _,	)	**No. _ _ _ _ _ _**
Deceased	)	
	)	**ORDER ESTABLISHING**
	)	**ESTATE'S OWNERSHIP OF**
	)	**PROPERTY AND DIRECTING**
_____	)	**TRANSFER TO ESTATE**

The petition of _ _[*name*]_ _, as _ _[*executor/administrator*]_ _ of the _ _[*will/estate*]_ _ of the above-named decedent, to establish the estate's ownership of property and to direct its transfer to the estate came on regularly for hearing this day. On proof made to the court's satisfaction, the court finds that notice has been given as required by law

[*Add one of the following alternatives*]

[*Alternative 1: If petition was not contested*]

and that the allegations in the petition are true.

[*Alternative 2: If petition was contested and a statement of decision was issued*]

and the court having issued its statement of decision,

[*Continue*]

IT IS ORDERED AND ADJUDGED:

1. On _ _[*date of death*]_ _, the property described in Attachment A was owned by _ _[*name of decedent*]_ _ as _ _[*specify manner of holding title*]_ _.

2. _ _[*Name*]_ _ is directed to transfer all _ _[his/her]_ _ title and interest in the property to _ _[*name*]_ _, as _ _[*executor/administrator*]_ _ of the _ _[*will/estate*]_ _ of _ _[*name of decedent*]_ _, and is directed to prepare, execute, and deliver all necessary documents of transfer.

3. _ _[*Specify order concerning any related claims.*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Judge/Commissioner*]_ _ **of the** _ _[*title of court*]_ _

Copies: Original for filing, if property includes an interest in real property; one copy for certification and recording in each county where real property is located; one copy for claimant and any other party who appeared at the hearing; one copy for each person who has requested a copy; one courtesy copy for client; office copies.

Comment: For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/19 Resolving Disputed Property Claims/§19.18 E. Form: Objections to Petition by Personal Representative to Determine Ownership of Estate Property

§19.18 E. Form: Objections to Petition by Personal Representative to Determine Ownership of Estate Property

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[*Title of court*]

Estate of _ _[*name*]_ _,	)	**No. _ _ _ _ _ _**
Deceased	)	
	)	**OBJECTIONS BY _ _[*NAME*
	)	*OF THIRD PARTY*
	)	*CLAIMANT*]_ _ **TO PETITION**
	)	**FOR DETERMINATION OF**
	)	**OWNERSHIP OF PROPERTY**
	)	**BY PROBATE COURT**
	)	_ _[*AND REQUEST TO ABATE*
	)	*PETITION*]_ _**(PROBATE**
_____	)	**CODE §850(a)(2))**

Claimant, _ _[*name*]_ _, objects to the petition of _ _[*name*]_ _, as _ _[*executor/administrator*]_ _ of the _ _[*will/estate*]_ _ of the above-named decedent, to have the ownership of the property described in Attachment A determined by this court.

1. Claimant is a person interested in the property that is the subject of this proceeding in that: _ _[*State facts on which claimant's interest in the property is based. Include copies of supporting papers as attachments, retaining the originals for presentation at the hearing. If the objection is supported by separately filed declarations, state that and offer a brief summary of their contents*]_ _.

2. Claimant objects on the following grounds: _ _[*Specify*]_ _.

[*Add if prior civil action pending*]

Before the filing of the petition under Probate Code §850(a)(2), civil action No. _ _[*specify*]_ _ had been filed on _ _[*date*]_ _, in the Superior Court of _ _[*name*]_ _ County concerning the subject matter. Summons issued on _ _[*date*]_ _, and was served on defendant _ _[*name*]_ _ on _ _[*date*]_ _ and jurisdiction was obtained in that court. A copy of the summons and complaint _ _[*and answer*]_ _ are attached as Attachments B and C.

[*Add if improper court for civil trial*]

The Superior Court of _ _[*name*]_ _ County is not the proper court for the civil trial of the issues presented by the representative's petition under Probate Code §850(a)(2) in that _ _[*cite authority*]_ _ provides that _ _[*describe requirements*]_ _.

[*Add if matter should be determined on civil action*]

For the following reasons, the issues presented by the _ _[*executor's/administrator's*]_ _ petition under Probate Code §850(a)(2) are matters more appropriately determined by a civil action: _ _[*Specify*]_ _.

[*Add if decedent did not have claim to, title to, or possession of property at time of death*]

On the date of death, decedent did not have _ _[*a claim to/title to/possession of*]_ _ the property because _ _[*allege facts on which objections are based*; *include copies of supporting papers as attachments, retaining originals for presentation at hearing*; *if the objection is supported by separately filed declarations, state that and offer a brief summary of their contents*]_ _.

[*Continue*]

3. The following is a list of the name(s) and address(es) of all persons known to petitioner who claim an interest in the property and all persons having an interest in decedent's estate that could be affected by a determination of ownership of the property, including the heirs and devisees, and each person who has filed a request for special notice, each of whom will be mailed or personally served with a copy of these objections.

[*List of names and addresses*]

For the foregoing reasons, claimant requests the court to _ _[*dismiss/deny/abate*]_ _ the _ _[*executor's/administrator's*]_ _ petition.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Claimant

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Claimant

[*Verification; see §17.61*]

Copies: Original for filing; one copy for each nonpetitioning representative, each heir and beneficiary, each person who claims an interest in the property (see §19.10), and each person who has filed a request for special notice; office copies.

Comment: Form 19.18 is intended for use by a claimant who objects primarily to having the probate court determine the matter. The grounds in the form for abating the petition are based on the three circumstances under which the court may dismiss or abate the petition. See §19.3. The form may be modified for use by a claimant who does not object to having the controversy determined in the probate proceedings. In that case, counsel should not include the first three paragraphs in 2. and should prepare and file a separate Prob C §850(a)(2) petition in addition to the written objections. See form in §19.14.

The statute does not specify who is to receive copies of the objections. The number of copies suggested is based on the statutory requirements for serving the petition.

The wording of the objections title should name the person making the objections, to distinguish it from objections filed by other claimants.

The objections must be verified. Prob C §1021. Duplicate signing by the verifying party is not required because verification constitutes signing. Prob C §1020.

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20

Trust Contests

James A. Barringer
Noël M. Lawrence

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§20.1 I. INTRODUCTION: SIMILARITY TO WILL CONTESTS; NO-CONTEST CLAUSES

Attacks on trust instruments can take a variety of forms, including proceedings to challenge the validity of trusts, to interpret trust provisions, to set aside conveyances to trusts, to impose constructive trusts on express trust assets, and to include or exclude beneficiaries. Many of the same issues that are relevant to will contests arise in attacks on trust instruments, particularly in trust contests alleging lack of capacity, undue influence, fraud, or duress. See chap 6.

Issues relevant to determining the applicability of no-contest clauses in estate proceedings are equally relevant to trust proceedings. The same rules of construction apply whether the document is a will, a trust, or any other instrument. Prob C §21101. However, the context of a no-contest clause in a trust may be different from a will. Many trusts now contain schedules specifying the character of the property that the trustors declare is held in trust under the instrument. Thus, depending on the exact language of the no-contest clause, actions that are collateral to the validity of the trust instrument but affect the distribution of property noted in the schedules (*e.g.,* an action to establish community property interests in estate property) may be found to violate a no-contest clause in a trust. See, *e.g., Burch v George* (1994) 7 C4th 246, 27 CR2d 165 (settlor declared that property subject to trust was separate property and was to remain separate property, and property added later to the trust was to be administered according to terms of trust); *Nairne v Jessop-Humblet* (2002) 101 CA4th 1124, 124 CR2d 726 (settlors promised that property listed as asset of revocable trust would be deeded to claimant on one settlor's death); *Estate of Pittman* (1998) 63 CA4th 290, 73 CR2d 622 (settlors declared that trust property listed on particular schedules was community or separate property of each settlor).

AUTHOR'S ADVICE: Whenever there is any question about whether a particular action would trigger a no-contest clause, counsel should consider seeking declaratory relief under Prob C §21320. Note that operative January 1, 2010, the declaratory relief procedures under Prob C §21320 will not be available for instruments that became irrevocable on or after January 1, 2001. See §5.12I. Whether the procedures will continue to be available for instruments that became irrevocable before January 1, 2001, is uncertain.

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II. GROUNDS FOR ATTACK

§20.2 A. Lack of Capacity and Similar Issues

Lack of capacity to execute a trust, undue influence, fraud, duress and menace, mistake as a ground for setting aside a trust, and bequest or distribution to a disqualified person are all grounds for attacking a trust, and are fully discussed in chap 6. Substantive and procedural law, and strategic considerations applicable to these issues, are often the same whether the instrument being attacked is a will or a trust, with several exceptions, including the following:

- The test for capacity to execute a trust differs in significant respects from the test for capacity to execute a will. See §6.4.
- Mistake may be a ground for setting aside a trust, but not a will. See §6.31.
- The testimony of a subscribing witness to a will is generally given more weight than the opinions of nonsubscribing witnesses. Although trusts rarely have subscribing witnesses, the settlor's competency can be supported by testimony of subscribing witness to a contemporaneous pour-over will. See §7.6.

PRACTICE TIP: If a revocable living trust is contested after the settlor's death, any pour-over will should be contested as well.

Because the use of trusts as a device for transferring property is relatively recent, much of the case law regarding capacity and similar issues involves wills rather than trusts. When a trust is at issue, the decisions in these cases can often be applied by analogy. Again, the execution of a contemporaneous pour-over will extends the applicability of such case law to settlors as well as testators. For advantages of a contemporaneous pour-over will in defending a challenge to a living trust, see §7.6.

PRACTICE TIP: When assessing facts for a trust contest, the practitioner must be aware that issues of undue influence, mistake, fraud, duress, menace, wrongful taking of property, financial abuse, and bequests to disqualified persons may also give rise to claims for elder abuse. It is important to allege the facts that give rise to the various causes of action in the trust contest, even though the action is not specifically one for elder abuse. If all of the elements of undue influence and lack of capacity are present and are coupled with a breach of trust and fiduciary duties, a later action for elder abuse will be stronger. For discussion of elder abuse remedies, see chap 8.

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§20.3 B. Failure to Fund

A trust is created only if there is trust property. Prob C §15202. For a trust to be effective, there must be an inter vivos transfer of the trust res to the trustee. *Reagh v Kelley* (1970) 10 CA3d 1082, 1094, 89 CR 425; Restatement (Second) of Trusts §17 (1959). When there is no effective transfer to the trustee, the trust fails as to that asset. Thus the first step in any potential attack on a trust is to determine whether there has been an effective transfer to the trustee.

When the settlor is also the initial trustee, the formalities of conveyance are relaxed and the declaration of the trustee that he or she holds the asset in trust may be sufficient. In *Estate of Heggstad* (1993) 16 CA4th 943, 950, 20 CR2d 433, the court held that a separate deed transferring real property from the settlor to himself as trustee was not necessary to create a valid trust, when a schedule attached to the written declaration of trust identified items of trust property. When all of the joint tenants of real property sign a trust declaration that the property is held under provisions that are inconsistent with a right of survivorship, the declaration of trust is sufficient to terminate the joint tenancy right of survivorship. *Estate of Powell* (2000) 83 CA4th 1434, 100 CR2d 501.

When the trust property is real estate, the statute of frauds requires that the declaration of trust be in writing signed by the trustee. Prob C §15206. If restrictions prevent current assignment, as in the case of a stock cooperative, a declaration of trust concerning such rights may nevertheless be effective. *Strauss v Summerhays* (1984) 157 CA3d 806, 816, 204 CR 227.

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Source: Estate Planning/California Trust and Probate Litigation/20 Trust Contests/§20.4 C. Interpretation of Terms of Trust

§20.4 C. Interpretation of Terms of Trust

A trust may be challenged without attacking the validity of the entire instrument. A trustee or a beneficiary may bring a petition under Prob C §17200(a) to:

- Determine questions of construction of the trust instrument (Prob C §17200(b)(1));
- Determine the existence or nonexistence of any immunity, power, privilege, duty, or right (Prob C §17200(b)(2));
- Determine the validity of a trust provision (Prob C §17200(b)(3));
- Ascertain beneficiaries and determine to whom property shall pass on final or partial termination of the trust (Prob C §17200(b)(4)); or
- Modify, terminate, or combine trusts (Prob C §17200(b)(13)-(14)).

In proceedings to construe trust provisions, the same principles of interpretation that apply to wills and other written instruments apply to trusts. See Prob C §§45, 21101-21140. Unless ambiguous, the trust's terms are to be construed by their ordinary legal meaning, and the instrument is to be interpreted from the entirety of the writing rather than from isolated elements. Prob C §§21120-21122. See, *e.g., Burkett v Capovilla* (2003) 112 CA4th 1444, 5 CR3d 817 (survivorship period, given ordinary meaning of words, commenced on date of settlor's death). Technical terms in the instrument are considered to have been used in their technical sense unless a contrary intention is clearly indicated from the context, or unless the instrument was drafted solely by the transferor and the transferor was unfamiliar with the technical sense. Prob C §21122. Extrinsic evidence is admissible to construe ambiguous terms in the instrument. *Ike v Doolittle* (1998) 61 CA4th 51, 70 CR2d 887; *Estate of Cox* (1970) 8 CA3d 168, 187, 87 CR 55.

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III. WHO MAY ATTACK

§20.5 A. Parties

During the early stages of trust litigation, the attorney must determine which parties are indispensable and which parties are merely desirable to include in the case. The trustee is an indispensable party in any action involving the trust or trust assets. CCP §389(a); *Bank of Cal. v Superior Court* (1940) 16 C2d 516, 106 P2d 879.

Whether all beneficiaries are indispensable depends on the nature of the action. The beneficiary is an indispensable party when his or her share of the principal or income is affected by the proceeding. *Auslen v Superior Court* (1962) 58 C2d 820, 27 CR 8; *Estate of Reed* (1968) 259 CA2d 14, 21, 66 CR 193. Beneficiaries whose interests are *not* affected by the proceeding include, *e.g.,* income beneficiaries when the proceeding affects only the distribution of the remainder and remainder beneficiaries when the dispute is merely between rival claimants. In an action to remove or surcharge the trustee, all beneficiaries are not indispensable parties. *Copley v Copley* (1981) 126 CA3d 248, 297, 178 CR 842; *Estate of Hensel* (1956) 144 CA2d 429, 301 P2d 105.

PRACTICE TIP: The attorney representing a trustee sued by one or more beneficiaries must always be sure that all indispensable parties have been joined. (If it is clear that a party is not indispensable, counsel should consider minimizing the complexity of the case by not joining the party.) Joinder will protect the trustee from multiple suits by other beneficiaries, particularly if the suit by one beneficiary over his or her interest may apply to other beneficiaries. See *Hebbard v Colgrove* (1972) 28 CA3d 1017, 1026, 105 CR 172. Failure to join an indispensable party divests the court of jurisdiction over that party and may make the proceedings voidable. *Copley v Copley* (1978) 80 CA3d 97, 109, 145 CR 437.

The California Attorney General must be given notice when a charitable trust or corporation is involved in the action. Prob C §17203(a)(3).

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§20.6 B. Standing

Those who would gain a pecuniary benefit from invalidating the trust should have standing to bring a trust contest. See §17.6. Under most circumstances, the contestants are the beneficiaries of an earlier estate plan or the heirs at law. However, if the beneficiary of an earlier plan violates a no-contest clause in that will or trust, that beneficiary might lose the standing to contest a later instrument. See *Montegani v Johnson* (2008) 162 CA4th 1231, 76 CR3d 621.

The trust cannot be sued in its own name; thus, the trustee is a required respondent in a trust contest. See *Tanner v Best* (1940) 40 CA2d 442, 104 P2d 1084 (complaint naming estate of decedent dismissed); *Saks v Damon Raike & Co.* (1992) 7 CA4th 419, 427, 8 CR2d 869. The trustee holds title to the assets and is the real party in interest. Beneficiaries have standing to petition the court under Prob C §17200(a) and are entitled to notice of a petition filed by someone else. Prob C §17203(a)(2). For further discussion of a trust beneficiary's standing, see §§21.46A-21.46B.

Often, a trust contest will consist of either an action to impose a constructive trust on the assets of an express trust, or an action (such as a Prob C §850 proceeding) to bring assets into a decedent's estate. For discussion of a §850 petition, see chap 19. Heirs, devisees, or other interested persons generally have standing to bring these property claims. See Prob C §850(a)(3) (trusts), Prob C §§850(a)(2), 9654 (estates). See also *Olson v Toy* (1996) 46 CA4th 818, 54 CR2d 29.

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§20.7 C. Guardian Ad Litem

The court may on its own motion or that of a trustee or interested person appoint guardians ad litem to protect the interests of minors, incapacitated persons, or unascertained persons if the court finds the representation of such persons inadequate. Prob C §1003. A guardian ad litem may give consent to the modification or termination of a trust. Prob C §15405. An order appointing a guardian ad litem may not be appealed. *Estate of Corotto* (1954) 125 CA2d 314, 324, 270 P2d 498.

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§20.8 1. Virtual or Class Representation

When a representative of a class of beneficiaries already exists, that beneficiary may have a sufficient interest to act for all members of the class, including the unborn. When a conflict of interest exists, notice must be given to all beneficiaries. Prob C §15804(b). The interest of the representative and the class members must be so similar that their motive to protect and preserve may be assumed to be the same. For detailed analysis of virtual representation, see Houska, *The Doctrine of Virtual Representation of Incapacitated, Minor, Unborn and Unascertained Beneficiaries in Relation to Notice of and Representation in a Probate Code §17200 Proceeding,* 10 Cal Trusts & Ests Q 25 (Winter 2004).

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§20.9 2. Adequacy of Representation

Appointment of a guardian ad litem will not protect against collateral attack if the guardian merely acts as a rubber stamp and does not actually protect the interests of the beneficiaries. When a guardian merely made his appearance and allowed the trust to be terminated, eliminating the interests of the unborn and unascertained remainder beneficiaries, there was no true representation by the guardian ad litem, and the trust termination was reversed on appeal in *Wogman v Wells Fargo Bank* (1954) 123 CA2d 657, 665, 267 P2d 423.

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Source: Estate Planning/California Trust and Probate Litigation/20 Trust Contests/§20.10 3. Form: Petition for Appointment of Guardian Ad Litem--Probate (Judicial Council Form DE-350/GC-100)

§20.10 3. Form: Petition for Appointment of Guardian Ad Litem—Probate (Judicial Council Form DE-350/GC-100)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
ESTATE OF *(Name)*: ☐ DECEDENT ☐ CONSERVATEE ☐ MINOR	
PETITION FOR APPOINTMENT OF GUARDIAN AD LITEM—PROBATE ☐ **EX PARTE**	CASE NUMBER:

NOTE: *This form is for use in proceedings under the Probate Code, except a request for court approval of (1) the compromise of a minor's disputed claim, (2) the compromise of an action to which a minor or a person with a disability is a party, or (3) disposition of the proceeds of a judgment in favor of a minor or person with a disability. (See Prob. Code, §§ 3600–3613.) A person seeking the appointment of a guardian ad litem in a civil proceeding should use form CIV-010. A person seeking the appointment of a guardian ad litem in a family law proceeding should use form FL-935. A person may not act as a guardian ad litem unless he or she is an attorney or is represented by an attorney. A guardian ad litem is NOT the same as a guardian of the person or estate of a minor.*

1. Petitioner *(name)*: is
   a. ☐ personal representative of the estate of:
   b. ☐ guardian of:
   c. ☐ conservator of:
   d. ☐ trustee of:
   e. ☐ other interested person *(specify capacity)*:
2. This petition seeks the appointment of the following person as guardian ad litem *(state name, address, and telephone number)*:
3. The guardian ad litem is to represent the interests of the following person *(state name, address, and telephone number)*:
4. The person to be represented is
   a. ☐ a minor *(date of birth)*:
   b. ☐ a person with a disability (within the meaning of Prob. Code, § 3603).
   c. ☐ an unborn person.
   d. ☐ an unascertained person.
   e. ☐ a person whose identity or address is unknown.
   f. ☐ a designated class of persons who are not ascertained or are not in being.
5. Appointment of a guardian ad litem arises out of issues regarding
   a. ☐ the execution of a disclaimer under Probate Code section 277 *(specify details in Attachment 5a)*.
   b. ☐ the representation of the interests of a spouse alleged to lack legal capacity (Probate Code, §§ 3112 and 3140) *(specify details in Attachment 5b)*.
   c. ☐ the consent to modification or termination of trust (Probate Code, § 15405) *(specify details in Attachment 5c)*.
   d. ☐ the approval and settlement of claims against a deceased settlor (Probate Code, § 19029) *(specify details in Attachment 5d)*.
   e. ☐ the representation of a minor, incapacitated person, or other person identified in Probate Code section 1003(a) in a proceeding under the Probate Code (Probate Code, § 1003(a)) *(specify details in Attachment 5e)*.
   f. ☐ other *(specify in Attachment 5f)*.

Form Adopted for Mandatory Use
Judicial Council of California
DE-350/GC-100 [Rev. January 1, 2008]

PETITION FOR APPOINTMENT OF GUARDIAN AD LITEM—PROBATE
(Probate—Decedent's Estates, and Guardianships and Conservatorships)

Print

ESTATE OF *(Name)*: ☐ DECEDENT ☐ CONSERVATEE ☐ MINOR	CASE NUMBER:

6. The appointment of a guardian ad litem is
   a. ☐ proper because the minor has no guardian of his or her estate.
   b. ☐ necessary for the following reasons *(specify reasons. Continue in Attachment 6b if necessary):*

7. The proposed guardian ad litem's relationship to the person he or she is representing is
   a. ☐ related *(state relationship):*
   b. ☐ not related *(specify capacity):*

8. The proposed guardian ad litem is fully competent and qualified to understand and protect the rights of the person he or she is representing as explained in Attachment 8 and has no interest adverse to the interests of that person.

9. Notice of this proceeding
   a. ☐ will be given to the parties named in Attachment 9a.
   b. ☐ should be dispensed with for the following reasons *(specify reasons for ex parte request. Continue in Attachment 9b if necessary):*

10. Number of pages attached: _____

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF ATTORNEY)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PETITIONER)

CONSENT TO ACT AS GUARDIAN AD LITEM

I consent to the appointment as guardian ad litem and I declare under penalty of perjury under the laws of the State of California that the foregoing petition is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PROPOSED GUARDIAN)

☐ **CONSENT OF MINOR 12 YEARS OF AGE OR OLDER *(Optional)***

I, *(name):* , am *(specify age):* years of age and hereby nominate *(name):* to be my guardian ad litem to represent my interests for the reasons set forth in items 5 and 6 of this petition.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF MINOR 12 YEARS OF AGE OR OLDER)

Comment: The caption for the petition should be the same as the main action. The minor, incapacitated, unborn, or

unascertained person is the party and the action should be brought or defended in his or her name and not that of the guardian ad litem. The guardian appears only as a representative. *Dixon v Cardozo* (1895) 106 C 506, 39 P 857; *Estate of Cochems* (1952) 110 CA2d 27, 242 P2d 56.

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Source: Estate Planning/California Trust and Probate Litigation/20 Trust Contests/§20.11 4. Form: Order Appointing Guardian Ad Litem--Probate (Judicial Council Form DE-351/GC-101)

§20.11 4. Form: Order Appointing Guardian Ad Litem—Probate (Judicial Council Form DE-351/GC-101)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
ESTATE OF *(Name):* ☐ DECEDENT ☐ CONSERVATEE ☐ MINOR	
ORDER APPOINTING GUARDIAN AD LITEM—PROBATE ☐ **EX PARTE**	CASE NUMBER:
	HEARING DATE:
	DEPT.: TIME:

1. The petition for the appointment of a guardian ad litem for *(name):*
   - a. ☐ a minor *(date of birth):*
   - b. ☐ an incapacitated person
   - c. ☐ an unborn person
   - d. ☐ an unascertained person
   - e. ☐ a person whose identity or address is unknown
   - f. ☐ a designated class of persons who are not ascertained or are not in being

   came on regularly for hearing as follows:
   - g. Judge *(name):*
   - h. Hearing date: Time: ☐ Dept.: ☐ Room:
   - i. The following persons were present at the hearing:
     - (1) ☐ Petitioner *(name):*
     - (2) ☐ Attorney for petitioner *(name):*
     - (3) ☐ Guardian ad litem named in item 4.
     - (4) ☐ Attorney for guardian ad litem *(name):*
     - (5) ☐ Person named in item 1.
     - (6) ☐ Other *(name):*

THE COURT FINDS

2. a. ☐ All notices required by law have been given.
   b. ☐ Notice is dispensed with.
3. It is reasonable and necessary to appoint a guardian ad litem for the person named in item 1.

THE COURT ORDERS

4. *(Name):*
   is hereby appointed guardian ad litem of *(name):*
   for the purposes set forth in items 5 and 6 of the petition.
5. The guardian ad litem ☐ is ☐ is NOT authorized to waive or disclaim any substantive rights of the represented party without further order of this court.
6. ☐ Other *(specify. Continue on Attachment 6 if necessary):*

7. ☐ Number of pages attached: _____

Date:

JUDGE OF THE SUPERIOR COURT

☐ SIGNATURE FOLLOWS LAST ATTACHMENT

Form Adopted for Mandatory Use
Judicial Council of California
DE-351/GC-101 [New January 1, 2004]

ORDER APPOINTING GUARDIAN AD LITEM—PROBATE

Probate Code, § 1003

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IV. STATUTE OF LIMITATIONS

§20.12 A. After Notification by Trustee

Under Prob C §16061.7(a), a trustee must serve a notification (1) when a revocable trust or any portion of it becomes irrevocable because of the death of one or more of the settlors of the trust or because the trust becomes irrevocable within one year of the death of the settlor because of a contingency related to the settlor's death as expressly stated in the trust, or (2) when there is a change of trustee of an irrevocable trust. See Prob C §16061.7 and California Trust Administration §§2.5-2.12 (2d ed Cal CEB 2001) for notification requirements.

When the notice requirements of Prob C §16061.7 apply, and the trustee complies with them, the statute of limitations for an action contesting the trust will be governed by that section. Under Prob C §16061.8, a trust contest must be brought not more than 120 days after notification has been served by the trustee that the trust has become irrevocable, or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered to the beneficiary during that 120-day period, whichever is later. "Terms of the trust" is defined in Prob C §16060.5 to include any document irrevocably exercising a power of appointment. To be effective, the notice must warn the beneficiary of the limitations period in a separate paragraph using 10-point boldface type or a reasonable equivalent. Prob C §16061.7(h); *Harustak v Wilkins* (2000) 84 CA4th 208, 100 CR2d 718 (12-point type not reasonable equivalent of 10-point boldface type).

When the trustee fails to give notification to a beneficiary, the trustee is responsible for all damages, attorney fees, and costs caused by the failure unless the trustee has made a reasonably diligent effort to comply with the notification requirements. If the failure affects an heir whose identity is known to the trustee, the trustee is responsible for all damages. Prob C §16061.9.

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§20.13 B. Statute of Limitations When Trustee Notification Not Given

In cases in which the trustee has not given the notification required by Prob C §16061.7, an attack on the validity of the trust will be governed by normal statutes of limitations, which vary depending on the facts alleged. See §4.18.

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Source: Estate Planning/California Trust and Probate Litigation/20 Trust Contests/§20.14 1. When Action Based on Trustor Incompetence

§20.14 1. When Action Based on Trustor Incompetence

There is no specific statute of limitations that covers an action to rescind a trust based on the trustor's lack of capacity. However, *Morse v Crocker Nat'l Bank* (1983) 142 CA3d 228, 190 CR 839, held that the 4-year statute of limitations in CCP §337 applies in these cases.

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Source: Estate Planning/California Trust and Probate Litigation/20 Trust Contests/§20.15 2. When Action Based on Fraud, Mistake, or Imposition of Constructive Trust

§20.15 2. When Action Based on Fraud, Mistake, or Imposition of Constructive Trust

An action challenging the validity of a trust based on fraud or mistake, including an action seeking to impose a constructive trust, is governed by the 3-year statute of limitations of CCP §338(d) to the extent the proceeding involves personal property. *Brazil v Silva* (1919) 181 C 490, 499, 185 P 174, disapproved on other grounds in 57 C2d at 133; *Getty v Getty* (1986) 187 CA3d 1159, 1168, 232 CR 603. To the extent that the action involves real property, the 5-year statute of CCP §318 applies. *Brazil v Silva*, *supra*.

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§20.16 3. When Statute May Be Stayed

When a confidential or fiduciary relationship exists between the person improperly procuring the trust and the party attacking the trust, the statute may be tolled until discovery of the wrongful acts. *Bedolla v Logan & Frazer* (1975) 52 CA3d 118, 131, 125 CR 59. See also Prob C §16460(a)(2).

The statute of limitations may be stayed because of the minority or incapacity of the aggrieved party. Bogert, The Law of Trusts and Trustees §951 at 664 (rev 2d ed 1995).

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Source: Estate Planning/California Trust and Probate Litigation/20 Trust Contests/§20.17 C. Transfers to Drafters and Other Disqualified Persons

§20.17 C. Transfers to Drafters and Other Disqualified Persons

There is a separate statutory time limit for an action to establish the invalidity of a transfer to a drafter or other person disqualified under Prob C §21350. See chap 6A. Under Prob C §21356(b), if the transfer to a disqualified person is made by some instrument other than a will, the action must be commenced within the later of 3 years after the transfer becomes irrevocable or 3 years from the date the person bringing the action discovers, or reasonably should have discovered, the facts regarding the transfer. It is unclear whether the Prob C §16061.8 statute of limitations for trust contests will control when it conflicts with the rules under Prob C §21356(b).

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§20.18 D. Laches

Laches is a defense that will deny a claimant equitable relief because of the claimant's delay in bringing suit, even though the suit is commenced within the statute of limitations. Laches is thus applicable in trust litigation when equitable remedies such as constructive trust, rescission, or reformation are sought. The defendant must show unreasonable delay by the plaintiff, and either prejudice to the defendant as a result of the delay or acquiescence by the plaintiff in the defendant's conduct. *Conti v Board of Civil Service Comm'rs* (1969) 1 C3d 351, 362, 82 CR 337; *Johnson v City of Loma Linda* (2000) 24 C4th 61, 99 CR2d 316.

Laches and the statute of limitations are affirmative defenses that if not specifically pleaded or otherwise properly raised are considered waived. *Victor Oil Co. v Drum* (1920) 184 C 226, 193 P 243; *Getz v Wallace* (1965) 236 CA2d 212, 45 CR 910.

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V. FORM OF CHALLENGE

A. Forum

§20.19 1. Civil Action

Most broad-based attacks on trust instruments may be brought in either the civil department or the probate department because they challenge the validity of the entire trust. Prob C §17000(b)(1). For discussion of concurrent jurisdiction, see §9.5. Usually a case will be brought to trial faster in the probate department than in the civil department. This can be either a tactical advantage or disadvantage, depending on the circumstances of the case.

PRACTICE TIP: Before deciding to proceed in the probate department rather than the civil department, counsel should determine whether the local rules and calendaring practices of the county involved will permit adequate time for discovery and any motions that are contemplated. Probate judges in some counties allow the parties ample time to carry out discovery and motion practice under the loose supervision of the probate department. In other counties, probate judges immediately assign contested matters to the master trial calendar, bypassing the comparatively slower process of the civil department and causing early discovery cutoffs.

For further discussion of practice and procedure in civil actions, see California Civil Procedure Before Trial, chap 4 (4th ed Cal CEB 2004), and California Trial Practice: Civil Procedure During Trial (3d ed Cal CEB 1995).

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§20.20 2. Probate Department Proceedings Under Trust Law

A trustee or beneficiary of a trust may file a petition in the probate department of the superior court either to determine the existence of the trust or to address issues concerning the internal affairs of the trust. Prob C §17200(a). A petition to determine the existence of the trust may raise any of the causes of action to set aside a trust, such as lack of capacity, undue influence, fraud, and mistake. Alternatively, grounds for setting aside a trust may be alleged in a trust contest brought in the civil department under the concurrent jurisdiction conferred by Prob C §17000(b).

The probate department of the superior court has exclusive jurisdiction over disputes concerning the internal affairs of trusts. Prob C §17000(a). The types of proceedings that are considered under the Trust Law to concern internal affairs of a trust include, without limitation, proceedings to determine questions of construction of the trust instrument (Prob C §17200(b)(1)), determine the existence or nonexistence of any immunity, power, privilege, duty, or right (Prob C §17200(b)(2)), determine the validity of a trust provision (Prob C §17200(b)(3)), ascertain beneficiaries and determine to whom property shall pass on final or partial termination of the trust (Prob C §17200(b)(4)), or modify, terminate, or combine trusts (Prob C §17200(b)(13)-(14)).

Thus, an attack on the validity of a trust amendment should be brought in the probate department, not the civil department. By contrast, an attack on the validity of the entire trust is subject to the concurrent jurisdiction of the civil and probate departments and may be brought in either forum. Prob C §17000(b)(1). The court may, however, deny the petition in the probate department if it determines that the matter should be heard in a civil action. Prob C §856.5.

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B. Proceedings Under Trust Law

§20.21 1. Contents of Petition

A petition brought under the Trust Law must state facts showing that the petition is authorized under Prob C §§17200-17211, must state the grounds of the petition, and must state the names and addresses of each person entitled to notice of the petition. Prob C §17201.

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§20.22 2. Notice of Petition

Notice of a petition under Prob C §17200 must be given at least 30 days before the hearing. Prob C §17203(a). The notice must be given to all trustees, beneficiaries (subject to Prob C §§15800-15805), and the Attorney General (if the petition relates to a charitable trust subject to the Attorney General's jurisdiction). Prob C §17203(a). When a trust is revocable, notice must be given to the person holding the power to revoke, not to the beneficiary. Prob C §15802. A beneficiary and, under limited circumstances, a creditor of the trust or settlor can request special notice. Prob C §17204.

In addition, at least 30 days before the time set for hearing on the petition, the petitioner must serve notice and a copy of the petition on any person, other than a trustee or beneficiary, whose right, title, or interest would be affected by the petition. Prob C §17203(b). If a person to whom notice would otherwise would be given has been deceased for at least 40 days and no personal representative has been appointed for the estate of that person, notice may instead be given to each heir and devisee of the deceased person, all named executors of the will of the decedent, and each person serving as guardian or conservator of the decedent at the time of the decedent's death, as far as is known to the petitioner. Prob C §17203(c).

In most circumstances, only the notice describing the proposed action need be sent. When a trustee or beneficiary has served and filed a notice of appearance or a request for a copy of the petition, the petitioner must mail a copy of the petition within 5 days after service of the notice of appearance or receipt of the request. Prob C §17205.

PRACTICE TIP: To protect against a claim that a beneficiary was not properly alerted to the issues to be raised in the hearing on the petition, it is best to serve a copy of the petition along with all notices.

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§20.23 3. Court's Powers Under Trust Law

The court has very broad powers to adjudicate the a petition brought under the Trust Law. The court may make any orders and take any other action necessary to dispose of the matters presented by the petition, including appointment of a temporary trustee to administer the trust in whole or in part. Prob C §17206.

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Source: Estate Planning/California Trust and Probate Litigation/20 Trust Contests/§20.24 C. Equitable Remedies

§20.24 C. Equitable Remedies

Whether an attack on the trust instrument is brought in the civil department or the probate department, various equitable remedies may be sought. These remedies include imposition of a constructive trust, rescission of the trust, or reformation of the trust instrument.

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Source: Estate Planning/California Trust and Probate Litigation/20 Trust Contests/§20.25 1. Constructive Trusts

§20.25 1. Constructive Trusts

An action to impose a constructive trust is often used as a method of attacking an express inter vivos trust. A constructive trust is an equitable remedy imposed to prevent a party in possession of property from being unjustly enriched. *Martin v Kehl* (1983) 145 CA3d 228, 237, 193 CR 312. It does not depend, however, on the absence of an adequate remedy at law. *Bacon v Grosse* (1913) 165 C 481, 493, 132 P 1027; *Heckmann v Ahmanson* (1985) 168 CA3d 119, 134, 214 CR 177.

One who wrongfully detains a thing (CC §2223) or gains a thing by "fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act" (CC §2224) is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it. Under these statutes, the only conditions necessary for imposition of a constructive trust are (a) the existence of a res, (b) the right of the plaintiff to that res, and (c) some wrongful acquisition or detention of the res by a party who is not entitled to it. *Communist Party v 522 Valencia, Inc.* (1995) 35 CA4th 980, 990, 41 CR2d 618; *Pacific Lumber Co. v Superior Court* (1990) 226 CA3d 371, 377, 276 CR 425.

In addition to the typical grounds for setting aside a trust such as undue influence, fraud, or mistake, a constructive trust will be imposed when there has been a violation of a trust or a breach of a confidential or fiduciary relationship. *South v Wishard* (1956) 146 CA2d 276, 284, 303 P2d 805. For example, in *Redke v Silvertrust* (1971) 6 C3d 94, 106, 98 CR 293, the court imposed a constructive trust on assets acquired by a husband who breached an oral agreement with his wife to bequeath her separate property to her daughter. The husband's failure to perform was a violation of the spouses' confidential relationship and constituted constructive fraud, which justified imposition of a constructive trust.

An action to impose a constructive trust may also be based on a breach of fiduciary duty by a trustee of an express trust. *Ehret v Ichioka* (1967) 247 CA2d 637, 643, 55 CR 869.

Unless an action to impose a constructive trust involves the internal affairs of a trust as defined in Prob C §17200(b), the constructive trust remedy may be sought in a regular civil action. An action to compel redress of a breach of trust, however, is an internal affairs matter and it would have to be brought as a petition proceeding in the probate department under Prob C §§17000(a) and 17200(a), (b)(12).

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§20.26 2. Reformation

Reformation is an equitable remedy used to change a written instrument to express the parties' true agreement when, through fraud, mutual mistake, or unilateral mistake in limited situations, the writing does not express the true intent of the parties. CC §3399; *Bailard v Marden* (1951) 36 C2d 703, 708, 227 P2d 10. In determining whether to grant reformation, a court exercises broad equitable powers. *Cardoza v Millington* (1956) 142 CA2d 26, 32, 297 P2d 778.

The purpose of reformation is to effectuate the common intention of the parties, when that intention was incorrectly reduced to writing. *Bailard v Marden*, *supra*. A writing that accurately reflects the common understanding of the parties is not subject to reformation. Even if the understanding of the parties is based on a mistaken assumption of fact, a court cannot reform the parties' agreement because that would require a new contract. In *Getty v Getty* (1986) 187 CA3d 1159, 1178, 232 CR 603, a trust was held not subject to reformation because it accurately reflected the settlor's intent, even if that intent was based on a mistaken assumption that one beneficiary would receive a separate inheritance.

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Source: Estate Planning/California Trust and Probate Litigation/20 Trust Contests/§20.27 a. Who May Seek

§20.27 a. Who May Seek

A written instrument may be reformed on application of a party aggrieved. CC §3399. A "party aggrieved" includes not only those who are the original parties to the transaction but also any third party who has suffered prejudice or pecuniary loss. *Orcutt v Ferranini* (1965) 237 CA2d 216, 224, 46 CR 715. Under the common law, a settlor without any pecuniary interest in the trust has standing to seek reformation on grounds that it will pass the settlor's estate in a manner contrary to his or her intent. *Bilafer v Bilafer* (2008) 161 CA4th 363, 369, 73 CR3d 880. See also Prob C §15409 (court may modify trust "[o]n petition by a trustee or beneficiary").

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§20.28 b. Grounds for Reformation

A mistake of a third person in reducing the common intent of the parties to writing is a ground for reformation. *First Am. Title Ins. & Trust Co. v Cook* (1970) 12 CA3d 592, 598, 90 CR 645; *Mills v Schulba* (1950) 95 CA2d 559, 213 P2d 408.

Unilateral mistake may serve as the basis for reformation only when the other party knows of or suspects the mistake. CC §3399. The nonmistaken party's inequitable conduct raises an estoppel to assert a contrary intent. Constructive notice of a unilateral mistake will not support reformation because there is no improper conduct. *La Mancha Dev. Corp. v Sheegog* (1978) 78 CA3d 9, 16, 144 CR 59. The knowledge or suspicion of an agent may be imputed to the party against whom reformation is sought. *Eagle Indem. Co v Industrial Acc. Comm'n* (1949) 92 CA2d 222, 225, 206 P2d 877.

Mistake of law may also be a ground for reformation. *Tyler v Larson* (1951) 106 CA2d 317, 235 P2d 39. See CC §1578. If parties execute an instrument thinking that it produces a certain legal effect, but they are mistaken, the instrument may be reformed to conform to its intended effect. *Stafford v California Canning Peach Growers* (1938) 11 C2d 212, 218, 78 P2d 1150.

Although the express language of CC §3399 provides for reformation to correct a defect based on fraud, mutual mistake, or the mistake of one party that is known or suspected by the other, unconscionable conduct that is neither fraudulent nor illegal has been held to justify reformation. *MacFarlane v Peters* (1980) 103 CA3d 627, 631, 163 CR 655.

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§20.29 c. Use of Extrinsic Evidence

The parol evidence rule bars the introduction of extrinsic evidence, oral or written, to contradict the terms of a writing intended by the parties as a final expression of their agreement. See CCP §1856. Reformation actions, however, are covered by an exception to the parol evidence rule. Extrinsic evidence is admissible to show that the writing does not express the intent of the parties in a reformation action based on mistake or fraud. *Berendsen v McIver* (1954) 126 CA2d 347, 356, 272 P2d 76.

Extrinsic evidence is not admissible, however, in the absence of clear and convincing proof that the language sought to be reformed resulted from fraud, mutual mistake, or a unilateral mistake when the other party knew of the mistake or suspected it. *Moore v Vandermast, Inc* (1941) 19 C2d 94, 119 P2d 129. Furthermore, extrinsic evidence is not admissible when the reformation action is in fact a dispute over trust interpretation, unless the proponent can first establish that the language in question is ambiguous. *Ike v Doolittle* (1998) 61 CA4th 51, 70 CR2d 887.

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§20.30 3. Rescission

Although a written instrument that accurately reflects a common intent based on a mistake of fact cannot be reformed, the mistake may be ground for rescission. *White v Berrenda Mesa Water Dist.* (1970) 7 CA3d 894, 900, 87 CR 338.

A trust agreement is subject to rescission like any other contract. A party to a contract may rescind the contract if his or her consent, or that of any party jointly contracting with him or her, was given by mistake or obtained through duress, menace, fraud, or undue influence. CC §1689(b)(1).

A contract of a person who is of unsound mind but not totally without understanding, made before a judicial determination of incapacity, may be rescinded. CC §§39(a), 1689(b)(7). The test is whether or not the person could deal with the subject matter of the contract sought to be rescinded with a full understanding of his or her rights and the nature, purpose, and effect of what he or she did with respect to the particular transaction. *Walton v Bank of Cal.* (1963) 218 CA2d 527, 541, 32 CR 856. The test of understanding varies depending on the nature of the contract. *Smalley v Baker* (1968) 262 CA2d 824, 832, 69 CR 521 (disapproved on other grounds in *Weiner v Fleischman* (1991) 54 C3d 476, 485, 286 CR 40). There is a rebuttable presumption that a person is of unsound mind if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence. CC §39(b). Substantial inability may not be proved solely by isolated incidents of negligence or imprudence. CC §39(b).

A gift, whether outright or in trust, can be rescinded if it was induced by fraud, mistake, or undue influence. See *Earl v Saks & Co.* (1951) 36 C2d 602, 609, 226 P2d 340; *Estate of Bliss* (1962) 199 CA2d 630, 639, 18 CR 821; see also Restatement of Restitution §§26, 39 (1937).

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Source: Estate Planning/California Trust and Probate Litigation/20 Trust Contests/ D. Pleadings/§20.31 1. Form: Petition to Determine Validity of Purported Trust and for Imposition of Constructive Trust

D. Pleadings

§20.31 1. Form: Petition to Determine Validity of Purported Trust and for Imposition of Constructive Trust

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[*Title of court*]

In re Trust Created Under the Will of _ _[*name*]_ _, Deceased [*or*] **In re _ _[*name*]_ _ Trust Established _ _[*date*]_ _**	**No. _ _ _ _ _ _** **PETITION TO DETERMINE VALIDITY OF PURPORTED TRUST AND TO IMPOSE CONSTRUCTIVE TRUST (PROBATE CODE §17200)**
_ _[*Name(s)*]_ _, **Petitioner(s)** **vs.** _ _[*Name(s)*]_ _, **Respondent(s)**	

Petitioner, _ _[*name*]_ _, alleges:

1. _ _[*Name*]_ _, hereafter referred to as decedent, died on _ _[*date*]_ _. At the time of death, decedent was a resident of _ _ _ _ _ _ County, California and left property in _ _ _ _ _ _ County, California.

2. On or about _ _[*date*]_ _, decedent, as settlor, executed a document purporting to create a revocable living trust (the "purported trust"). The purported trust gave the entirety of its assets to respondent, _ _[*name*]_ _.

3. Petitioner is a person interested in the devolution of the estate of decedent, in that petitioner is _ _[*specify status and interest of petitioner showing standing, e.g., an intestate heir of decedent. Petitioner is also informed and believes, and therefore alleges, that petitioner is a beneficiary under decedent's will executed earlier in time than the estate plan reflected in the purported trust and its related pour-over will. Petitioner has standing to bring this petition because petitioner will benefit by a judicial determination that the purported trust is invalid, thereby causing decedent's assets to be distributed through decedent's probate estate*]_ _.

4. Petitioner requests this court to rescind and nullify the purported trust on the following grounds:

[*State grounds, e.g.:*]

(a) First Ground: At the time of the alleged execution of the purported trust, decedent was not of sound and disposing mind. Petitioner is informed and believes and therefore alleges that, at the time the purported trust was executed, decedent did not have sufficient mental capacity to (i) understand the nature of decedent's actions in executing the purported trust, (ii) understand and recollect the nature and situation of decedent's property, or (iii) remember and understand decedent's relations to decedent's family members.

(b) Second Ground: The purported trust was executed as a direct result of undue influence exerted by respondent over the decedent. The undue influence consisted of the following:

[*Set forth facts constituting undue influence, e.g.:*]

(i) Respondent occupied the position of _ _[*specify relationship to decedent*]_ _ for approximately _ _ years before and up to the time of decedent's death. Respondent had a friendly and confidential relationship with decedent, who reposed trust and confidence in respondent. Respondent took over decedent's financial affairs.

(ii) At the time the purported trust was signed and at the time of decedent's death, decedent was aged and infirm, and suffering from memory problems. As a result of decedent's physical and mental infirmities, decedent was easily influenced and controlled by respondent.

(iii) Respondent actively procured the purported trust as part of a pattern of conduct aimed at gaining control of decedent's major assets.

(iv) During the last few months of decedent's life, respondent took active steps to isolate decedent and prevent decedent from having contact with decedent's family members.

(v) The disposition of decedent's estate as provided in the purported trust confers an undue benefit on respondent. Petitioner and decedent always enjoyed a close relationship. Respondent "moved in" on decedent during the last few years of decedent's life, taking ever greater control of decedent's life. Before becoming decedent's _ _[*specify respondent's relationship to decedent*]_ _, respondent had been a stranger to decedent.

[*Continue*]

5. By virtue of respondent's exertion of undue influence over decedent, respondent holds title to _ _[*describe assets of trust*]_ _ as well as all income therefrom, as constructive trustee for the benefit of the persons entitled to distribution of the estate of decedent.

6. The names and addresses of the persons entitled to notice of this petition are as follows: _ _[*List names and addresses.*]_ _

7. No request for special notice has been filed in this proceeding.

WHEREFORE, petitioner prays for an order of this court:

1. Finding the purported trust void due to the mental incapacity of decedent;

2. Finding the purported trust void due to the undue influence of respondent;

3. Declaring that respondent holds the assets of the purported trust in trust for the persons entitled to distribution of the estate of decedent;

4. For costs herein; and

5. For such other orders as the court may deem proper.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Petitioner

[*Verification; see §§17.56, 17.61*]

Comment: For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/20 Trust Contests/§20.32 2. Form: Petition by Beneficiary to Determine Validity of Trust Provision

§20.32 2. Form: Petition by Beneficiary to Determine Validity of Trust Provision

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[*Title of court*]

In re Trust Created Under the Will of _ _[*name*]_ _, Deceased [*or*] **In re _ _[*name*]_ _ Trust Established _ _[*date*]_ _** _ _[*Name(s)*]_ _, **Petitioner(s)** **vs** _ _[*Name(s)*]_ _, **Respondent(s)**	**No. _ _ _ _ _ _** **PETITION TO DETERMINE VALIDITY OF TRUST PROVISION (PROBATE CODE §17200(b)(3))**

Petitioner alleges:

1. Petitioner is a beneficiary

[*Add one of the following alternatives*]

[*Alternative 1: For testamentary trusts*]

of the testamentary trust created under the will of _ _[*name*]_ _, deceased, by decree of _ _[*preliminary/final*]_ _ distribution dated _ _[*date*]_ _.

[*Alternative 2: For living trusts*]

of the living trust dated _ _[*date*]_ _, of which _ _[*name*]_ _ _ _[*is/was*]_ _ the settlor and _ _[*name*]_ _ is the trustee.

[*Continue*]

2. _ _[*Name*]_ _ is the duly appointed trustee of the trust.

[*Add for institutional trustees*]

_ _[*Name of institutional trustee*]_ _ **is** _ _[*specify, e.g., a national banking association incorporated under the laws of the United States, doing business as a trust company in the State of California*]_ _**.**

[*Optional*]

3. Attached to this petition as Exhibit _ _ is a copy of the _ _[*decree of distribution/trust instrument*]_ _ **that sets forth the terms and conditions of the trust.**

[*Continue*]

[*Add one of the following alternatives*]

[*Alternative 1: For living trusts or testamentary trusts not subject to continuing jurisdiction*]

[4.] The principal place of administration of this trust is _ _ _ _ _ _ County, State of California.

[*Alternative 2: For testamentary trusts subject to continuing jurisdiction*]

[4.] The decedent's estate is administered in _ _ _ _ _ _ County, State of California.

[*Continue*]

[5.] The trust described herein is irrevocable.

[6.] The provision of paragraph _ _ of the trust is invalid in that it _ _[*set forth grounds for invalidity, e.g., the provision (a) is fraudulent as to creditors, or (b) tends to impose a restraint on marriage, or family relations, or religious freedom, or (c) produces a tax result that was unintended by the settlor (such as disqualifying the trust for the estate tax marital deduction), or (d) names a disqualified person (such as the drafting attorney) as trustee, or (e) was added by a purported trust amendment while the settlor was incompetent or was the product of undue influence (which must be pled with particularity), or (f) violates the rule against perpetuities*]**_ _.**

[7.] The remaining provisions of the trust are severable from the invalid paragraph _ _ and should be confirmed as valid and enforceable.

[8.] The names and addresses of the persons entitled to notice of this petition are as follows: _ _[*List names and addresses.*]**_ _**

[9.] No request for special notice has been filed in this proceeding.

WHEREFORE, petitioner requests that the court issue an order:

1. Declaring paragraph _ _ of the trust invalid;

2. Declaring the trust valid and enforceable with respect to paragraph _ _;

3. For costs herein; and

4. For such other orders as the court may deem proper.

Date: _ _ _ _ _ _ **__**[*Signature*]**__**
_ _[*Typed name*]**_ _**
Petitioner

[*Verification; see §§17.56, 17.61*]

Comment: For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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21

Breach of Trust

Andrew Zabronsky

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I. GROUNDS FOR BREACH OF TRUST

§21.1 A. Breach of Trust Defined

A breach of trust is a violation by the trustee of any duty that the trustee owes a beneficiary. Prob C §16400. See *Estate of Gump* (1991) 1 CA4th 582, 595, 2 CR2d 269. Ordinarily, a trustee must be personally at fault to be liable for breach of trust. Restatement (Second) of Trusts §201, Comment a (1959). This fault requirement is satisfied when the trustee commits a breach of trust (1) in bad faith, (2) knowingly but in good faith, or (3) negligently. Restatement §201. Negligence is the failure of the trustee to meet the applicable standard of care. *Estate of Gump, supra*. See §§21.27-21.62.

Even in the absence of negligence, a breach of trust may occur when the trustee mistakenly interprets the trust instrument or trust law as authorizing an act that the court determines is not in fact authorized. Restatement §201, Comment b. Good faith reliance on the advice of counsel will not exonerate a trustee from acts in excess of authority. If in doubt, the trustee can gain a measure of protection by applying to the court for instructions. Restatement §201. But see *Estate of Gilmaker* (1964) 226 CA2d 658, 663, 38 CR 270 (trustee must exercise *reasonable diligence* to ascertain nature and extent of obligations).

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§21.2 B. Duty to Comply With Trust Terms

The extent of the trustee's duties and powers is determined by the trust instrument. *Crocker-Citizens Nat'l Bank v Younger* (1971) 4 C3d 202, 211, 93 CR 214. With regard to a testamentary trust, the decree of distribution defines the duties and powers of the trustee. *Kaiser v Gibson* (1968) 264 CA2d 319, 323, 70 CR 246. The trustee has a duty to administer the trust according to the terms of the trust and, when not inconsistent, trust law. Prob C §16000.

Deviation from the terms of the trust, absent a sufficient excuse, is a breach of trust. *Estate of Gilmaker* (1962) 57 C2d 627, 631, 21 CR 585 (trustee violated direction to keep no more funds in account than were insured by FDIC).

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§21.3 1. Duty to Review Trust Terms

To comply with trust terms, the trustee must understand them. The trustee is under a duty diligently to review the trust instrument. *Estate of Gilmaker* (1964) 226 CA2d 658, 663, 38 CR 270. Even so, construction of the trust instrument is not always a simple matter. The meaning of the words used may not be immediately clear. See, *e.g., Kropp v Sterling Sav. & Loan Ass'n* (1970) 9 CA3d 1033, 1044, 88 CR 878 ("may" construed as "shall"). Moreover, the trust terms may confer duties and powers by implication as well as expressly. *Crocker-Citizens Nat'l Bank v Younger* (1971) 4 C3d 202, 211, 93 CR 214.

The interpretation of trusts is governed by the same statutory scheme as the interpretation of wills. Prob C §21101; *Newman v Wells Fargo Bank* (1996) 14 C4th 126, 134, 59 CR2d 2. The guiding principle of trust construction is to discern the intention of the settlor as expressed in the instrument. See *Kropp v Sterling Sav. & Loan Ass'n* (1970) 9 CA3d 1033, 1044, 88 CR 878. See also *Wells Fargo Bank v Marshall* (1993) 20 CA4th 447, 453, 24 CR2d 507. Thus, in interpreting a trust, it is proper for the court to place itself in the position of the trustor and consider the circumstances under which the document was made. *Wells Fargo Bank v Marshall, supra* (extrinsic evidence as to circumstances under which written instrument was made is available to interpret instrument). See *Newman v Wells Fargo Bank, supra* (will interpretation).

If the trustee acts in excess of its powers, the trustee may be held for a breach of trust even if the trustee's action was based on a reasonable misconstruction of the instrument. Restatement (Second) of Trusts §201, Comment b (1959). Such a technical breach of trust, however, may in appropriate cases be excused. Prob C §16440(b).

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§21.4 2. Change in Circumstances

Unusual circumstances may arise that justify a deviation from the trust. *Crocker-Citizens Nat'l Bank v Younger* (1971) 4 C3d 202, 211, 93 CR 214. The courts will not permit the purposes of a trust to be subverted by compelling "slavish adherence" to the trust terms. *Stanton v Wells Fargo Bank* (1957) 150 CA2d 763, 770, 310 P2d 1010. For example, if a required trust investment becomes entirely uneconomic, a court might authorize a substitute investment. Restatement (Second) of Trusts §167 (1959); Restatement (Third) of Trusts §66 (2007).

On the other hand, courts must exercise their power to modify sparingly and only in the clearest cases. The court will not modify a trust merely because modification might be advantageous to beneficiaries or could offer an expedient solution to problems of trust management. *Crocker-Citizens Nat'l Bank v Younger, supra*; *Security-First Nat'l Bank v Easter* (1934) 136 CA 691, 693, 29 P2d 422 (settlor directed that family home be retained during lifetime of widow; court refused to permit modification to allow sale despite widow's request, owing to reduction of income, that sale be authorized).

On petition, the court may modify a trust when changed circumstances threaten the purposes of the trust (Prob C §15409) or when all beneficiaries consent (Prob C §15403). In an emergency, a trustee may be justified in deviating from the trust terms without prior court approval. Restatement (Third) of Trusts §66 (2007).

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§21.5 3. Directing Power

The trustee of a revocable trust has a duty to follow written directions acceptable to the trustee given by the person with the power to revoke or the person to whom the settlor has delegated the right to direct the trustee. Prob C §16001(a). The trustee is not liable to a beneficiary for following such a direction. Prob C §16462. Similarly, many irrevocable trusts grant the settlor or a third party the power to direct the trustee to take a particular action (*e.g.,* to make a distribution to the settlor). If the trust grants such a directing power, the trustee must act in accordance with exercise of the power. Restatement (Third) of Trusts §75 (2007); *Vale v Union Bank* (1979) 88 CA3d 330, 336, 151 CR 784. In *Vale,* the trustee was held to have violated its duties by failing to follow the directions of an investment committee: "[T]he trust agreement is crystal clear that the bank, as trustee, was not to evaluate or exercise any independent judgment as to the propriety of investments directed by the administrative committee."

On the other hand, when the direction to the trustee of an irrevocable trust is on its face a breach of the terms of the trust (*e.g.,* a forbidden investment), the directed trustee cannot comply. If the trustee "reasonably should know" the direction is a breach, the trustee may be required to apply to the court for instructions. 3 Scott & Ascher on Trusts §16.7 (5th ed 2007).

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§21.6 C. Breach of Other Fiduciary Duties

The trustee is a fiduciary of the highest character whose duty demands the strictest integrity. *Kinert v Wright* (1947) 81 CA2d 919, 925, 185 P2d 364. A trustee "is bound to act in the highest good faith towards his beneficiary and may not obtain any advantage by the slightest misrepresentation. Concealment, threat, or adverse pressure of any kind is unlawful as long as the confidential relation exists," and any violation of these duties constitutes a fraud against the beneficiaries. *Estate of Vokal* (1953) 121 CA2d 252, 257, 263 P2d 64.

Within limits, however, the fiduciary duties set forth in the trust law must give way when the trust instrument provides otherwise. See Prob C §16000. Settlors may, and frequently do, permit trustees to engage in what would otherwise be prohibited violations of duty. See, *e.g., Estate of Thompson* (1958) 50 C2d 613, 616, 328 P2d 897 (self-dealing permitted); *Copley v Copley* (1981) 126 CA3d 248, 278, 178 CR 842 (conflict of interest permitted).

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§21.7 1. Duty of Loyalty

The trustee has a duty always to consider and act in the best interests of the trust. *Toedter v Bradshaw* (1958) 164 CA2d 200, 208, 330 P2d 688. The trustee may not, by the slightest impropriety, seek any advantage from a beneficiary. *Estate of Vokal* (1953) 121 CA2d 252, 257, 263 P2d 64. Nor may the trustee wield power for the trustee's own "aggrandizement, preference, or advantage" to the detriment of the beneficiary. *Jones v H.F. Ahmanson & Co.* (1969) 1 C3d 93, 109, 81 CR 592; *Van de Kamp v Bank of America* (1988) 204 CA3d 819, 834, 251 CR 530. This common-law fiduciary duty of loyalty is codified in Prob C §16002.

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§21.8 a. Breach by Pressuring Beneficiary

A breach of the duty of loyalty may be established by a showing that the trustee placed its interest above those of the beneficiaries. *Estate of Gump* (1991) 1 CA4th 582, 596, 2 CR2d 269. In *Gump,* the trustee threatened beneficiaries that the costs of an audit would be charged solely to their income shares, in an attempt to pressure the beneficiaries into dropping objections to the trustee's account. As a result, reimbursement of the trustee's litigation costs was denied even though the trustee had prevailed on most of the exceptions to the account.

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§21.9 b. Breach by Secret Profits

All benefits derived from the trust belong to the beneficiaries. *Van de Kamp v Bank of America* (1988) 204 CA3d 819, 834, 251 CR 530 (banking regulations permitted deposit practices that would otherwise have been breaches of trust). All benefits and advantages acquired by the fiduciary as an outgrowth of the fiduciary's office, exclusive of the agreed compensation, are considered to have been acquired for the benefit of the beneficiary. *Savage v Mayer* (1949) 33 C2d 548, 551, 203 P2d 9; *Jones v H.F. Ahmanson & Co.* (1969) 1 C3d 93, 109, 81 CR 592 (fiduciary may not use position or inside information for fiduciary's own benefit to detriment of beneficiaries).

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§21.10 2. Duty to Avoid Conflicts of Interest

A trustee has a basic fiduciary duty to avoid conflicts of interest. See Prob C §16004. The public policy basis underlying the duty to avoid conflicts of interest is to reduce the likelihood that trustees will *actually* breach the duty of loyalty by requiring them to avoid situations that might *tempt* them to do so. See *Toedter v Bradshaw* (1958) 164 CA2d 200, 208, 330 P2d 688. Prohibited conflicts may arise when the trustee profits from the use of trust property, participates in transactions adverse to the beneficiary, or attempts to enforce a claim against trust property that the trustee purchased after appointment as trustee. See Prob C §16004(a)-(b).

Further, when the trustee obtains an advantage from a transaction between the trustee and a beneficiary during the existence of the trust, the transaction is presumed to be a violation of the trustee's fiduciary duties. This presumption affects the burden of proof. Prob C §16004(c).

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§21.11 a. Self-Dealing

A trustee may not deal with himself or herself in any transaction in his or her individual capacity. The fairness of the transaction and the trustee's good faith are irrelevant. *Van de Kamp v Bank of America* (1988) 204 CA3d 819, 835, 251 CR 530; *Cagnolatti v Guinn* (1983) 140 CA3d 42, 44, 189 CR 151 (fiduciaries who diverted trust funds for their personal benefit were guilty of self-dealing); *Estate of Boggs* (1942) 19 C2d 324, 333, 121 P2d 678. Improper self-dealing is a breach of trust. Prob C §16004(a).

A trustee may not escape the prohibition on self-dealing transactions by acting for his or her own benefit through a third party. *Estate of Howard* (1955) 133 CA2d 535, 541, 284 P2d 966.

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Source: Estate Planning/California Trust and Probate Litigation/21 Breach of Trust/§21.12 (1) Self-Deposits

§21.12 (1) Self-Deposits

A trustee may deposit trust funds in a financial institution operated by, or associated with, the trustee. Prob C §16225(b). Appropriate self-deposits do not breach the duty of loyalty, and the trustee need not disclose or account for the profit such deposits earn. *Van de Kamp v Bank of America* (1988) 204 CA3d 819, 251 CR 530. The authority to make self-deposits, however, does not exonerate the trustee from the duty to invest assets prudently and in accordance with fiduciary principles. See, *e.g., Conservatorship of Pelton* (1982) 132 CA3d 496, 501, 183 CR 188 (bank trustee's authorized deposit of $264,000 for 17 months in passbook account was breach of trust when almost twice the interest could have been earned with equal safety and almost equal liquidity).

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§21.13 (2) Loans From Trustee to Trust

A loan from the trustee to the trust may constitute impermissible self-dealing. *Estate of McLellan* (1936) 14 CA2d 271, 274, 57 P2d 1338. In *McLellan,* the trustee's renewal of an existing loan at a *lower* interest rate was held to be a breach of trust.

Banking regulations, however, permit loans by a trustee bank to a trust if the loan is fair and reasonable. 12 CFR §9.12(c) (national banks); Fin C §786 (state-chartered banks). Further, many trust instruments expressly authorize such loans. Nevertheless, such a power is still subject to fiduciary duties. Prob C §16202.

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Source: Estate Planning/California Trust and Probate Litigation/21 Breach of Trust/§21.14 (3) Loans to Purchaser of Trust Assets

§21.14 (3) Loans to Purchaser of Trust Assets

A loan from the commercial department of a bank trustee to a third party to enable the purchase of a trust asset is not per se a prohibited self-dealing transaction. Prob C §16015; *Estate of Pitzer* (1984) 155 CA3d 979, 202 CR 855. In *Pitzer,* a breach of trust was found under the circumstances because the bank obtained a security interest in trust property and because it obtained a profit during the escrow period.

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Source: Estate Planning/California Trust and Probate Litigation/21 Breach of Trust/§21.15 (4) Other Kinds of Self-Dealing

§21.15 (4) Other Kinds of Self-Dealing

Other types of prohibited self-dealing by the trustee include:

- Making loans from the trust to the trustee. *People v Larkin* (ND Cal 1976) 413 F Supp 978, 981 (trustee of charitable trust hypothecated trust assets to obtain loan for trustee's closely held company).
- Entering into personal dealings with unrelated third parties that compete with the trustee's fiduciary duties to the beneficiary. Restatement (Second) of Trusts §170, Comment p (1959); Restatement (Third) of Trusts §78, Comment e (2007).
- Usurping the financial opportunity of a beneficiary. See, *e.g., Sequoia Vacuum Sys. v Stransky* (1964) 229 CA2d 281, 40 CR 203.

Although at common law a trustee could not compensate himself or herself for extraordinary administrative services, such as legal or accounting services (*Estate of Lair* (1945) 70 CA2d 330, 336, 161 P2d 288), the trust law now permits a trustee to hire agents who are associated with him or her. Prob C §16247.

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§21.16 b. Conflicting Personal Interests

A trustee may be removed when there are irreconcilable conflicts between the trustee's personal interests and those of the trust. *Estate of Hammer* (1993) 19 CA4th 1621, 24 CR2d 190; *Getty v Getty* (1988) 205 CA3d 134, 252 CR 342. Whether an adverse personal interest is improper depends on the facts and circumstances of each particular case. *Estate of Wemyss* (1975) 49 CA3d 53, 122 CR 134. For example, in *Hammer,* the executor was removed for conflicts arising from her asserting a personal claim, adverse to the heirs, to the principal asset of the estate, and also suing the sole beneficiary in another forum on an unrelated matter. *Estate of Hammer* (1993) 19 CA4th 1621, 1639, 24 CR2d 190.

A beneficiary may serve as trustee notwithstanding the inherent potential conflict of interest. *Crocker-Citizens Nat'l Bank v Younger* (1971) 4 C3d 202, 212, 93 CR 214.

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§21.17 c. Conflicting Duties

Frequently trustees, like large shareholders of private companies, are officers or directors of companies in which the trust has an ownership interest. Such a trustee owes fiduciary duties to the beneficiaries that might conflict with the fiduciary duties the trustee owes the corporation.

This situation does not *necessarily* present an improper conflict of interest, at least when there is disclosure and the trustee receives no more than appropriate compensation from the corporation. *Estate of McLaughlin* (1954) 43 C2d 462, 470, 274 P2d 868. Improper compensation, however, may constitute a breach of trust. See *Estate of Feraud* (1979) 92 CA3d 717, 723, 154 CR 889 (incentive bonuses based on revenues rather than net income).

A fiduciary duty owing to one principal does not excuse the fiduciary's duty to another. *Black v Shearson, Hammill & Co.* (1968) 266 CA2d 362, 367, 72 CR 157. In *Black,* the fiduciary, a stockbroker, sold to a customer stock of a corporation of which he was an officer. Although he owed the corporation a duty not to reveal confidential information, that duty did not excuse the conflicting duty of disclosure he owed the client. The court said the fiduciary's conflict "should not be resolved by weighing the conflicting duties; it should be avoided in advance… or terminated when it appears." 266 CA2d at 368. See also *Blackman Turkus v MF Downtown Sunnyvale* (2008) 162 CA4th 858, 887, 76 CR3d 325.

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§21.18 3. Duty of Impartiality

The trustee has a duty to deal impartially with all beneficiaries of a trust and must act impartially in investing and managing trust property, while at the same time considering the differing interests of the beneficiaries. Prob C §16003; *Estate of Nicholas* (1986) 177 CA3d 1071, 1089, 223 CR 410 (blindly following recommendation of majority of beneficiaries, over objection of minority, does not satisfy duty of impartiality). The rule applies to multiple beneficiaries of the same class or of succeeding classes. Restatement (Third) of Trusts §§79, 90, Comment i (2007).

"Impartially" does not necessarily mean "equally." Settlors frequently express an intent to favor one beneficiary (*e.g.,* the settlor's spouse) or class of beneficiaries (*e.g.,* income beneficiaries) over another. In such cases, the terms of the trust control. Prob C §16000. Moreover, even without express direction, it may appear that the primary purpose of the trust is to benefit one beneficiary or class of beneficiaries. See, *e.g., Estate of Miller* (1964) 230 CA2d 888, 909, 41 CR 410 (apparent that primary purpose of settlor was to benefit income beneficiary); *Estate of Traung* (1962) 207 CA2d 818, 835, 24 CR 872 (settlor's "overriding intent" was that primary beneficiary receive full share of corpus).

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§21.19 4. Duty of Disclosure

It is the trustee's duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration. Prob C §16060. The trustee is also under the common-law duty to fully disclose all material facts. *Van de Kamp v Bank of America* (1988) 204 CA3d 819, 835, 251 CR 530. The trustee must furnish to each beneficiary all material information necessary to protect the beneficiary's interests in the trust. *Werschkull v United Cal. Bank* (1978) 85 CA3d 981, 1001, 149 CR 829. When there is a material, nonroutine transaction, the trustee may have a duty of prior disclosure. *Allard v Pacific Nat'l Bank* (Wash 1983) 663 P2d 104. But see *Copley v Copley* (1981) 126 CA3d 248, 272, 178 CR 842 (trustee acted appropriately when she remained quiet to delay discussion on issue of stock valuation until estate tax return was accepted).

When there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud sufficient to entitle the injured party to bring an action. *Werschkull v United Cal. Bank, supra*. It is not necessary that the trustee intended to profit by the misrepresentation. See *Brown v Critchfield* (1980) 100 CA3d 858, 869, 161 CR 342. See also *Di Grazia v Anderlini* (1994) 22 CA4th 1337, 28 CR2d 37. Of course, any nondisclosure used to gain an advantage over the beneficiary would be a breach of the duty of loyalty as well. *Estate of Vokal* (1953) 121 CA2d 252, 257, 263 P2d 64. See §§21.7-21.9.

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§21.20 5. Duty Not to Delegate

The trustee has a duty to render personal service and not to delegate to others acts that the trustee reasonably should perform personally. In addition, the trustee may not transfer the office to another person nor delegate the entire administration of the trust to a cotrustee or other person. Prob C §16012. The test for improper delegation is whether a prudent person would consider the acts "so important and so much within his capacity that he must do [them] personally." *Powers v Ashton* (1975) 45 CA3d 783, 789, 119 CR 729 (decision to sue, under circumstances, was nondelegable).

If a trustee abdicates control of the trust to another, whether an advisor or even a cotrustee, the trustee becomes the guarantor of any losses, irrespective of motive and whether the surrender of control actually caused the loss. *Gaver v Early* (1923) 191 C 123, 126, 215 P 394.

The duty not to delegate does not preclude the trustee from employing an agent when appropriate. Comment to Prob C §16012. The trustee may employ agents to render advice and assistance. Prob C §16247; *Estate of Whitney* (1926) 78 CA 638, 248 P 754. For example, it is proper for a corporate trustee to employ a real estate agent to solicit offers to purchase land, as long as the trustee does not delegate decision-making authority. 3 Scott & Ascher on Trusts §§17.3.2, 17.3.4 (5th ed 2007).

In some cases, a trustee may have an affirmative obligation to take advice. Failure to obtain necessary assistance in a subject area in which the trustee lacks expertise may be negligence. *Estate of Gump* (1991) 1 CA4th 582, 595, 2 CR2d 269.

Different rules apply to delegation of investment functions covered by the Uniform Prudent Investor Act. See Prob C §§16045-16054. See also §§21.31-21.39.

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§21.21 6. Duty to Keep Trust Assets Separate

The trustee has a duty to keep trust assets separate and identified. Prob C §16009. For example, in *Estate of McCabe* (1950) 98 CA2d 503, 509, 220 P2d 614, the trustee so commingled trust funds with her own that she, in practical effect, disregarded the trust and defeated its purpose.

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§21.22 7. Duty to Enforce or Defend Claims

In addition to all of the duties discussed above, the trustee has a general duty to take reasonable steps to enforce claims of the trust. Prob C §16010. This does not mean that the trustee must enforce every claim. The standard is whether a prudent trustee would take steps to enforce a claim in such circumstances. *Pillsbury v Karmgard* (1994) 22 CA4th 743, 763, 27 CR2d 491. The trustee must evaluate such factors as whether there is a likely chance of success and whether a judgment would be collectible. *Schwartz v Labow* (2008) 164 CA4th 417, 78 CR3d 838 (trustee suspended for using $1.3 million of trust funds to obtain partially collectible $700,000 judgment).

The trustee also has a duty to take reasonable steps to defend actions that may result in a loss to the trust. Prob C §16011. Depending on the circumstances, it may be reasonable to settle an action or suffer a default rather than to defend, but no matter how the case is resolved, a trustee who fails to exercise reasonable judgment faces liability.

Furthermore, a trustee generally has a duty to defend against challenges to the trust's validity, and the trustee's attorney will be entitled to reasonable fees from the trust to prevent a failure of the trust. *Estate of Duffill* (1922) 188 C 536, 555, 206 P 42. However, when the trustee is also a beneficiary, the dispute is over competing trust instruments, and the trustee employs an attorney to defend the instrument that benefits the trustee, the trustee's attorney may not be entitled to fees from the trust. *Whittlesey v Aiello* (2002) 104 CA4th 1221, 128 CR2d 742 (attorney for trustee named in trust amendment that benefited trustee not entitled to fees from trust for unsuccessful defense of validity of amendment because it would be inequitable to force prevailing remainder beneficiary under initial trust, in effect, to pay opponent's fees on top of her own); *Terry v Conlan* (2005) 131 CA4th 1445, 33 CR3d 603 (trustee not allowed to pay her attorney from trust to defend 2001 trust instrument benefiting her and her siblings against 1999 trust instrument benefiting their stepmother—trustee not defending existence of the trust, just trust instrument for her benefit over other instrument).

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Source: Estate Planning/California Trust and Probate Litigation/21 Breach of Trust/§21.23 a. Duty to Enforce Claims Against Predecessor Trustee

§21.23 a. Duty to Enforce Claims Against Predecessor Trustee

In addition to the general duty to enforce claims is the specific duty to enforce claims against a predecessor trustee. See Prob C §16403(b). A trustee is not liable simply because of a breach of duty by his or her predecessor, but the successor is liable if the successor commits a breach by failing to redress breaches committed by the predecessor.

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§21.24 (1) Predecessor Trustee Must Give All Trust Assets to Successor

The successor trustee's first obligation on assuming trusteeship is to take possession of all assets of the trust and to ensure that the predecessor trustee has delivered all the assets to the successor. If the predecessor has not delivered all assets of the trust to the successor, the successor must take reasonable steps to compel the transfer. Prob C §16403(b)(2).

The successor should review the predecessor's final account to ascertain whether all current assets of the trust have been delivered, but the cautious trustee may go back even further in time to ascertain the status of the assets of the trust. The trustee should review the original trust document and any attachments that list the original assets of the trust. If the trust is a testamentary trust or a living trust and the settlor has died, the trustee should also review the estate tax return to determine the assets of the trust. Depending on how long the trust has been in existence, the trustee may decide to review some or all of the annual accountings. If the trust has been in existence for a long time, however, and particularly if there have been court approved accountings, it is reasonable for the trustee to limit his or her review to recent accounts. Of course, the review will depend on the situation. For example, if there has been a history of mistrust or conflict between the predecessor trustee and the beneficiaries, the successor trustee may want to look back further than successor might otherwise have done in order to avoid similar problems.

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§21.25 (2) Breach of Trust by Predecessor Trustee

If the successor trustee is aware (or reasonably should have been aware) of a breach of trust by the predecessor trustee, the successor must take steps to redress the breach. See Prob C §16403(b)(1), (3). Sometimes, the breach is apparent, *e.g.,* when the predecessor's final account reveals that the predecessor misappropriated assets. Often, the breach is not apparent (or may be nonexistent).

The new trustee should carefully review the predecessor's final account to determine whether there was a breach of trust. Depending on the results and circumstances, the trustee may conduct further investigation of the predecessor's acts.

Sometimes the predecessor trustee has resigned because of a conflict with the beneficiaries. In such situations, the beneficiaries are often distrustful of the predecessor trustee and may suspect wrongdoing. The beneficiaries will usually convey these suspicions to the successor trustee, who should undertake an investigation. If the successor trustee discovers a breach of trust, then he or she must evaluate whether an action should be pursued against the predecessor trustee. If, on the other hand, the investigation reveals no wrongdoing, the trustee should report the results of the investigation to the beneficiaries.

Sometimes, even though the investigation does not reveal any wrongdoing, the beneficiary is convinced that there has been a breach of trust by the predecessor trustee. This is a difficult situation for the successor trustee who has a duty to conserve trust assets and not spend them on further investigation or litigation that has no basis. If wrongdoing by the predecessor trustee later is revealed, however, the successor may be found liable for not pursuing the breach. Just as the successor must decide on reviewing the transfer of assets to the successor trustee, the successor must determine how far back into the history of the trust he or she should look in reviewing the actions of the predecessor. Factors that will influence this decision include the length of time the trust has been in existence and whether there have been court-approved accountings.

In such a situation, there may also be a conflict among the beneficiaries, in which one or more suspect a breach of trust by the predecessor trustee and others do not share the suspicion. The trustee may be caught between his or her duties to remedy the breach of the predecessor and to conserve trust assets. The trustee should document carefully his or her efforts and may try to take comfort in the "prudent trustee" standard used to evaluate his or her acts. The trustee's decision not to pursue a potential claim or to conduct further investigation is evaluated on the basis of facts known to the trustee when the decision is made; thus, there is some limit to the hindsight that the beneficiaries can use to attack the trustee's decision. Prob C §16040(a); *Pillsbury v Karmgard* (1994) 22 CA4th 743, 763, 27 CR2d 491. On the prudent trustee rule, see §§21.27-21.30.

If the successor discovers a breach by the predecessor trustee that can be corrected, the successor is obligated to do so as soon as is practicable. For example, if trust assets are improperly invested, the successor should change the investment as soon as possible. The trustee then may be obligated to seek redress from the predecessor for any damage suffered by the trust. If the claim against the predecessor could have been collected had the successor taken timely steps to do so, and it then becomes uncollectible, the successor trustee may be surcharged for the loss suffered by the trust. *Purdy v Johnson* (1917) 174 C 521, 528, 163 P 893.

On surcharge of trustees, see chap 13.

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§21.26 b. Duty to Enforce Claims Against Cotrustee

When a trust has more than one trustee, each trustee is obligated to actively participate in the administration of the trust. Prob C §16013. A trustee may not delegate his or her responsibilities, nor may he or she allow the cotrustee to administer the trust without his or her participation. A trustee who abdicates his or her responsibilities and permits his cotrustee to exert exclusive control over the assets of the trust may be held liable for any breach by the cotrustee. *Blackmon v Hale* (1970) 1 C3d 548, 83 CR 194; Restatement (Third) of Trusts §81 (2007).

Not only does the cotrustee have a duty to supervise and review the actions of his or her cotrustees, but the trustee must act affirmatively to redress a breach of trust by his or her cotrustees. Prob C §16402(b). For example, when a dispute among trustees prevented the investment of trust funds, the trustees were held liable not only for the breach of the duty to invest, but also for failing to take steps to remedy the situation. *Lynch v John M. Redfield Found.* (1970) 9 CA3d 293, 88 CR 86. The trustee also may seek to surcharge a cotrustee as part of an accounting of the trust. *Estate of Hensel* (1956) 144 CA2d 429, 301 P2d 105.

PRACTICE TIP: In advising the trustee, counsel should impress on cotrustees the necessity of participating in administration of the trust and of reviewing actions taken by the other cotrustees.

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§21.26A D. Aiding or Abetting Breach of Trust

A trust beneficiary may sue third parties who, for their own financial advantage, actively participated with the trustee in a breach of trust, whether by inducing, aiding, or abetting the breach, or by receiving trust property from the trustee in knowing breach of the trust. *Wolf v Mitchell, Silberberg & Knupp* (1999) 76 CA4th 1030, 90 CR2d 792; *City of Atascadero v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 CA4th 445, 80 CR2d 329; *Pierce v Lyman* (1991) 1 CA4th 1093, 3 CR2d 236, superseded by statute on other grounds in 85 CA4th at 396. A third person who assists a trustee with a transaction is not required, however, to inquire whether the trustee has the power to conduct the transaction, and is protected as if the trustee is properly exercising the power, if the person acts in good faith for valuable consideration and without actual knowledge that the trustee is exceeding or improperly exercising his or her powers. Prob C §18100; *Vournas v Fidelity Nat'l Title Ins. Co.* (1999) 73 CA4th 668, 86 CR2d 490. See also Com C §3307.

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II. STANDARD OF CARE

A. Prudent Trustee Rule

§21.27 1. Standard of Care

The prudent trustee rule requires the trustee to perform his or her duties in good faith and with reasonable prudence, discretion, and intelligence. *Estate of Bissinger* (1963) 212 CA2d 831, 840, 28 CR 217; *Estate of Cousins* (1896) 111 C 441, 44 P 182. It imposes a standard of care with respect to noninvestment duties that requires the trustee to use the reasonable skill, care, and caution that a prudent person acting in a similar capacity would use to accomplish the purposes of the trust. Prob C §16040(a). It does not make a trustee, however, the insurer of all trust losses, impose liability for every mistake of judgment, or require the trustee to exercise extraordinary care. See, *e.g., Pillsbury v Karmgard* (1994) 22 CA4th 743, 762, 27 CR2d 491 (trustee reasonably decided not to pursue action for malicious prosecution).

Whether the trustee's conduct meets the requisite standard of care is determined by the circumstances as they reasonably appear at the time, and not by hindsight. 22 CA4th at 763. Moreover, the standard of care is unaffected by whether the trustee is compensated. *Lynch v John M. Redfield Found.* (1970) 9 CA3d 293, 301, 88 CR 86.

Although the prudent trustee rule applies to many functions of the trustee, a somewhat different standard applies to investment and management functions covered by the Uniform Prudent Investor Act. See Prob C §16040(c). See also §§21.31-21.39. Different rules also guide the court's review of a trustee's discretionary functions. See §§21.40-21.46.

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§21.28 2. Illustrations of Rule

Courts have found violations of the prudent trustee rule in the following situations:

- Failure to vigorously monitor and manage rental real property owned by the trust. *Estate of Gump* (1991) 1 CA4th 582, 595, 2 CR2d 269.
- Failure to obtain necessary assistance in subject area in which the trustee lacked expertise. 1 CA4th at 595.
- Failure to take action in general to protect the interest of the beneficiaries. *Younglove v Hacker* (1936) 15 CA2d 211, 217, 59 P2d 451.
- Accepting the suggestion of a beneficiary without exercising independent judgment. *Estate of Talbot* (1956) 141 CA2d 309, 315, 296 P2d 848.

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§21.29 3. More Stringent Standard for Expert Trustee

If a trustee is an expert, or holds himself or herself out to the trustor as being an expert, the trustee is under a duty to exercise such skill. Prob C §16014; Restatement (Third) of Trusts §77 (2007). Professional trustees are held to more stringent standards than lay trustees and are required to apply the knowledge and competence ordinarily possessed by professionals under similar circumstances. *Estate of Beach* (1975) 15 C3d 623, 635, 125 CR 570 (bank as trustee); *Estate of Collins* (1977) 72 CA3d 663, 673, 139 CR 644 (corporate trustee).

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§21.30 4. Standard May Be Altered by Trustor

The requirements of the prudent trustee rule may be relaxed or expanded by the terms of the trust. Prob C §16040(b); Restatement (Third) of Trusts §77, Comment d (2007). The trustee who relies in good faith on such a provision in the trust is not liable to the beneficiary. Prob C §16040(b).

Provisions relaxing the standard of care are exculpatory provisions and are strictly construed. Restatement §77, Comment d. See *Estate of Collins* (1977) 72 CA3d 663, 673, 139 CR 644.

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B. Prudent Investor Rule

§21.31 1. Uniform Prudent Investor Act

Unless the settlor provides otherwise, the trustee has a duty to comply with the prudent investor rule. Prob C §16046(a). In California, the prudent investor rule has been codified as the Uniform Prudent Investor Act (UPIA). See Prob C §§16045-16054.

The UPIA was enacted effective January 1, 1996. It applies to all trusts existing on or after January 1, 1996, but only to decisions or actions occurring after that date. Prob C §16054. Because prudent management of trust assets may require periodic review of the investment portfolio, however, even pre-1996 decisions and actions could come within the ambit of the prudent investor rule.

The discussion in §§21.32-21.39 focuses on the ways in which trustees may violate the prudent investor rule. For a comprehensive review of the trustee's investment duties, see California Trust Administration, chap 5 (2d ed Cal CEB 2001).

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2. Compliance With Act

§21.32 a. Requirement of Reasonable Skill, Care, and Caution

The Uniform Prudent Investor Act (UPIA) abandons the notion that some investments are bad per se and permits a trustee to invest in any kind of property or type of investment, as long as the trustee exercises reasonable care, skill, and caution. Prob C §16047(a). Under the UPIA, a trustee's individual investment and management decisions are evaluated by considering the trust portfolio as a whole, and in light of the trustee's overall investment strategy. Prob C §16047(b). Thus, in selecting investments, the trustee may consider general economic conditions, tax consequences, expected return, need for liquidity or regular income, and a range of other factors that may come into play. See Prob C §16047(a) (listing factors trustee may consider).

The UPIA provides that compliance with the prudent investor rule is determined in light of the circumstances existing at the time of a trustee's decision or action. Prob C §16051.

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Source: Estate Planning/California Trust and Probate Litigation/21 Breach of Trust/§21.33 b. Requirement of Initial Review

§21.33 b. Requirement of Initial Review

The prudent investor rule requires the trustee to review the trust assets and make decisions concerning their retention or disposition. Prob C §16049. Review is necessary to bring the trust portfolio into compliance with the purposes of the trust and with the Uniform Prudent Investor Act (Prob C §§16045-16054). The trustee must conduct the review within a reasonable time after accepting the trusteeship or receiving trust assets. Prob C §16049.

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§21.34 c. Exception to Rule When Trust Terms Control

The settlor may expand or restrict the prudent investor rule by express provisions in the trust instrument. A trustee is not liable to a beneficiary for the trustee's good faith reliance on the settlor's express provisions. Prob C §16046(b). See, *e.g., Stanton v Wells Fargo Bank* (1957) 150 CA2d 763, 771, 310 P2d 1010 (settlor's instructions limiting trustees to certain investments so as to avoid losses like those incurred by settlor's acquaintances during Depression would not be modified due to changed economic conditions between 1930 and 1957). Provisions relaxing the standard of care owed by the trustee are viewed as exculpatory clauses and are strictly construed. Restatement (Second) of Trusts §174, Comment d (1959). See §21.53.

A provision of the trust instrument merely authorizing a particular type of investment does not exempt the trustee from the prudent investor rule. *Conservatorship of Pelton* (1982) 132 CA3d 496, 501, 183 CR 188 (bank trustee's deposit of funds in passbook account, an authorized investment, was potential breach of trust when almost twice the interest could have been earned with equal safety in another investment); *Estate of Collins* (1977) 72 CA3d 663, 672, 139 CR 644.

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3. Duties Under Act

§21.35 a. Failure to Invest

The trustee has the duty to take reasonable steps to marshal, safeguard, and make trust property productive. Prob C §§16006-16007; *Lynch v John M. Redfield Found.* (1970) 9 CA3d 293, 298, 88 CR 86; *Higgins v City of Santa Monica* (1964) 62 C2d 24, 29, 41 CR 9. The trustee is liable for breach of trust if, under the circumstances, the trustee unreasonably delays compliance with investment duties. *Lynch v John M. Redfield Found.* (1970) 9 CA3d 293, 302, 88 CR 86 (5-year delay unreasonable as matter of law).

On the other hand, the duty to invest must give way to the terms or purposes of the trust. Prob C §§16000, 16046(b); *Higgins v City of Santa Monica, supra* (purpose of trust was to hold and preserve real property in natural state, not to generate income). Further, the trustee need not invest funds immediately necessary for the orderly administration of the trust. Prob C §16225(e); *Van de Kamp v Bank of America* (1988) 204 CA3d 819, 845, 251 CR 530.

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§21.36 b. Failure to Diversify

The trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so. Prob C §16048; *Estate of Collins* (1977) 72 CA3d 663, 669, 139 CR 644 (duty to distribute risk of loss by reasonable diversification); *Estate of Beach* (1975) 15 C3d 623, 634 n10, 125 CR 570; *Mandel v Cemetery Board* (1960) 185 CA2d 583, 8 CR 342. In *Collins,* for example, the trustee, by investing two-thirds of the trust in one investment (undersecured junior deeds of trust) failed to diversify the investments in a relatively small trust fund. *Estate of Collins, supra*. In *Mandel,* the court held that the investment of nearly 80 percent of the trust's funds in one security (loans to an affiliated limited partnership secured by deeds of trust) represented an imprudent failure to diversify. *Mandel v Cemetery Board* (1960) 185 CA2d 583, 586, 8 CR 342.

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§21.37 c. Failure to Investigate

A trustee must make a reasonable effort to determine facts relevant to investing and managing trust assets. Prob C §16047(d); *Estate of Collins* (1977) 72 CA3d 663, 669, 139 CR 644; *Estate of Hamon* (1922) 60 CA 154, 157, 212 P 399. The trustee in *Collins* invested in junior deeds of trust without adequately investigating either the borrowers or the collateral. The court found that the trustee's valuation of the collateral, based only on general discussions with a broker about property values in the area, was inadequate. The trustee's excuse that it could not be expected to remember the details of its investigation ten years after the fact was unavailing because the investigation should have been documented. *Estate of Collins, supra*.

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§21.38 d. Improper Delegation

The Uniform Prudent Investor Act permits a trustee to delegate investment and asset management functions "as prudent under the circumstances." Prob C §16052. The trustee must also exercise prudence in selecting the agent, defining the agent's role, and reviewing the agent's performance. A trustee who complies with these obligations will not be liable for the agent's actions. Prob C §16052(c).

In some cases, prudence may *require* the trustee to seek the assistance of an expert. *Estate of Gump* (1991) 1 CA4th 582, 595, 2 CR2d 269 (failure to obtain necessary assistance in subject area in which trustee lacks expertise may be negligence).

Except when investment selection has been prudently delegated to another, the trustee must exercise independent judgment in the selection of investments. *Estate of Talbot* (1956) 141 CA2d 309, 315, 296 P2d 848 (accepting investment advice of beneficiary without exercising independent judgment may be imprudent).

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§21.39 e. Retention of Investments

The trustee may collect, hold, and retain trust property received from a settlor or anyone else until it is appropriate to dispose of the property, in the trustee's judgment. Prob C §16220. This power is subject to Prob C §16202 (subjecting exercise of a power by the trustee to the trustee's fiduciary duties) and the Uniform Prudent Investor Act (UPIA).

Before the UPIA, as a general rule a trustee was under a duty to the income beneficiary to sell unproductive or underproductive property. *Estate of Gross* (1963) 216 CA2d 563, 569, 31 CR 281. Under the UPIA, the question focuses on the portfolio as a whole rather than an individual investment. See Prob C §16047(b). In either case, the general rule is not inflexible. A trustee with discretion might, under the circumstances, legitimately determine that retention of a particular asset was in the ultimate best interests of the beneficiaries and in accordance with the settlor's intent. *Estate of Gross* (1963) 216 CA2d 563, 568, 31 CR 281.

Settlors frequently direct that the family home be retained during the life of the surviving spouse. See, *e.g., Security-First Nat'l Bank v Easter* (1934) 136 CA 691, 693, 29 P2d 422 (court refused to permit sale even though widow requested it).

When a closely held family business is involved, the settlor may well have intended that the business be held for the benefit of remainder beneficiaries who are lineal descendants. *Estate of Bixby* (1961) 55 C2d 819, 825, 13 CR 411 (settlor's intent predominated over income beneficiary's desire for more productive asset).

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C. Discretionary Acts

§21.40 1. Ordinary Discretion

Except when absolute discretion clearly is conferred by the trust instrument (see §§21.41-21.46), a discretionary power conferred on a trustee is not left to the trustee's unfettered discretion but must be exercised reasonably. Prob C §16080; *Estate of Nicholas* (1986) 177 CA3d 1071, 1087, 223 CR 410.

A trustee is liable for abuse of discretion if he or she:

- Fails to exercise independent judgment (see, *e.g., Estate of Talbot* (1956) 141 CA2d 309, 315, 296 P2d 848 (trustee merely acted on advice of beneficiary));
- Acts in bad faith (see, *e.g., Copley v Copley* (1981) 126 CA3d 248, 284, 178 CR 842 (no good faith effort to determine value of stock));
- Exceeds the bounds of reasonable judgment (see, *e.g., Estate of Heard* (1951) 107 CA2d 225, 234, 236 P2d 810, disapproved on other grounds in 55 C2d at 823).

A trustee's mere belief is not substantial evidence of reasonableness when it is unsupported by *any* facts or circumstances. *Estate of Nicholas* (1986) 177 CA3d 1071, 1089, 223 CR 410.

On the other hand, the court will not substitute its judgment and discretion for that of a trustee who acts within proper limits, and the court may not control the trustee's action merely because it disagrees with the trustee. *Estate of Genung* (1958) 161 CA2d 507, 512, 326 P2d 861. Rather, the court must find an abuse of discretion before it will intervene. 161 CA2d at 512; *Estate of Marre* (1941) 18 C2d 184, 190, 114 P2d 586. For example, if the trustee is empowered to apply as much of the trust property as the trustee considers necessary for the support of a beneficiary, the court will not interfere with the discretion on the ground that the trustee has applied too small an amount, if in the exercise of the trustee's judgment the trustee applies at least the minimum amount that could reasonably be considered necessary, even though the court might have applied a larger amount. Restatement (Second) of Trusts §187, Comment e (1959); Restatement (Third) of Trusts §50, Comment b; §87, Comment c (2007).

Consultation with legal counsel may help demonstrate an appropriate exercise of discretion. *Estate of Bixby* (1961) 55 C2d 819, 824, 13 CR 411.

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2. Absolute Discretion

§21.41 a. Absolute Discretion Not Reviewable for Reasonableness

Absolute discretion, exercised in good faith by a trustee, cannot be controlled by a court on the basis of the soundness of the discretion exercised. *Estate of Ferrall* (1953) 41 C2d 166, 173, 258 P2d 1009. Nevertheless, even a grant of absolute discretion is not beyond review. When a trust instrument confers "absolute," "sole," or "uncontrolled" discretion, the trustee still must conform with fiduciary principles, may not act in bad faith, and may not disregard the purposes of the trust. Prob C §16081(a).

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§21.42 (1) Fiduciary Principles

A grant of absolute discretion does not permit a trustee to neglect the trust or abdicate his or her judgment. *MCA Inc. v U.S.* (9th Cir 1982) 685 F2d 1099 (applying California law); *Coberly v Superior Court* (1965) 231 CA2d 685, 689, 42 CR 64. See Prob C §16081(a). In *Coberly,* a beneficiary sought to surcharge the trustee bank for neglect of duty in connection with the delayed sale of the principal trust asset, consisting of shares in a closed corporation. Although the trustee successfully argued at trial that the beneficiary was not entitled to complain because the terms of the trust instrument gave the trustee absolute discretion in the management of assets, the appellate court reversed. It found that "[a] grant of absolute discretion to a trustee to administer assets does not mean it can do as it pleases, but rather that the grantor has waived the… standard of reasonableness. The trustee is still required to avoid arbitrary action and to use its best judgment." *Coberly v Superior Court, supra*.

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§21.43 (2) Good Faith

Absolute discretion may not be exercised fraudulently, in bad faith, or in a manner that constitutes abuse of discretion. *Estate of Ferrall* (1953) 41 C2d 166, 173, 258 P2d 1009. See Prob C §16081(a). See, *e.g., Copley v Copley* (1981) 126 CA3d 248, 284, 178 CR 842 (trustee who made no good faith effort to comply with duty to determine fair market value of stock was liable even though trustee had absolute discretion). The trustee, however, is entitled to a presumption that it acted in good faith. *Estate of Ferrall* (1953) 41 C2d 166, 177, 258 P2d 1009. But see *Estate of Nicholas* (1986) 177 CA3d 1071, 1087, 223 CR 410 (on petition for instructions, trustee not entitled to presumption that it *will* act in good faith).

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§21.44 (3) Purposes of Trust

No matter how broad a discretion is granted the trustee, it cannot outweigh the intention of the settlor or defeat the purpose of the trust. *Estate of Miller* (1964) 230 CA2d 888, 907, 41 CR 410. See Prob C §16081(a). Whenever the exercise of the trustee's discretion is challenged, the inquiry will concern whether the trustee acted as the settlor intended. *Estate of Ferrall* (1953) 41 C2d 166, 174, 258 P2d 1009; *Estate of Traung* (1962) 207 CA2d 818, 835, 24 CR 872.

All things being equal, the fact that a testator imposed a trust, rather than making an outright gift of the property, may demonstrate an intent to benefit the remainder beneficiaries. *Estate of Bixby* (1961) 55 C2d 819, 824, 13 CR 411 (testator "plainly intended" to benefit grandchildren; otherwise, reasonable to assume he would have left estate to children outright).

The settlor, however, may have other reasons to impose a trust. In *Estate of Miller, supra,* the testator divided her estate among her three children, leaving the share of one child in trust, "due to an unfortunate addiction to liquor." The trustee, who had absolute discretion, refused to make requested distributions. The court concluded that the trustee's action failed to account for the purpose of the trust, which was to provide basic support and maintenance for the child. *Estate of Miller* (1964) 230 CA2d 888, 909, 41 CR 410.

In *Estate of McCabe* (1950) 98 CA2d 503, 507, 220 P2d 614, the trustee was given "absolute and uncontrolled" discretion to determine the amount of distributions. The court noted that the purpose of the trust was to ensure proper support for the beneficiary and held that the trustee was required to use the income as far as necessary to support her, and had discretion only to determine what conditions would constitute necessity.

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§21.45 b. Absolute Discretion Strictly Construed

A grant of absolute discretion is viewed as an exculpatory clause, and is strictly construed. *Estate of Collins* (1977) 72 CA3d 663, 673, 139 CR 644; *Estate of Gross* (1963) 216 CA2d 563, 566, 31 CR 281. See Prob C §16081. Even when a trustee is *apparently* granted absolute discretion, review of the entire trust instrument may show that the settlor intended to constrain such discretion. *Copley v Copley* (1981) 126 CA3d 248, 284, 178 CR 842. In *Gross,* for example, the trustee was granted "full power and authority" to retain trust property. The court held that only ordinary discretion was conferred, in the absence of a clear grant by the testator of absolute discretion. *Estate of Gross* (1963) 216 CA2d 563, 567, 31 CR 281. See also *Conservatorship of Pelton* (1982) 132 CA3d 496, 501, 183 CR 188 (authority to make particular investment does not supersede general duty to invest prudently).

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Source: Estate Planning/California Trust and Probate Litigation/21 Breach of Trust/§21.46 3. Absolute Discretion When Trustee Is Also Beneficiary

§21.46 3. Absolute Discretion When Trustee Is Also Beneficiary

A grant of absolute discretion with respect to a person's power to make discretionary distributions is subject to fiduciary constraints and usually only permits distributions for health, education, support, and maintenance. See Prob C §16081(b). The statute is intended to protect the power holder from the adverse tax consequences that might result from holding a general power of appointment. IRC §§678, 2041, 2514.

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III. BENEFICIARY'S STANDING TO BRING SUIT

§21.46A A. Against Trustee

Beneficiaries have standing to bring a proceeding against the trustee to redress a breach of trust by any available remedy. Prob C §17200(a), (b)(12). This proceeding must be brought by verified petition in the probate department. *Saks v Damon Raike & Co*. (1992) 7 CA4th 419, 430, 8 CR2d 869. This requirement is waived, however, if the matter is tried without objection in the general civil department. *Harnedy v Whitty* (2003) 110 CA4th 1333, 1344, 2 CR3d 798. For remedies, see §21.63. There is no right to jury trial. Prob C §§16421, 17006.

A beneficiary has standing to sue a *former* trustee for breach of trust, even when a successor trustee is available to do so. *Estate of Bowles* (2008) 169 CA4th 684, 87 CR3d 122.

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§21.46B B. Against Third Parties

In general, trust beneficiaries do not have standing to sue third parties who commit misconduct with respect to trust assets. *Saks v Damon Raike & Co.* (1992) 7 CA4th 419, 8 CR2d 869; *Powers v Ashton* (1975) 45 CA3d 783, 119 CR 729. This is because the trustee, as the holder of legal title to trust assets, is the real party in interest for prosecuting such suits. 7 CA4th at 428; 45 CA3d at 787; see also CCP §367. Even the general right of a third party beneficiary to sue on a contract made expressly for his or her benefit does not apply when a trust has been created in favor of that party, and the contract is between the trustee and an agent of the trustee. *National Bank v Exchange Nat'l Bank* (1921) 186 C 172, 180, 199 P 1; *Saks v Damon Raike & Co.* (1992) 7 CA4th 419, 431, 8 CR2d 869. A trust beneficiary's right to sue is ordinarily limited to enforcement of the trust according to its terms. *Botsford v Haskins & Sells* (1978) 81 CA3d 780, 146 CR 752; Prob C §17200 (authorizing beneficiaries to bring action concerning the *internal* affairs of the trust).

The general rule is subject to two important exceptions. First, a beneficiary has standing to sue a third party and join the trustee when the trustee cannot or will not enforce a cause of action against the third party. *Triplett v Williams* (1969) 269 CA2d 135, 74 CR 594. The beneficiary must plead and prove that the trustee's failure to bring suit was negligent, wrongful, or otherwise improper. *Pillsbury v Karmgard* (1994) 22 CA4th 743, 27 CR2d 491. The proceeding must be brought by verified petition in the probate department. *Saks v Damon Raike & Co.* (1992) 7 CA4th 419, 430, 8 CR2d 869. This requirement is waived, however, if the matter is tried without objection in the general civil department. *Harnedy v Whitty* (2003) 110 CA4th 1333, 1344, 2 CR3d 798.

Second, when the trustee has committed a breach of trust, the beneficiaries may prosecute an action against third parties who, for their own financial advantage, induce the trustee to commit a breach of trust; actively participate with, aid, or abet the trustee in that breach; or receive and retain trust property from the trustee in knowing breach of trust. *Estate of Bowles* (2008) 169 CA4th 684, 87 CR3d 122; *City of Atascadero v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 CA4th 445, 80 CR2d 329; *Saks v Damon Raike & Co., supra*. In an appropriate case, the trustee's attorney may be sued under this exception. *Wolf v Mitchell, Silberberg & Knupp* (1999) 76 CA4th 1030, 90 CR2d 792. However, that the trustee's attorney may have taken excessive compensation from the trust does not by itself constitute a financial advantage of the sort that will permit a beneficiary's direct suit. *Berg & Berg Enters., LLC v Sherwood Partners, Inc.* (2005) 131 CA4th 802, 835, 32 CR3d 325. Furthermore, a beneficiary who intends on proceeding against the trustee's lawyer may have to comply with CC §1714.10, which requires prior court approval for conspiracy claims against an attorney. In actions brought under this second exception to the general rule, the beneficiaries need not join the trustee in the suit because they are considered to be the parties who are primarily wronged and entitled to sue, although the trustee may also be entitled to sue the third party on the same claim. When a successor trustee has brought suit against the third party, however, the beneficiaries may lose their direct right of action. *City of Atascadero v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 CA4th 445, 467, 80 CR2d 329.

NOTE: This rule can lead to a multiplicity of actions, as was the case in *City of Atascadero v Merrill Lynch, Pierce, Fenner & Smith, Inc., supra,* because both the trustee and the beneficiaries may have claims against a third party and neither is required to join the other. See CCP §369 (trustee need not join beneficiaries); *City of Atascadero v Merrill Lynch, Pierce, Fenner & Smith, Inc., supra* (beneficiaries need not join trustee).

At common law, a beneficiary could sue a third party only in equity. Restatement (Second) of Trusts §§281 comment a, 282 (1959). Thus, the beneficiary should have no right to jury trial on a claim against the third party. See *C & K Eng'g Contractors v Amber Steel Co.* (1978) 23 C3d 1, 9, 151 CR 323 (if the action is essentially equitable, the parties have no right to jury trial).

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IV. EVIDENCE

A. Burden of Proof

§21.47 1. Beneficiary Has Initial Burden

When a beneficiary seeks relief for a breach of trust, the beneficiary has the burden of proving the existence of a fiduciary duty and the trustee's failure to perform it. *Van de Kamp v Bank of America* (1988) 204 CA3d 819, 853, 251 CR 530 (burden of proof as to bad faith, fraud, and abuse of discretion was on petitioner, and trustees were entitled to benefit of presumption that they acted in good faith). If the beneficiary meets the initial burden, the burden then shifts to the trustee to justify his or her actions. The trustee must show that it met the applicable standard of care and that it acted with the utmost good faith toward the beneficiary. *Van de Kamp v Bank of America, supra*.

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§21.48 2. When Trustee Obtains Advantage

There is a statutory presumption affecting the burden of proof in transactions between trustees and beneficiaries in which the trustee obtains an advantage. In such a situation, the presumption arises that the transaction is in violation of the trustee's fiduciary duties. Prob C §16004(c). The presumption may arise either during the existence of the trust or while the influence acquired by the trustee remains. Prob C §16004(c). The term "advantage" is liberally construed. *Ferrara v La Sala* (1960) 186 CA2d 263, 271, 9 CR 179. See *Rader v Thrasher* (1962) 57 C2d 244, 252, 18 CR 736 (proof of any advantage by trustee sufficient to raise presumption of insufficient consideration in transaction between trustee and beneficiary).

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§21.49 B. Expert Testimony

Professional trustees and other experts are held to a more stringent standard of care than lay trustees. See §21.29. Normally, proof of liability for failure to meet this standard of care requires testimony from a qualified expert. *Estate of Beach* (1975) 15 C3d 623, 635, 125 CR 570 (retention of unproductive stock). Expert testimony is not required, however, when the question can be resolved through common knowledge. *Estate of Anderson* (1983) 149 CA3d 336, 351, 196 CR 782; *Jorgensen v Beach 'n' Bay Realty, Inc.* (1981) 125 CA3d 155, 163, 177 CR 882.

The prudent trustee rule requires that the trustee exercise the same skill, care, and caution as a prudent person acting in a similar capacity. Prob C §16040. Depending on the circumstances, the standard of a prudent trustee might or might not be a matter of common knowledge. Under the former prudent man rule, on the other hand, expert testimony was not required because the standard only required the prudence that "a man of ordinary judgment would be expected to bestow upon his own affairs." *Estate of Anderson* (1983) 149 CA3d 336, 352, 196 CR 782.

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§21.50 C. Presumption Arising From Failure to Maintain Records

All inferences will be taken against a fiduciary who fails to maintain proper trust records. *Estate of McCabe* (1950) 98 CA2d 503, 505, 220 P2d 614 (rebuttable presumption of fraud against trustee who fails to maintain proper trust accounts); *Blackmon v Hale* (1970) 1 C3d 548, 560, 83 CR 194. Moreover, without records, memories fade, and the trustee may be unable to meet his or her burden of proof. *Estate of Collins* (1977) 72 CA3d 663, 671, 139 CR 644 (although trustees could not be expected to recall specifics of loan made ten years earlier, they should have documented their investigation). On the burden of proof, see §§21.47-21.48.

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§21.50A D. Attorney-Client Privilege

In general, a party's confidential attorney-client communications are privileged from disclosure. Evid C §§952, 954. When a party is a trustee, however, an important exception may lead to disclosure. After a trustee's resignation or removal, the successor trustee generally becomes the holder of the attorney-client privilege with respect to "confidential communications that occurred when the predecessor, in its fiduciary capacity, sought the attorney's advice for guidance in administering the trust." *Moeller v Superior Court* (1997) 16 C4th 1124, 1134, 69 CR2d 317. Therefore, the successor trustee is entitled to discover the predecessor's attorney-client communications on matters of trust administration and, apparently, free to waive the privilege and permit disclosure to others, including beneficiaries. Indeed, as in *Moeller,* the successor trustee may also be a beneficiary.

The successor trustee cannot discover all the predecessor's attorney-client communications. The predecessor retains the privilege regarding advice sought for its own protection. *Wells Fargo Bank v Superior Court* (2000) 22 C4th 201, 209, 91 CR2d 716. As a practical matter, however, the distinction between trust administration advice and defensive advice is not always easy to draw. *Moeller* places the burden squarely on the trustee to "scrupulously and painstakingly" distinguish its interests from those of the beneficiaries. 16 C4th at 1135. A trustee who wishes to maintain the confidentiality of defensive advice would be wise to use the safe harbor adopted in *Moeller.* If the predecessor seeks legal advice in its personal capacity out of genuine concern for possible future charges of breach of fiduciary duty, it "may be able to avoid disclosing the advice to a successor trustee by hiring a separate lawyer and paying for the advice out of its personal funds." 164 C4th at 1134.

PRACTICE TIP: As *Moeller* states, "a trustee must take into account the possibility that its confidential communications with an attorney may someday be disclosed to a successor trustee." 16 C4th at 1133. Accordingly, the attorney should advise the trustee about this important exception to the attorney-client privilege early in the relationship, preferably in the retainer agreement. The attorney should also bear in mind that advice to a trustee client about trust administration may be disclosed to a successor trustee, and potentially to the beneficiaries.

In contrast, trust beneficiaries generally do not have a right to obtain disclosure of trustee attorney-client communications, whether about trust administration or potential trustee liability. *Wells Fargo Bank v Superior Court* (2000) 22 C4th 201, 91 CR2d 716. As a result, generally the only way that beneficiaries can compel disclosure of a trustee's confidential attorney-client communications is through removal or resignation of the trustee, appointment of a successor, and voluntary waiver of the privilege by the successor. One outcome of the decisions in *Wells Fargo* and *Moeller* will thus likely be intensified efforts by beneficiaries to obtain interim removal of a trustee during breach of trust litigation.

One court has applied the principle established in *Moeller* to hold that a successor trustee steps into the shoes of the predecessor trustee with respect to a waiver of the attorney work-product privilege. *Eddy v Fields* (2004) 121 CA4th 1543, 18 CR3d 487 (when predecessor trustees' attorney waived privilege with respect to his own clients, successor trustee was entitled to view that work product).

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V. TRUSTEE'S LIABILITY FOR ACTS OF OTHERS

§21.51 A. Acts of Agents

A trustee is liable for an agent's act or omission that would constitute a breach of trust if committed by the trustee, if at least one of the following circumstances is present (Prob C §16401(b)):

- The trustee directed the agent's act;
- The trustee improperly delegated authority to perform the act to the agent (see Prob C §16012; §21.20);
- The trustee did not use reasonable prudence in selecting the agent;
- The trustee did not periodically review the agent's performance;
- The trustee concealed the agent's act; or
- The trustee knew of the agent's wrongdoing and failed to take reasonable steps to compel the agent to correct the wrong.

In other circumstances, a trustee has no liability for the acts or omissions of an agent. Prob C §16401(a). Whether the trustee has acted reasonably under Prob C §16401 is governed by the prudent person standard of care (see §21.27). Comment to Prob C §16401.

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§21.52 B. Acts of Cotrustees

Each trustee has a duty to participate in the administration of the trust, to take reasonable steps to prevent a cotrustee from committing a breach of trust, and to take reasonable steps to compel a cotrustee to redress a breach of trust. Prob C §16013.

A trustee is not responsible for breaches by a cotrustee unless the trustee is also at fault by consenting to the breach, by otherwise participating in it, by negligently permitting it to occur, or by other circumstances listed in Prob C §16402(b). See, *e.g., Blackmon v Hale* (1970) 1 C3d 548, 559, 83 CR 194 (trustee who surrendered sole control of assets to cotrustee was liable for cotrustee's misappropriation of assets); *Gaver v Early* (1923) 191 C 123, 127, 215 P 394 (trustee who puts trust assets in care of another is liable for any resulting loss, even if person entrusted with assets is cotrustee). In any other circumstances, the trustee is not liable for breaches committed by a cotrustee. Prob C §16402(a).

When the trustee is liable, the trustee's liability is joint and several with that of the cotrustee, though the trustee can sue the cotrustee for contribution. *Gbur v Cohen* (1979) 93 CA3d 296, 300, 155 CR 507.

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VI. TRUSTEE'S DEFENSES

§21.53 A. Exculpatory Clauses

Settlors choose trustees they trust and frequently attempt to protect them from liability. The settlor may provide that the trustee will have no liability as long as he or she acts in good faith, or the settlor may purport to confer "uncontrolled" discretion or to relax the standard of care owed by the trustee. Such exculpatory provisions are generally permitted. Prob C §16461(a). Nevertheless, permitting a settlor to relieve the trustee of all accountability is against public policy (*Estate of Ferrall* (1953) 41 C2d 166, 174, 258 P2d 1009) as it would promote dereliction by trustees (see 4 Scott & Ascher on Trusts §24.27.3 (5th ed 2007)). Accordingly, a trust instrument may not shield a trustee from liability for acts performed with gross negligence, in bad faith, or with reckless indifference. Prob C §16461(b). Nor is a trustee immune from liability for any profit the trustee derives from a breach of trust. Prob C §16461(b).

Exculpatory clauses are always strictly construed. *Estate of Collins* (1977) 72 CA3d 663, 673, 139 CR 644. In addition, an exculpatory clause that was drafted or demanded by the trustee might have been obtained improperly (see Prob C §16464(b)(3)) or constitute a form of adhesion contract.

For discussion of exculpatory provision in trust instrument relieving trustee from liability for adequately disclosed items in account or report, see §13.5A.

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§21.54 B. Consent or Affirmance of Beneficiaries

A trustee may be relieved of liability for breach of trust by the consent or affirmance of adult beneficiaries. Prob C §§16463, 16465. To give valid consent or affirmance, the beneficiary (1) may not be incapacitated, (2) must know of his or her rights and know of the material facts that the trustee knew or should have known and did not reasonably believe that the beneficiary knew, and (3) must not have been induced to consent by the trustee's improper conduct. Prob C §§16463(b), 16465(b)(1)-(3). Furthermore, if the trustee has an interest in the transaction, the trustee must show that it was fair and reasonable to the beneficiary. Prob C §§16463(c), 16465(b)(4). In determining whether a beneficiary has been fully and fairly informed of the breach, the courts may look to whether the beneficiary had independent advice. Bogert, The Law of Trusts and Trustees §544 (rev 2d ed 1993).

Mere acquiescence by the beneficiary will not constitute a defense to a breach of trust. *Ferro v Citizens Nat'l Trust & Sav. Bank* (1955) 44 C2d 401, 414, 282 P2d 849 ("acquiescence" defined as "passive submission or acceptance"); *Trafton v Youngblood* (1968) 69 C2d 17, 28, 69 CR 568 (attorney diversion of client trust funds presented as fait accompli did not constitute consent to breach of trust).

Consent of one beneficiary does not bar nonconsenting beneficiaries from claiming a breach of trust (*Yapp v State Bar* (1965) 62 C2d 809, 816, 44 CR 593) except to the extent that the doctrine of virtual representation may apply (see §21.56). An award against a trustee who was acting with the consent of some but not all beneficiaries may be limited to compensation of the interests of the nonconsenting beneficiaries. *Estate of Talbot* (1956) 141 CA2d 309, 327, 296 P2d 848.

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Source: Estate Planning/California Trust and Probate Litigation/21 Breach of Trust/§21.55 C. Discharge by Release or Contract

§21.55 C. Discharge by Release or Contract

A trustee may be relieved of liability for a breach of trust by the beneficiary's release or contract discharging the trustee from the breach. Prob C §16464.

A release or discharge will not relieve a trustee of liability when (Prob C §16464(b)):

- The beneficiary was incapacitated at the time;
- The beneficiary did not know of his or her rights and of material facts that
- The trustee knew or reasonably should have known, and
- The trustee did not reasonably believe the beneficiary knew;
- The release or contract was induced by the trustee's improper conduct; or
- The transaction involved an unfair bargain between the trustee and beneficiary.

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D. Statute of Limitations

§21.56 1. Three Years After Written Report or Discovery

Probate Code §16460 sets forth a 3-year statute of limitations for actions by a beneficiary against a trustee for breach of express trust. It provides that the beneficiary's cause of action accrues not only when the beneficiary has actual knowledge of a breach, but also on receipt by the beneficiary of an "interim or final account in writing, or other written report" by the trustee that provides "sufficient information so that the beneficiary… reasonably should have inquired into the existence of the claim." Prob C §16460(a)(1). If the account or other written report does not adequately disclose the existence of a claim for breach, the 3-year period begins to run when the beneficiary discovers or "reasonably should have discovered, the subject of the claim." Prob C §16460(a)(2).

Probate Code §16460 represents a substantial change from prior law. Previously, the limitations period did not begin to run unless the beneficiary had "actual knowledge of some unequivocal act in violation of duties of the trustee or in repudiation of the trust." *Di Grazia v Anderlini* (1994) 22 CA4th 1337, 28 CR2d 37. Now under §16460, a beneficiary must act within 3 years of receiving information sufficient to permit discovery of a claim. *Noggle v Bank of America* (1999) 70 CA4th 853, 82 CR2d 829.

In *Noggle*, remainder beneficiaries claimed that the trustee breached its trust by investing solely for income, in violation of its duty to the remainder. Some of the beneficiaries had not been told that the trust assets were invested entirely in fixed income securities, and the annual accountings they received did not directly disclose that fact. The court noted that the accountings provided sufficient information to allow each beneficiary to calculate the market value of trust assets, "and were received over a sufficient number of years to permit each remainderman to make *comparisons* and observe the absence of growth," and held that no more was required to trigger the 3-year statute under §16460. *Noggle v Bank of America* (1999) 70 CA4th 853, 861, 82 CR2d 829.

The *Noggle* court rejected the remainder beneficiaries argument that they did not have an affirmative duty to check "every action" the trustee took, but could assume that the trustee was acting in their best interests. 70 CA4th at 860, n5. Absent proof of fraud, beneficiaries have a duty of inquiry when they receive sufficient information to put them on notice. Compare *Goldberg v Goldberg* (1963) 217 CA2d 623, 630, 32 CR 93 (court assumed beneficiaries relied on good faith of trustee in absence of direct evidence that beneficiaries knew trustee "had turned against them").

A written report disclosing a breach of trust need not comply with Prob C §16061 (duty to report information on request) or Prob C §16063 (contents of account) to trigger the statute of limitations. *Noggle v Bank of America, supra*.

A provision in a trust instrument requiring a beneficiary to object to an account within a specified period is effective, so long as the beneficiary is given at least 180 days to object and the trustee complies with Prob C §16461(c). For a discussion of such provisions, see §13.5A.

Under certain circumstances, under the doctrine of virtual representation, notice to one beneficiary is sufficient to constitute notice to that beneficiary's successors. Prob C §15804. See *Estate of Lacy* (1975) 54 CA3d 172, 189, 126 CR 432 (§15804 enacted to recognize principle of virtual representation); Bogert, *The Law of Trusts & Trustees* §871 (rev 2d ed 1995) (under rule of virtual representation, some beneficiaries may represent interests of beneficiaries who have similar or identical interests). The extent to which the doctrine of virtual representation may apply to trigger the running of the statute against beneficiaries without actual notice has not been addressed by California courts.

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Source: Estate Planning/California Trust and Probate Litigation/21 Breach of Trust/§21.57 2. Three Years After Discovery [Deleted]

§21.57 2. Three Years After Discovery [Deleted]

This section has been deleted.

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§21.58 3. Tolling

The running of the statute is stayed during periods when the beneficiary is incapacitated, including the beneficiary's minority or disability. Bogert, The Law of Trusts and Trustees §951 (rev 2d ed 1995). On the other hand, for limitations purposes, an incapacitated beneficiary is considered to have received an account or report if received by the beneficiary's legal representative or guardian ad litem, or, in the case of a minor, a guardian or parent who does not have a conflict of interest. Prob C §16460(b).

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§21.59 E. Laches

An action that otherwise might properly be brought under the statute of limitations may still be barred by the doctrine of laches. Under the Restatement (Second) of Trusts §219 (1959), a beneficiary cannot hold the trustee liable for breach of trust if the beneficiary fails to sue the trustee for as long and under such circumstances that it might be inequitable to permit the beneficiary to hold the trustee liable.

The elements of laches are (1) a failure to assert a right, (2) a delay in the assertion of the right for some appreciable period, and (3) circumstances that would cause prejudice to an adverse party if assertion of the right is permitted. *Getty v Getty* (1986) 187 CA3d 1159, 1170, 232 CR 603 (dismissal of trust beneficiary's action for fraud and declaratory relief affirmed as violating statute of limitations and laches); *Hovey v Bradbury* (1896) 112 C 620, 44 P 1077.

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§21.60 F. Res Judicata and Collateral Estoppel

A beneficiary seeking to contest actions taken by a trustee that are raised by an accounting submitted for court approval must bring claims before the accounting is approved. Unless there is extrinsic fraud by a trustee (see §21.62), the failure of a beneficiary to raise any claims may bar the beneficiary from subsequently litigating the claims under the doctrine of res judicata. *Noggle v Bank of America* (1999) 70 CA4th 853, 82 CR2d 829; *Lazzarone v Bank of America* (1986) 181 CA3d 581, 589, 226 CR 855 (res judicata applies in probate proceedings).

In *Getty v Getty* (1986) 187 CA3d 1159, 1173, 232 CR 603, the court determined that not only may a probate adjudication be binding on the matters that were actually litigated but it may also be binding on matters that could have been raised with respect to the issue litigated.

When a judgment or order (including an order settling an account) in a guardianship or conservatorship proceeding becomes final, it releases the guardian or conservator from all claims of the ward or conservatee or of any person affected by the order. Prob C §2103(a).

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§21.61 1. Narrow Application of Doctrines

Although broad language is used in most orders approving accountings, the approval of "all of the acts of trustees" does not provide protection except for items actually included in the account and passed on by the probate court. *Estate of Schneider* (1979) 95 CA3d 55, 59, 156 CR 838. In *Schneider,* the court surcharged a trustee who had failed to fully report the trust income and his own income from the trust despite the existence of several orders approving the trustee's annual accounting. Because the court had not been fully informed of the facts, it had not actually approved the financial transactions in dispute. 95 CA3d at 56. See also *Estate of De Laveaga* (1958) 50 C2d 480, 487, 326 P2d 129; *Conservatorship of Coffey* (1986) 186 CA3d 1431, 1437, 231 CR 421.

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§21.62 2. Extrinsic Fraud Exception

Res judicata and collateral estoppel do not apply when there has been extrinsic fraud by a trustee. See *Estate of Sanders* (1985) 40 C3d 607, 613, 221 CR 432 (court may exercise its equitable jurisdiction to set aside orders in probate proceedings in cases of extrinsic and collateral fraud). Extrinsic fraud occurs when one party unlawfully prevents another from having his day in court, as by failing to provide required notice of the suit. In the fiduciary contest, trustees have been found to commit extrinsic fraud when their petition conceals information that was required to have been disclosed. See *Lazzarone v Bank of America* (1986) 181 CA3d 581, 596, 226 CR 855. However, the disclosure of a loss triggers a duty for the beneficiary to inquire further into the possibility that the loss was the result of trustee negligence or fraud. 181 CA3d at 597 (sustaining demurrer against beneficiary who claimed extrinsic fraud but did not allege that trustee's accounts "concealed any trust assets or trust losses").

Exactly what else constitutes extrinsic fraud for purposes of avoiding the bar of res judicata, however, is unclear. One line of cases appears to apply a liberal interpretation. These cases have found extrinsic fraud in failure to disclose material information (*Estate of Anderson* (1983) 149 CA3d 336, 196 CR 782) or the failure of trust counsel to disclose a conflict of interest (*Morales v Field, DeGoff, Huppert & MacGowan* (1979) 99 CA3d 307, 160 CR 239; *Potter v Moran* (1966) 239 CA2d 873, 49 CR 229). In *Estate of Sanders* (1985) 40 C3d 607, 615, 221 CR 432, the supreme court held that a judgment would be likely to be set aside when there has been a breach of fiduciary duty, even if the "same conduct in a non-fiduciary relationship would not be considered extrinsic fraud."

Other cases appear to construe the extrinsic fraud exception more strictly. See, *e.g., Estate of Gump* (1991) 1 CA4th 582, 2 CR2d 269 (beneficiary must demonstrate both reliance and injury to prevail on claim of extrinsic fraud); *Bank of America v Superior Court* (1986) 181 CA3d 705, 226 CR 685.

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VII. REMEDIES

§21.63 A. Remedies Available

If a trustee commits, or threatens to commit, a breach of trust, a beneficiary or cotrustee may commence a proceeding to (Prob C §16420):

- Compel or enjoin the trustee from breaching the trust;
- Compel the trustee to compensate for a breach;
- Appoint a receiver or temporary trustee;
- Remove the trustee (see chap 14);
- Set aside acts of the trustee (subject to Prob C §18100);
- Reduce or deny compensation of the trustee;
- Impose an equitable lien or a constructive trust on trust property (subject to Prob C §18100); or
- Trace and recover trust property that has been wrongfully disposed of (subject to Prob C §18100).

These provisions do not preclude any other appropriate remedy provided by statute or common law. Prob C §§16420(b), 16442. For example, the trustee's failure to account or otherwise perform after citation or order may be punishable as contempt. Even imprisonment under CCP §1219(a) has been used to enforce contempt by holding the trustee until he or she performs.

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§21.64 B. Damages

When a breach of trust has caused a loss, a beneficiary or cotrustee may seek damages to redress the loss. *Estate of Gump* (1982) 128 CA3d 111, 180 CR 219. The object of the damage award is twofold: (1) to compensate for losses sustained as a result of the breach, and (2) to induce trustees to comply with their obligations by making them disgorge any profit or by imposing a penalty. Restatement (Second) of Trusts §205 (1959).

The court is given latitude to charge the trustee with the measure of liability that is appropriate under the circumstances. See Prob C §16440(a). When the trustee has acted reasonably and in good faith under the circumstances as known to the trustee, the court may excuse the trustee in whole or in part from liability for the breach of trust if it would be equitable to do so. Prob C §16440(b). See *Estate of Talbot* (1956) 141 CA2d 309, 322, 296 P2d 848 (court has flexibility to fix proper measure of damages; there should be different measure of damages depending on whether trustee acted in bad faith, in excess of authority, or merely negligently).

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§21.65 1. Requirement of Causation

There must be a causal connection supporting any monetary award that the trustee is ordered to pay. Prob C §16440; Restatement (Second) of Trusts §§204-205 (1959). Thus, the trustee is only liable for loss or depreciation resulting from the breach of trust, for profits that the trustee made through the breach of trust, or for any profits that would have accrued to the trust but for the breach of trust. Prob C §16440(a). If a trustee abdicates control of the trust to another, however, the trustee may become the guarantor of any losses, irrespective of whether the surrender of control actually caused the loss. *Gaver v Early* (1923) 191 C 123, 126, 215 P 394.

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2. Measure of Damages

§21.66 a. Loss Plus Interest

A breaching trustee is chargeable with any loss or depreciation in the value of the trust estate resulting from the loss, plus interest. Prob C §16440(a)(1). Absent fraud, personal benefit, or acts in excess of authority, the trustee's liability generally is limited to this measure. *Estate of Gump* (1982) 128 CA3d 111, 117, 180 CR 219.

Interest accrues from the date of breach, whether or not the damage is liquidated. *Redke v Silvertrust* (1971) 6 C3d 94, 106, 98 CR 293. The trustee is charged with the greater of the legal interest rate or the rate actually received. Prob C §16441(a).

Interest may be awarded only on a money judgment, not on a judgment awarding stock or other property. *Redke v Silvertrust* (1971) 6 C3d 94, 107, 98 CR 293.

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§21.66A b. Disgorgement of Profit Plus Interest

A trustee who profits from a breach of trust may be required to disgorge the profits, plus interest. Prob C §16440(a)(2). In *Nickel v Bank of America* (9th Cir 2002) 290 F3d 1134, 1138, disgorgement of profits was held to be the appropriate remedy for a bank trustee that had overcharged on fees, on the theory that "if you take my money and make money with it, your profit belongs to me." The court further held that it was unnecessary to trace the overcharges to any particular profits; plaintiffs were entitled to a proportionate share of the bank's profits during the years of misappropriation.

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§21.67 c. Appreciation Damages

If appropriate, a breaching trustee may be charged with profit that would have accrued to the trust but for the breach. Prob C §16440(a)(3). A recurring question, however, concerns the circumstances in which appreciation damages are "appropriate."

In *Estate of Talbot* (1956) 141 CA2d 309, 296 P2d 848, a trustee with discretionary sale power sold certain stocks, acting in good faith but in breach of trust. The trial court ordered the objectors "made whole" for the resulting loss, allowed damages based on the appreciated value of the stock through the date of trial, and reserved jurisdiction to determine and allow future appreciation until termination of the trust. The appellate court reversed, concluding that, in the absence of a breach of the duty of loyalty or duty to retain specific assets, the trustee's liability for the wrongful sale of property should be limited to loss to the corpus plus interest, and loss of income and appreciation should be excluded. 141 CA2d at 326.

The question of whether the limitation expressed in *Talbot* survives the subsequent enactment of Prob C §16440 has not been addressed. It may be relevant that the *Talbot* court considered the Restatement (Second) of Trusts §205 (1959), on which Prob C §16440 is closely modeled, and concluded that its holding was in harmony with the Restatement.

On the other hand, in *Estate of Anderson* (1983) 149 CA3d 336, 196 CR 782, the executor, a bank, imprudently sold the principal asset of the testamentary trust; it also misrepresented or failed to disclose numerous material facts, including its failure to consider adverse tax consequences. Instead of charging the bank for the value of the property at the time of the sale plus interest, as the bank urged, the court held that the appropriate measure was the value of the property at the time of trial, including appreciation. It distinguished *Talbot* because, unlike the trustee in that case, the bank breached its duty of loyalty. 149 CA3d at 354.

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Source: Estate Planning/California Trust and Probate Litigation/21 Breach of Trust/§21.68 d. Offsetting Gains Against Losses

§21.68 d. Offsetting Gains Against Losses

When the trustee has engaged in a variety of transactions in breach of trust, some resulting in profits and some resulting in losses, the trustee may not net out the results if the breaches are separate and distinct. Restatement (Third) of Trusts (Prudent Investor Rule) §213 (1992). See 4 Scott & Ascher on Trusts §24.18 (5th ed 2007). Thus, if a number of imprudent investments are made, the trustee may be liable for losses even if other investments produced offsetting profits. Under the Uniform Prudent Investor Act (UPIA), however, the issue of whether a particular investment is imprudent must be determined by examining the portfolio as a whole. See Prob C §16047(b).

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C. Punitive Damages

§21.69 1. Availability

Although traditionally courts were reluctant to award punitive damages in equitable actions against trustees (see *Rivero v Thomas* (1948) 86 CA2d 225, 239, 194 P2d 533), this reluctance apparently has dissipated, and it appears that punitive damages now may be available to remedy breaches of trust. In *Werschkull v United Cal. Bank* (1978) 85 CA3d 981, 1003, 149 CR 829, the court affirmed a jury's award of punitive damages against a trustee found guilty of concealment. In *Vale v Union Bank* (1979) 88 CA3d 330, 339, 151 CR 784, the court held that punitive damages were available against a trustee who, in breach of the duty of loyalty, resigned in an attempt to coerce the beneficiary to invest in the trustee's pooled trust funds.

Both *Werschkull* and *Vale* relied, to some degree, on cases involving actions at law against fiduciaries in nontrust contexts. The adoption of the trust law in 1987 made clear that a beneficiary's remedies against the trustee are exclusively in equity. See Prob C §16421. Whether Prob C §16421 has any impact on *Werschkull* and *Vale*, however, has not been addressed.

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§21.70 2. Requirement of Actual Damages

In nonfiduciary contexts, punitive damages cannot be awarded unless actual damages are suffered. In cases involving a breach of fiduciary duty, however, the requirement of actual injury "is greatly de-emphasized." *Werschkull v United Cal. Bank* (1978) 85 CA3d 981, 1003, 149 CR 829 (affirming award on showing of nominal damages).

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§21.71 D. Denial of Compensation

The trust law authorizes a reduction or denial of compensation as a remedy to a beneficiary for the trustee's breach of trust or threatened breach of trust. Prob C §16420(a)(7). See *Estate of Gump* (1991) 1 CA4th 582, 598, 2 CR2d 269.

In *Estate of Gump* (1982) 128 CA3d 111, 117, 180 CR 219, it was held that, when the trustee is negligent in connection with some, but not all, of its duties, the court may properly deny compensation rendered in connection with the mismanaged asset, but may not deny all compensation. Disallowance in a greater amount is permitted only when the trustee personally benefited or acted fraudulently, or when the disallowance is used to redress losses to the trust.

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E. Attorney Fees

1. Attorney Fees for Beneficiary

a. From Trustee

§21.72 (1) Generally Unavailable

Under the "American Rule," absent contractual or statutory authorization, attorney fees are not recoverable either as damages or costs and must be borne by the respective parties. This general rule applies to an action grounded on a trustee's negligent mismanagement of trust assets. *Estate of Gump* (1982) 128 CA3d 111, 118, 180 CR 219; *Estate of Gerber* (1977) 73 CA3d 96, 117, 140 CR 577. Even fraud is not grounds for exception from this rule. *Gray v Don Miller & Assocs.* (1984) 35 C3d 498, 504, 198 CR 551 (nontrust fiduciary context). See *Schneider v Friedman, Collard, Poswall & Virga* (1991) 232 CA3d 1276, 1281, 283 CR 882 (bad faith of attorney).

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Source: Estate Planning/California Trust and Probate Litigation/21 Breach of Trust/§21.73 (2) Bad Faith Defense of Contest to Account

§21.73 (2) Bad Faith Defense of Contest to Account

Surcharge actions may arise as objections to a trustee's account. Attorney fees may be awarded to the prevailing party if a beneficiary brings, or a trustee opposes, a contest to the trustee's account without reasonable cause and in bad faith. Prob C §17211. The trustee's defense of a patent breach of trust might justify an award of attorney fees to the beneficiary under this provision.

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b. From Trust

§21.74 (1) Common Fund Theory

A beneficiary whose action results in the preservation or recovery of a common fund that benefits a class of nonlitigating interested parties may, in the discretion of the court, receive fees from the trust. *Estate of Gump* (1982) 128 CA3d 111, 118, 180 CR 219 (affirming denial when nonlitigating party had only 11-percent interest); *Copley v Copley* (1981) 126 CA3d 248, 292, 178 CR 842. In appropriate circumstances, the successful beneficiary could also recover under the "substantial benefit" rule or the "private attorney general" concept. *Werschkull v United Cal. Bank* (1978) 85 CA3d 981, 1006, 149 CR 829 (remanding issue of attorney fees when award appeared to bear no relationship to rate of compensation and number of hours spent by attorneys).

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§21.75 (2) Based on Settlor's Intent

In *Wells Fargo Bank v Marshall* (1993) 20 CA4th 447, 24 CR2d 507, the beneficiary was required to bring an action to interpret the trust instrument to establish that she was indeed a beneficiary. Finding that it would be contrary to the trustor's evident intent to require the beneficiary to incur her own attorney fees, the court held she was, in equity, entitled to reimbursement for fees. 20 CA4th at 458.

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2. Attorney Fees for Trustee

§21.76 a. Successful Defense

Attorney fees and litigation costs incurred in the trustee's successful defense of an action brought by the beneficiary are recoverable from the trust. *Estate of Gump* (1991) 1 CA4th 582, 604, 2 CR2d 269. The trustee need not bring the claim for attorney fees within the 60-day time limit of Cal Rules of Ct 3.1702. *Hollaway v Edwards* (1998) 68 CA4th 94, 80 CR2d 166 (decided under former Cal Rules of Ct 870.2).

Indeed, attorneys who aid a trustee in trust administration need not await final adjudication of the beneficiaries' claims against the trustee before receiving compensation from the trust. *Kasperbauer v Fairfield* (2009) 171 CA4th 229, 236, 88 CR3d 494. *Kasperbauer* involved fees paid from the trust to the attorneys for a former trustee (who had been removed) in connection with preparing an account and responding to beneficiaries' objections to the account, while the objections were still pending. The court noted that the Probate Code is "studded" with provisions authorizing the trustee to hire and pay attorneys to assist in trust administration, and that preparing an account and responding to beneficiaries' objections to it are aspects of trust administration. Therefore, payment of reasonable attorney fees from trust assets as those fees were incurred was proper, even though the trustee had been discharged. Furthermore, stated the court, because most of the trust assets had been distributed to the beneficiaries, the common law, set forth in Restatement (Second) of Trusts, §249 (1959), supported the former trustee's right to indemnification from the beneficiaries for expenses incurred in defending the account, to the extent of the property distributed, unless he had manifested an intention to forego indemnity or the beneficiaries had so changed their position that indemnification would be inequitable. Finally, the court noted that the beneficiaries could seek reimbursement from the former trustee at the conclusion of the case if they prevailed on their claim that he had breached his fiduciary duties or that his trust administration expenditures were excessive.

Contests are frequently brought by fewer than all of the beneficiaries. In that situation, the question arises of whether fees should be charged against the share of the particular beneficiary or against the entire estate. In *Conley v Waite* (1933) 134 CA 505, 506, 25 P2d 496, the court held that, when an unfounded suit is brought against the trustee by a beneficiary, "attorney fees may be allowed [the trustee] in defending the action and may be made a charge against the interest in the estate of the party causing the litigation." In unsuccessful contests brought against executors, however, the supreme court has held that the fees must be charged against the estate as a whole, not against the contestant's share. A contrary rule would unduly deter contestants from questioning the stewardship of their fiduciaries through proceedings brought in good faith. *Estate of Beach* (1975) 15 C3d 623, 645, 125 CR 570. When the contest is frivolous, the trustee's fees may be allocated against the contestant. *Estate of Ivey* (1994) 22 CA4th 873, 882, 28 CR2d 16. The court distinguished *Beach* on the grounds that different statutes are involved in trust matters, and that *Beach* was limited to proceedings brought in good faith. 22 CA4th at 884.

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§21.77 b. Unsuccessful Defense

When a trustee has acted improperly, the court may deny reimbursement of attorney fees. *Estate of Gump* (1991) 1 CA4th 582, 605, 2 CR2d 269; *Estate of Baird* (1955) 135 CA2d 343, 347, 287 P2d 372, overruled on other grounds in *Estate of Schloss* (1961) 56 C2d 248, 14 CR 643. On the other hand, when the challenged trustee acted in good faith and with probable cause, discretionary attorney fees have been awarded. *Copley v Copley* (1981) 126 CA3d 248, 295, 178 CR 842 (fees awarded despite $12 million surcharge). Fees may also be awarded for work that provides a benefit to the estate. *Estate of Gump, supra*.

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§21.78 c. Mixed Success

When the trustee successfully defends the majority of claims against him or her and has acted in good faith, the court will award reimbursement for the fees incurred in successfully defending proper actions. *Estate of Cassity* (1980) 106 CA3d 569, 574, 165 CR 88. When the trustee has been found guilty of a breach of loyalty, however, the court may, in its discretion, deny all fees. *Estate of Gump* (1991) 1 CA4th 582, 609, 2 CR2d 269.

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Source: Estate Planning/California Trust and Probate Litigation/21 Breach of Trust/§21.79 F. Form: Petition for Relief From Breach of Trust

§21.79 F. Form: Petition for Relief From Breach of Trust

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[*Title of Court*]

In re _ _[*name*]_ _ Trust,	**No. _ _ _ _ _ _**
Established _ _[*date*]_ _	
	PETITION FOR RELIEF FROM BREACH OF TRUST (PROBATE CODE §16420)
	Hearing: _ _[*date; time*]_ _
	Dep't: _ _ _ _ _ _

Petitioner, _ _[*name*]_ _, alleges:

1. Petitioner is a beneficiary _ of the _ _[*name*]_ _ Trust, executed by _ _[*name*]_ _ on _ _[*date*]_ _, a copy of which is attached as Exhibit A and incorporated by reference, and has standing to bring this petition under Probate Code §17200(a).

[*Add one of the following alternatives*]

[*Alternative 1: Venue based on place of administration of trust*]

2. Venue is proper in that the principal place of administration of the Trust is located in this county.

[*Alternative 2: Venue based on county here estate is being administered*]

2. Venue is proper in that the trust is a testamentary trust, and the decedent's estate is being administered in this county.

[*Continue*]

3. _ _[*Name of trustee*]_ _ is, and at all relevant times was, the duly acting trustee of the trust.

4. Trustee is in breach of _ _[*his/her/its*]_ _ trust in that trustee violated _ _[*his/her/its*]_ _ _ _[*duty/duties*]_ _ _ _[*specify duty or duties violated, e.g., to administer the trust in accordance with its terms and to exercise reasonable skill, care, and diligence in the administration of the trust by reason of the following misconduct*: *set forth facts supporting breach of trust, e.g., trustee failed to make distributions required under the trust instrument in a timely manner*]_ _.

5. As a proximate result of trustee's breach of trust, _ _[*specify damages resulting from trustee's breach, e.g., there has been a loss or depreciation in value of the trust estate, and/or trustee has made an undue profit and/or a profit that would have accrued to the Trust has not accrued*]_ _ in that _ _[*set forth facts supporting damage allegations*]_ _.

WHEREFORE, Petitioner requests that:

[*If applicable, add one or more of the following options*]

[*Option 1: Trustee be compelled to perform*]

1. Trustee be compelled to perform _ _[*his/her/its*]_ _ duty to _ _[*specify duty to be performed*]_ _.

[*Option 2: Trustee be enjoined*]

[2.] Trustee be enjoined from breaching _ _[*his/her/its*]_ _ trust by _ _[*describe conduct to be enjoined*]_ _.

[*Option 3: Trustee redress breach*]

[3.] Trustee be compelled to redress _ _[*his/her/its*]**_ _ breach of trust by payment of money damages _ _**[*according to proof at trial/in the amount of _ _*[*dollar amount*]**_ _** *plus interest at the legal rate*]**_ _.**

[*Option 4: Court appoint receiver*]

[4.] The court appoint a receiver or temporary trustee to take possession of the trust property and administer the trust.

[*Option 5: Trustee be removed*]

[5.] Trustee be removed from office;

[*Option 6: Acts in breach be set aside*]

[6.] The court set aside the following acts in breach of trust _ _[*describe acts to be set aside*]**_ _.**

[*Option 7: Court impose constructive trust*]

[7.] The court impose a constructive trust over the following property, or the proceeds of said property, disposed of in breach of trust _ _[*describe property wrongfully disposed of*]**_ _.**

[*Continue*]

[8.] The court make all other further and proper orders.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Petitioner

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Petitioner

VERIFICATION

I, _ _[*name of petitioner*]**_ _, declare that:**

I have read the foregoing petition and know its contents. It is true of my own knowledge except as to matters that are stated in it on information and belief, and as to those matters I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Copies: Original (filed with court with proof of service); copies for notice; office copies; copy for probate department.

Comment: To petition the court for removal of a trustee for breach of trust, see forms in §§14.37-14.38. To compel a trustee to account, see forms in §§13.21-13.23. To object to an account and request a surcharge or other remedies, see form in §13.52.

For discussion of captions and a complete sample caption, see §§10.5-10.6.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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22

Actions by and Against Trustee

Richard M. Bryan
Caroline K. Hinshaw

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b. Action Against Trustee When No Probate Estate and No Claims Procedure Initiated §22.51
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VIII. CLAIMS OF BENEFICIARIES' CREDITORS
A. Execution on Spendthrift Trusts and Education or Support Trusts; Discretionary Payments §22.53
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I. POWER AND DUTY OF TRUSTEE TO PROSECUTE AND DEFEND ACTIONS

§22.1 A. Power of Trustee

The trustee has the power to prosecute or defend actions, claims, or proceedings in order to protect trust property and the trustee in the performance of his or her duties. Prob C §16249. A trustee may bring the same kinds of actions against a third person as the trustee could maintain if he or she held the trust property free of trust. Restatement (Second) of Trusts §280 (1959). The trustee also has the power to pay, contest, settle, or release a claim belonging to the trust. Prob C §16242.

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§22.2 B. Duty of Trustee

The trustee has a duty to take reasonable steps to enforce claims that are part of trust property or defend actions that may result in loss to the trust. Prob C §§16010-16011. The trustee is required to act "with reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument." Prob C §16040(a). Depending on the circumstances of the case, it might be reasonable to settle an action or suffer a default rather than to prosecute or defend an action.

For discussion of general considerations in evaluating whether entering into litigation is reasonable for the trustee, see chap 4.

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§22.3 1. Trustee's Duty to Pursue Claims

The duty of the trustee to protect and enhance the trust includes the obligation to litigate claims against third parties. Prob C §16010; Restatement (Third) of Trusts §76 (2007) A trustee who breaches the duty to litigate a claim or collect a debt is subject to an action for surcharge. *Purdy v Johnson* (1917) 174 C 521, 163 P 893. The test to determine whether a trustee should pursue an action on a claim or put pressure on a debtor to collect a debt is an evaluation of whether a prudent person would do so in like circumstances. *Estate of Gilliland* (1977) 73 CA3d 515, 140 CR 795.

For discussion of the trustee's duty to appeal, see §23.6.

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§22.4 a. Limitations on Duty to Pursue Claim

If it reasonably appears that a claim or debt is uncollectible, the trustee is not under a duty to file an action to collect it. Likewise, there is no duty to pursue a claim or debt if an action to enforce it would probably be unsuccessful. Restatement (Third) of Trusts §76, Comments d (2007).

If the trustee pursues litigation and is unsuccessful, the trustee is under a duty to appeal the decision if it would be unreasonable under the circumstances not to appeal. *Gray v Union Trust Co.* (1915) 171 C 637, 639, 154 P 306; *Estate of Harvey* (1958) 164 CA2d 330, 330 P2d 478; Restatement §76, Comment d.

In all events, however, the trustee's duty to pursue litigation on a claim or debt owed to the trust is subject to any contrary provisions in the trust instrument. For example, a term of the trust may provide that a particular debt to the trust be forgiven on the occurrence of a certain event, *e.g.,* a loan that is forgiven on the death of the trustor. Prob C §16000.

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§22.5 b. Document Reasons for Decision

When the trustee declines to pursue an action on a claim, the trustee should carefully document the reasons underlying that decision. In *Pillsbury v Karmgard* (1994) 22 CA4th 743, 762, 27 CR2d 491, the court found that the trustee was not negligent in not pursuing a claim because the trustee made the decision based on (1) an evaluation of the facts surrounding the claim, (2) an evaluation of the witnesses' credibility, (3) an opinion obtained from trusted and experienced counsel, and (4) the fact that the trustee weighed the risks and benefits in concluding that pursuing litigation was not in the trust's best interests.

It is also important to document the reasons underlying the decision to pursue litigation on a claim of the trust, particularly when the result of the litigation is unsuccessful. Trustees and their attorneys will be compensated for their services as long as they acted "in consonance with the fiduciary duties imposed upon them," even though the services did not increase, protect, or preserve the trust. *Estate of Trynin* (1989) 49 C3d 868, 874, 264 CR 93.

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§22.6 2. Trustee's Duty to Respond to Claims

The trustee has a duty to defend against claims that may cause a loss to the trust, as long as it is reasonable to do so. Prob C §16011; Restatement (Second) of Trusts §178 (1959); 3 Scott & Ascher on Trusts §17.10 (5th ed 2007). Furthermore, a trustee generally has a duty to defend against challenges to the trust's validity, and the trustee's attorney will be entitled to reasonable fees from the trust, if it is upheld. *Estate of Duffill* (1922) 188 C 536, 555, 206 P 42. However, when the trustee is also a beneficiary, the dispute is over competing trust instruments, and the trustee employs an attorney to defend the instrument that benefits the trustee, the trustee's attorney may not be entitled to fees from the trust. *Whittlesey v Aiello* (2002) 104 CA4th 1221, 128 CR2d 742 (attorney for trustee named in trust amendment that benefited trustee not entitled to fees from trust for unsuccessful defense of validity of amendment because it would be inequitable to force prevailing remainder beneficiary under initial trust, in effect, to pay opponent's fees on top of her own); *Terry v Conlan* (2005) 131 CA4th 1445, 33 CR3d 603 (trustee not allowed to pay her attorney from trust to defend 2001 trust instrument benefiting her and her siblings against 1999 trust instrument benefiting their stepmother—trustee not defending existence of the trust, just trust instrument for her benefit over other instrument).

With regard to either duty, the trustee's responsibility is not limited to a purely defensive role. A trustee who is aware of adverse claims or actions that might impair the trust must take affirmative action to protect the trust. See *Metzenbaum v Metzenbaum* (1953) 115 CA2d 395, 399, 252 P2d 31.

For discussion of the trustee's duty to defend against an appeal, see §23.6.

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§22.7 a. Consult Trust Instrument

In determining how to respond to the claim of a third party, the trustee must consult the trust instrument regarding the trustee's authority to respond and address the claim. In particular, the trustee must ascertain whether the trustee is authorized to employ counsel and pay counsel's fees and expenses. If not, the trustee should immediately seek court instructions. It is also advisable to obtain the court's prior approval for one or more budgeted allotments for anticipated fees and expenses in the defense.

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§22.8 b. Trustee's Petition for Instructions

Particularly when the outcome of defending a claim is questionable and it appears that the defense will be of significant expense to the trust, the trustee is well advised to petition the court having jurisdiction of the trust for instructions and approval to proceed with the defense. Prob C §17200(b)(6). Trustees of trusts under court supervision certainly should petition the court for instructions before entering litigation. Because 30 days' notice of the hearing of such petitions for instructions is usually required, the trustee's petition must be promptly filed on learning of the claim, and it may be necessary to obtain additional time in which to respond to an action that is already filed and served on the trustee. Prob C §17203.

PRACTICE TIP: Most probate courts will specially set a petition for instructions by the trustee so that it will not have to wait longer than the 30-day notice period. Counsel should consult local probate rules. If the time to respond to the claimant's action will expire before the hearing on the trustee's petition for instructions, and counsel for the claimant will not extend the time to respond, a motion for an extension of time to respond should be filed in the proceeding against the trustee. CCP §§1003-1008.

Trust beneficiaries who are notified of such petitions may later be barred from objecting to the trustee's expenditure of funds for defense against a claim if they neglect to appear and object to the petition for instructions. The trustee also may seek to obtain the beneficiaries' consent, release, or affirmation of a decision to defend or not to defend against a claim. Prob C §§16463-16465.

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§22.9 c. Beneficiaries' Petition to Compel Trustee to Defend

Trust beneficiaries may bring a petition under Prob C §§17000-17457 to compel the trustee to bring a claim against a third party on behalf of the trust. *Saks v Damon Raike & Co*. (1992) 7 CA4th 419, 8 CR2d 869. In the event that a trustee refuses to defend against a third party's claim, it should be possible for the trust beneficiaries to bring a petition under the same theory to compel the trustee to defend a claim as well. See Prob C §16420.

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II. ACTIONS BY TRUSTEE AGAINST THIRD PERSONS

§22.10 A. Standing of Trustee

When a cause of action is brought on behalf of a trust, the trustee is the real party in interest, not the trust itself or its beneficiaries. *Powers v Ashton* (1975) 45 CA3d 783, 787, 119 CR 729. The trustee is the proper party to sue and defend on behalf of the beneficiaries in an action with a third person. *Bernstein v Equitable Discount Corp.* (1935) 8 CA2d 265, 269, 47 P2d 518. The beneficiaries need not be joined in a suit brought by the trustee against a third party on behalf of the trust. CCP §369.

NOTE: A trustee may not, however, prosecute an action in propria persona in state or federal court unless the trustee is also an attorney. *C.E. Pope Equity Trust v U.S.* (9th Cir 1987) 818 F2d 696; *Van Noy v U.S.* (D Or 1998) 81 AFTR2d 1943; *Ziegler v Nickel* (1998) 64 CA4th 545, 75 CR2d 312. But see *Finkbeiner v Gavid* (2006) 136 CA4th 1417, 39 CR3d 871 (trustee had right to appear in pro per when petitioning to modify and terminate trust, because she was not suing a third party).

Beneficiaries may have standing to sue a third person and join the trustee when the trustee cannot or will not enforce a cause of action that the trustee ought to bring against a third person. *Triplett v Williams* (1969) 269 CA2d 135, 138, 74 CR 594. They may also have standing when the third person, for purposes of advancing his or her own interests or financial advantage, actively participated with the trustee in a breach of trust by inducing the trustee to commit the breach, aided or abetted the breach, or received trust property from the trustee in knowing breach of the trust. *City of Atascadero v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 CA4th 445, 80 CR2d 329. See §21.26A.

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§22.11 B. Probate Court Concurrent Jurisdiction

The superior court that has jurisdiction over the trust has concurrent jurisdiction of actions and proceedings by or against creditors or debtors of trusts, and other actions and proceedings involving trustees and third persons. Prob C §17000(b)(2)-(3).

In proceedings involving trusts, the court has all the powers of the superior court. Prob C §17001. Section 17001 legislatively overruled *Copley v Copley* (1978) 80 CA3d 97, 104, 145 CR 437, which had limited probate court power to in rem jurisdiction over trusts, to the exclusion of in personam jurisdiction over third parties.

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.12 C. Action to Recover Trust Assets

§22.12 C. Action to Recover Trust Assets

A trustee (or any interested person) may file a petition in the probate court requesting an order when the trustee has a claim to real or personal property, title to or possession of which is held by another. Prob C §850(a)(3)(B).

In an action by a trustee for the benefit of the trust, a person who, in bad faith, has wrongfully taken, concealed, or disposed of property in or belonging to the trust is liable for twice the value of the property recovered. Prob C §859.

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III. ACTIONS BY THIRD PERSONS AGAINST TRUST

§22.13 A. Trustee as Party Defendant

The trustee is the proper party to sue and defend on behalf of the beneficiaries in an action with a third person. *Bernstein v Equitable Discount Corp.* (1935) 8 CA2d 265, 269, 47 P2d 518. Beneficiaries must be joined only when the litigation involves their interests. *Lake v Dowd* (1929) 207 C 290, 293, 277 P 1047.

Claims may be asserted against the trust by proceeding against the trustee. Prob C §18004. Therefore, the trustee and not the trust must be named as the party defendant in any action brought by a creditor or other claimant. CCP §389.

By analogy, a complaint naming the decedent's estate as a defendant is demurrable because the estate is not an entity separate from the personal representative. *Lazar v Estate of Lazar* (1962) 208 CA2d 554, 25 CR 354 (amendment allowed).

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§22.14 B. Jurisdiction Over Trust

The superior court that has jurisdiction over the trust has concurrent jurisdiction of actions and proceedings by or against creditors or debtors of trusts and other actions and proceedings involving trustees and third persons. Prob C §17000(b)(2)-(3). Therefore, in addition to the court that otherwise has jurisdiction over an action against a trust or trustee, the claimant or plaintiff may choose to bring his or her action in the superior court that has jurisdiction over the trust.

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§22.15 C. Forms of Civil Action

A claim based on a contract entered into by a trustee in the trustee's representative capacity, on an obligation arising from ownership or control of trust property or on a tort committed in the course of administration of the trust, may be asserted against the trust by proceeding against the trustee in the trustee's representative capacity, whether or not the trustee is personally liable on the claim. Prob C §18004.

Probate Code §18004 is not exclusive. For a sample form of civil complaint for collection of money, see California Civil Procedure Before Trial §15.35 (4th ed Cal CEB 2004). For a sample form of answer, see Civ Proc Before Trial §§25.83-25.83A.

NOTE: It appears that, concerning punitive damages, a third-party plaintiff may prosecute a noncontract action against an oppressive, malicious, or fraudulent trustee, leaving the trustee and the beneficiaries with the problem of sorting out liability between them for the punitive damages. CC §3294. See §22.28.

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§22.16 D. Petition Under Probate Code

As an alternative to a civil action, the claimant may bring a petition under the Probate Code when the trustee is in possession of or holds title to real or personal property and the property, or some interest in the property, is claimed to belong to the claimant. Prob C §850(a)(3)(A). Similarly, when the property of the trust is claimed to be subject to a creditor of the settlor of the trust, the creditor may bring a petition under Prob C §850(a)(3)(C). The court may not grant the petition if it finds that the matter should be determined by civil action. Prob C §856.5.

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§22.17 1. Advantages of Petition

Where appropriate, a petition should resolve a dispute more promptly and with less expense than a civil suit. If needed, all discovery proceedings are available. Prob C §1000. When a dispute is subject to concurrent jurisdiction (*e.g.* property disputes involving third persons), counsel should consider the tactical issues outlined in §19.3A.

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.18 2. No Jury Trial

§22.18 2. No Jury Trial

A jury trial is seemingly not available if the claimant elects to proceed by bringing a Prob C §850(a)(3) petition. Prob C §825. A litigant who prefers a jury trial may need to persuade the court that the matter should be resolved by a general civil action rather than a probate petition. Prob C §856.5.

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.19 3. Form: Petition for Order Determining Interest in Property

§22.19 3. Form: Petition for Order Determining Interest in Property

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[*Title of court*]

In re Trust Created Under the Will of _ _[*name*]_ _, Deceased [*or*] **In re _ _[*name*]_ _ Trust, Established _ _[*date*]_ _**	**No. _ _ _ _ _ _** **PETITION FOR ORDER DETERMINING INTEREST IN PROPERTY _ _[*AND DIRECTING TRUSTEE TO TRANSFER _ _[TITLE/POSSESSION]_ _ OF PROPERTY*]_ _ (PROBATE CODE §850(a)(3)(A) and (C))**

Petitioner, _ _[*name*]_ _, alleges:

1. Petitioner is _ _[*state capacity*]_ _.

[*Add one of the following alternatives*]

[*Alternative 1*]

2. _ _[*Name of trustee*]_ _ is the acting trustee of the trust created under the will of _ _[*name*]_ _, deceased.

[*Alternative 2*]

2. _ _[*Name of trustee*]_ _ is the acting trustee of the _ _[*name*]_ _ Trust, established _ _[*date*]_ _.

[*Continue*]

[*If appropriate, attach photocopy of trust instrument*]

3. The principal place for the administration of the trust is located at _ _[*address*]_ _. Under Probate Code §§17000-17457, this court has jurisdiction to determine all matters raised in this petition.

4. The names, addresses, and interests of the settlor, trustee, all beneficiaries, and all other persons entitled to notice of the hearing of this petition are as follows: _ _[*List names, addresses, and interests in trust*]_ _.

[*Add one of the following alternatives*]

[*Alternative 1: Petitioner is owner*]

**5. Petitioner _ _[*is the owner of/has an interest in*]_ _ _ _[*real/personal/real and personal property*]_ _, *i.e.,* _ _[*that certain real property commonly known as _ _[street address]_ _ and more particularly described as _ _[legal description]_ _/_ _[list personal property]_ _]_ _, _ _[title to/possession of]_ _ which is held by the trustee. _ _[Set forth facts to show that petitioner is entitled to title and/or possession of the real and/or personal property.*]_ _

[*Alternative 2: Petitioner is creditor*]

5. Petitioner is a creditor of _ _[*name*]_ _, the settlor of the trust and is entitled to _ _[*lien/possession/other interest in*]_ _ _ _[*real/personal/real and personal property*]_ _, *i.e.,* _ _[*that certain real property commonly known as _ _[street address]_ _ and more particularly described as _ _[legal description]_ _/_ _[list personal property]_ _]_ _, _ _[title to/possession of]_ _ which is held by the trustee. _ _[*Set forth facts to show that petitioner is entitled to a lien, possession, or other interest in the property and the legal basis for the same.*]_ _

[*Continue*]

6. No other action is pending for determination of the matters raised in this petition.

[*Add one of the following alternatives*]

[*Alternative 1*]

7. No requests for special notice have been filed in this proceeding.

[*Alternative 2*]

7. Requests for special notice have been filed in this proceeding by _ _[*names*]_ _, and notice will be given.

[*Continue*]

WHEREFORE, petitioner prays for the order(s) of this court

1. Determining that petitioner is entitled to _ _[*title/possession/lien/specify other interest*]_ _ of _ _[*describe property*]_ _;

[*If appropriate, add*]

2. Directing that the trustee shall forthwith _ _[*execute a deed/specify other means of transfer*]_ _ transferring _ _[*describe property or interest*]_ _ to petitioner;

[*Continue*]

[3.] For all other orders that this court shall deem to be necessary or appropriate in this matter.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*Verification*; *see §§17.56, 17.61*]

Comment: For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.20 4. Notice of Hearing

§22.20 4. Notice of Hearing

Judicial Council Form DE-120 (Notice of Hearing—-Decedent's Estate or Trust) must be used. The form must be modified to show the name of the trust in place of a decedent's estate. Thirty days' notice of the hearing is required. Prob C §17203.

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.21 IV. COSTS

§22.21 IV. COSTS

In any action prosecuted or defended by a trustee, costs may be recovered in the same manner as in an action prosecuted or defended in the trustee's own right. CCP §1026(a). Costs must, by the judgment, be made chargeable only on the estate, fund, or party represented, unless the court directs that the costs be paid by the fiduciary personally for mismanagement or bad faith in the action or defense. CCP §1026(b).

If a trustee is the prevailing party in a probate court proceeding, he or she, like any other party in such a proceeding, will be subject to Prob C §1002, which provides that costs are awarded within the discretion of the court. Costs in probate proceedings are not awarded as a matter of right. *Estate of McCormack* (1969) 2 CA3d 492, 499, 82 CR 651. By contrast, if the trustee is the prevailing party in a civil action, he or she will be entitled to costs as a matter of right. CCP §1032(b).

PRACTICE TIP: Accordingly, it is important to include a request for costs in any probate department petition filed by the trustee, and to obtain a ruling from the court and a court order awarding costs. Only then will there be a basis for submitting an itemized memorandum of costs.

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V. LIABILITY OF TRUST PROPERTY VERSUS TRUSTEE'S PERSONAL LIABILITY

§22.22 A. Trustee Generally Not Liable

The trust property is liable to creditors and claimants, and the trustee generally is not personally liable unless the trustee committed intentional wrongdoing. Of course, the trustee should be joined individually when the claim is that the trustee is at fault.

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§22.23 1. Contracts

For contracts entered into on or after July 1, 1987, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administration of the trust unless the trustee fails to reveal the trustee's representative capacity or identify the trust in the contract. Prob C §18000(a).

On contracts entered into before July 1, 1987, the trustee was liable unless the contract stipulated that the trustee was not liable. Comment to Prob C §18000; *Zimmer Constr. Co. v White* (1935) 8 CA2d 672, 47 P2d 1087.

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§22.24 2. Torts

A trustee is personally liable for torts committed in the course of administration of the trust only if the trustee is personally at fault. Prob C §18002; *Haskett v The Villas at Desert Falls* (2001) 90 CA4th 864, 877, 108 CR2d 888 (successor trustee not personally liable for attorney fees and costs awarded to defendants in suit brought in representative capacity by predecessor trustee and dismissed for failure to timely bring case to trial; defendants failed to show that dismissal resulted from trustee's intentional or negligent conduct). The trust property is liable for torts committed personally by the trustee or by employees of the trust in the course of administration of the trust estate. *Johnston v Long* (1947) 30 C2d 54, 59, 181 P2d 645; Restatement §264, Comment b. See also California Trust Administration §15.50 (2d ed Cal CEB 2001).

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.25 3. Property Ownership

§22.25 3. Property Ownership

A trustee is personally liable for obligations arising from ownership or control of trust property only if the trustee is personally at fault. Prob C §18001; *Haskett v The Villas at Desert Falls* (2001) 90 CA4th 864, 877, 108 CR2d 888.

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§22.26 4. Negotiable Instruments

A trustee is personally liable if he or she signs his own name to a negotiable instrument without identifying his representative capacity. Com C §§1201(34), 3402.

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§22.27 B. Liability of Dissenting Cotrustee

A dissenting cotrustee who does not join in the exercise of a power held by three or more cotrustees is not liable to third persons for the consequences of the exercise of the power. Prob C §18003(a). A dissenting cotrustee who joins in an action at the direction of the majority cotrustees is not liable to third persons for the action of the majority if the dissenting cotrustee expresses the dissent in writing to any other cotrustee at or before the time the action is taken. Prob C §18003(b).

NOTE: Section 18003 does not excuse a cotrustee from liability for failure to discharge the cotrustee's duties as a trustee. Prob C §18003(c).

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.28 C. Proceeding to Determine Liability as Between Trust and Trustee

§22.28 C. Proceeding to Determine Liability as Between Trust and Trustee

The question of liability as between the trust estate and the trustee personally may be determined in a proceeding under the Trust Law by petition under Prob C §17200. Prob C §18005.

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§22.29 VI. STATUTORY PROTECTION OF THIRD PERSONS

In actions by third persons against the trust or actions by the trustee against third persons, the rights of third persons who dealt with a trustee in good faith, for valuable consideration, and without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them are protected by Prob C §§18100-18104.

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.30 A. Assumption of Trustee's Authority

§22.30 A. Assumption of Trustee's Authority

Third persons are not bound to inquire into the trustee's authority and may assume that the trustee has and is properly exercising the power that the trustee purports to exercise. Prob C §18100.

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.31 B. Trustee's Application of Property

§22.31 B. Trustee's Application of Property

Third persons are not bound to ensure the proper application of trust property paid or delivered to the trustee. Prob C §18101.

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.32 C. Transaction With Former Trustee

§22.32 C. Transaction With Former Trustee

Third persons entering into a transaction with a former trustee without knowledge that the person is no longer a trustee are fully protected as if the former trustee was authorized to act. Prob C §18102.

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§22.33 D. Trust Omitted From Grant

A grant to third persons is deemed absolute when an express trust has been omitted from prior recorded instruments. Prob C §18103.

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§22.34 E. Beneficiary Undisclosed

An interest in real property conveyed by an instrument in favor of a person in trust is presumed held by the person absolutely and free of the trust if no beneficiary is indicated in the instrument. The presumption affects the burden of proof and may be rebutted. Prob C §18104.

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.35 F. Trust Certification

§22.35 F. Trust Certification

Third persons without actual knowledge that the representations of a trust certification are incorrect may rely on the representations. A transaction between the trustee and a third person acting in reliance on a trust certification and any lien created by it are enforceable against the trust property. Prob C §18100.5(f).

NOTE: A third person who in bad faith refuses to accept the certification in lieu of trust documents is liable for damages, including attorney fees, incurred as a result of refusal to accept the certification. Prob C §18100.5(h).

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VII. CLAIMS OF SETTLOR'S CREDITORS

A. Liability of Trust Estate During Settlor's Lifetime

§22.36 1. Revocable Trust

During the settlor's lifetime, the property of a revocable trust is subject to the claims of the settlor's creditors to the extent that the settlor has the power to revoke the trust in whole or in part. Prob C §18200. See *Galdjie v Darwish* (2003) 113 CA4th 1331, 1349, 7 CR3d 178 (court could order specific performance by settlors/trustees even though they were sued only in their individual capacity). Therefore, a settlor's creditor may "ignore the trust to the extent that it is revocable." Comment to Prob C §18200. See also Prob C §15304 (spendthrift provision in irrevocable trust invalid against settlor's creditors or transferees).

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.37 a. Civil Action

§22.37 a. Civil Action

A settlor's creditor may, therefore, pursue a civil action to judgment against the settlor individually and, to the extent that the settlor has the power to revoke the trust, execute against the trust property as if the trust did not exist. Presumably, when appropriate, a settlor's creditor could also pursue interim proceedings against the trust property in the course of the litigation, including, for example, attachment (CCP §§483.010-483.020) or lis pendens (CC §3146).

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§22.38 b. Petition Under Probate Code

Alternatively, to avoid the delays of litigation in a civil action, a settlor's creditor may pursue the settlor by petition under the Probate Code. The petition may include claims against the settlor for damages and recovery of property in the possession of the trustee. Prob C §850(a)(3). See §22.16.

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§22.39 c. Other "Settlors"

Persons other than the transferor of trust property who furnish consideration for the creation of the trust may be considered to be settlors. *McColgan v Walter Magee, Inc.* (1916) 172 C 182, 155 P 995; *Parscal v Parscal* (1983) 148 CA3d 1098, 1104, 196 CR 462. See California Trust Administration §10.9 (2d ed Cal CEB 2001).

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§22.40 2. Irrevocable Trust

During the settlor's lifetime, the property of an irrevocable trust for the benefit of the settlor is generally subject to the claims of settlor's creditors to the extent of the settlor's beneficial interest in the trust. See Restatement (Third) of Trusts §§58, 60, Comment f (2007); *DiMaria v Bank of California* (1965) 237 CA2d 254, 46 CR 924. Thus, when the settlor does not retain a beneficial interest, property in an irrevocable life insurance trust is not subject to claims of the settlor's creditors. See *Laycock v Hammer* (2006) 141 CA4th 25, 44 CR3d 921.

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.41 a. Spendthrift Provisions Invalid

§22.41 a. Spendthrift Provisions Invalid

A settlor may not transfer property to an irrevocable trust for the settlor's benefit and then rely on a provision restraining the voluntary or involuntary transfer of settlor's interest ("spendthrift provision"). Such a restraint is invalid against a settlor's transferees or creditors. Prob C §15304(a).

If the trust provides for discretionary distributions for a settlor's support or education, the settlor's creditors may reach the maximum amount that the trustee could distribute to the settlor under the trust instrument, not to exceed the settlor's proportionate contribution to the trust. Prob C §15304(b).

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§22.42 b. Enforcement of Money Judgments

The procedure under CCP §709.010 is the *exclusive* procedure for enforcement of a money judgment against the settlor's beneficial interest in an irrevocable trust. See §22.54.

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.43 c. Fraudulent Transfers

§22.43 c. Fraudulent Transfers

A settlor's creditor should consider whether an action lies to set aside the settlor's transfer of property into an irrevocable trust under (1) the Uniform Fraudulent Transfer Act (CC §§3439-3439.12), (2) a common-law action (*Macedo v Bosio* (2001) 86 CA4th 1044, 1051, 104 CR2d 1), or (3) statutory provisions voiding the transfer of personal property without delivery (CC §§3440-3440.9). However, it appears that, to the extent that a settlor received adequate consideration for the creation of an irrevocable trust, the trust property is beyond the reach of the settlor's creditors.

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B. Liability of Trust Estate After Settlor's Death

§22.44 1. Probate Estate Must Be Exhausted

On the death of the settlor of a revocable trust, the property of the trust that was subject to the power of revocation at the time of the settlor's death is subject to the claims of the creditors and the expenses of administration of the deceased settlor's estate, to the extent that the estate is inadequate to satisfy those claims and expenses. Prob C §19001(a). The probate estate, if any, of the deceased settlor must be exhausted before the trust estate is liable to creditor claims. If the trustee initiates a claims proceeding and pays the deceased settlor's debts from the trust, the trustee has a right of reimbursement from the settlor's estate. Prob C §19006(c). See §22.49.

On the death of a settlor of an irrevocable trust, the beneficial interest of the settlor usually terminates in favor of remainder beneficiaries. If there is a reversion in favor of the settlor, property of the trust will become property of the estate, which must be exhausted before property of any revocable trust of the settlor will be subject to the claims of creditors. For discussion of dispositive clauses in irrevocable trusts, see Drafting California Irrevocable Trusts, chap 9 (3d ed Cal CEB 1997).

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.45 2. Creditor Claim Required Against Estate

§22.45 2. Creditor Claim Required Against Estate

To reach trust assets under Prob C §19001, the creditor must first ascertain whether probate administration has been initiated for the deceased settlor's estate. If an estate proceeding has been opened, the creditor seeking trust assets must act as a regular creditor and generally file a timely creditor claim in that estate proceeding, or the claim will be barred. By (1) filing a timely creditor claim in probate, and (2) filing a timely complaint against the personal representative if that claim is rejected, the creditor preserves the right to recover trust assets under Prob C §19001 if the creditor successfully obtains judgment. *Dobler v Arluk Med. Ctr. Indus. Group, Inc*. (2001) 89 CA4th 530, 540, 107 CR2d 478. The amount that can be recovered on the judgment under §19001 is then payable in the normal course of the trust's administration. 89 CA4th at 540; Prob C §19300.

Under the statutes governing probate administration, claims must be filed whether litigation is pending or not, including claims on judgments that are not liens. Prob C §§9000-9370. See §§15.37-15.39 for situations in which no creditor claim is required. For detailed discussion of the creditor claim procedure in probate administration, see California Decedent Estate Practice, chap 14 (2d ed Cal CEB 2009).

PRACTICE TIP: If no proceeding to administer the deceased settlor's estate has been initiated, the creditor may initiate a probate if there is property subject to administration. See Prob C §8461(q).

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.46 a. Time for Filing Creditor Claim

§22.46 a. Time for Filing Creditor Claim

Creditor claims must be filed within 4 months following the issuance of letters of administration to a personal representative with general powers, or 60 days after notice was mailed or personally delivered, whichever is later. Prob C §9100(a).

If the creditor had no knowledge of the facts giving rise to the claim more than 30 days before the time for filing a claim, then the creditor may file a late claim within 60 days after the creditor has actual knowledge of both the facts giving rise to the claim and the administration of the estate. Prob C §9103(a)(2).

The claim also must be filed within the statute of limitations for the original action against the deceased settlor as limited or supplanted by the 1-year "drop dead" provision of CCP §366.2. The statute of limitations may be subject to equitable estoppel. See, *e.g., Battuello v Battuello* (1998) 64 CA4th 842, 75 CR2d 548. The statute of limitations is not tolled by the trustee's failure to apply to administer the deceased settlor's estate or to give notice to creditors as required by Prob C §19003. *Wagner v Wagner* (2008) 162 CA4th 249, 75 CR3d 511; *Levine v Levine* (2002) 102 CA4th 1256, 126 CR2d 255. The 1-year period to commence an action on a claim that arises from a promise or agreement with a decedent to distribution from an estate or trust is not tolled by the creditor claims procedures, even if the claim is asserted in the form of a demand for payment of money as damages for breach. CCP §366.3. *Stewart v Seward* (2007) 148 CA4th 1513, 56 CR3d 651. See also §5.18.

PRACTICE TIP: It is therefore incumbent on any creditor (or his or her attorney) who discovers that the debtor is deceased to proceed with all haste to determine what must be done to comply with creditor claim requirements.

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.47 b. Action on Rejected Estate Claim

§22.47 b. Action on Rejected Estate Claim

An action may not be filed until the claim is rejected. Prob C §9351. If the creditor claim is not rejected within 30 days after the claim was filed, the creditor may treat the claim as rejected. Prob C §9256.

After a claim is rejected, the creditor has 90 days to file an action after notice of rejection is given if the claim is due or 90 days after the claim becomes due. Prob C §9353. If litigation is pending and notice of rejection is given, the creditor must substitute the personal representative of the estate as the party defendant in the litigation proceeding within "3 months." Prob C §9370.

In addition to other available venues, a creditor's action may be brought in the county in which the decedent's estate is administered. Attorney fees and other litigation expenses may be awarded if the court finds that the prosecution or the defense of an action on a claim was unreasonable. Prob C §9354.

NOTE: Unless there was an execution lien at the time of the decedent's death, money judgments are paid in the course of administration of the estate and the creditor may not execute on property of the estate. Prob C §9300.

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§22.48 c. Liability of Distributees of Estate

Even if no creditor claim was filed, recipients of property distributed from the deceased settlor's estate may be personally liable to the creditor up to the value of the property that they received. Prob C §9392. This can occur when the personal representative knew of the creditor but did not provide notice of administration. Prob C §9392(a). However, the limitations period set forth in CCP §366.2 applies to a creditor's suit against distributees. Prob C §9392(a)(3).

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.49 3. Discretionary Trust Claims Procedure

§22.49 3. Discretionary Trust Claims Procedure

If the trustee initiates the discretionary claims procedure under Prob C §§19000-19403, creditors who are required to do so must file claims, or the claims are barred. Prob C §19255(a). The trustee, however, cannot initiate this claim procedure if the trustee has actual knowledge that someone has filed a petition to administer the deceased settlor's estate. Prob C §19003(a). The filing requirements for trust claims are similar to those for probate estates. See Prob C §19100. For discussion of the creditor claim procedure in deceased settlors' revocable trusts, see California Trust Administration §§10.11-10.45 (2d ed Cal CEB 2001).

PRACTICE TIP: A trust claims proceeding initiated by the trustee of one revocable trust created by the deceased settlor protects all other such trusts created by that settlor. Prob C §19006(a).

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§22.50 a. Action on Rejected Trust Claim

Under the procedure set forth in Prob C §19255, if the claim is due, suit must be brought within 90 days after the trustee's notice of rejection of the claim. In addition to other venues, suit may be brought in the county in which the principal office for the administration of the trust is located. Notice of pendency of the action must be filed in the trust proceeding. Both the trustee and the distributee of any property distributed more than 120 days after notice of rejection is given are exempt from liability by reason of the distribution. If the court finds that either the prosecution of the claim by the creditor or the defense of the claim by the trustee was unreasonable, litigation expenses, including attorney fees, may be awarded to the prevailing party.

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§22.51 b. Action Against Trustee When No Probate Estate and No Claims Procedure Initiated

If there is no probate administration and the trust claims procedure is not initiated, the creditor may file suit against the trustee to enforce a debt, claim, or action against the deceased settlor. The statute of limitations applicable to the original cause of action is limited or supplanted by CCP §§366.2 and 366.3, which provide that actions that survive a defendant who dies before the expiration of the original statute of limitations, including claims of breach of promise to make a will, must be brought within 1 year after the decedent's death. See *Wagner v Wagner* (2008) 162 CA4th 249, 75 CR3d 511 (CCP §366.2 statute of limitations applies when trustee did not make written claim nor elect to use formal trust claim procedure providing for tolling in some instances); *Levine v Levine* (2002) 102 CA4th 1256, 126 CR2d 255 (CCP §366.2 statute of limitations applies to all debts of decedent, regardless of whom the claim is brought against). See also CCP §§377.10-377.62. For discussion of survival of actions, see California Decedent Estate Practice, chap 29 (2d ed Cal CEB 2009).

Alternatively, a creditor of the deceased settlor or a person who claims that the trustee is in possession of real or personal property belonging to the claimant may file a petition under Prob C §850(a)(3)(A) or (C). See §22.16.

NOTE: Except for property subject to execution liens at the time of the settlor's death, all money judgments, whether obtained before or after the death of the settlor, are subject to payment in the course of the trust administration and may not be enforced against the property of the trust. Prob C §§19300-19304. See *Dawes v Rich* (1997) 60 CA4th 24, 27 n2, 70 CR2d 72.

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§22.52 c. Action Against Distributees of Trust

When no probate or trust claims proceeding has been initiated and property has been distributed from a deceased settlor's revocable trust to the named beneficiaries after the settlor's death, a creditor's recourse is against the trust beneficiaries and not against the trustee. In *Valentine v Read* (1996) 50 CA4th 787, 57 CR2d 836, the creditor asserted a quantum meruit claim for predeath services to the deceased settlor. The trustee was the husband of the primary beneficiary, who was not a resident of the United States, and to whom significant distributions were made. The court held that the trustee was not liable for having made distributions placing assets beyond the reach of creditors.

If the trust has been partially but not completely distributed, the beneficiary's personal liability is limited to (1) amounts that cannot be satisfied from the as yet undistributed trust estate and (2) a pro rata portion of the creditor's claim based on the amount of the beneficiary's distribution and the total trust distributions, not to exceed the amount received by the beneficiary. Prob C §§19400-19403.

The creditor must bring the action within 1 year after death under CCP §§366.2 and 366.3. *Levine v Levine* (2002) 102 CA4th 1256, 126 CR2d 255 (CCP §366.2 statute of limitations applies to all debts of decedent, regardless of whom the claim is brought against); *Dawes v Rich* (1997) 60 CA4th 24, 70 CR2d 72. For example, in *Dawes*, the creditor brought an action against the marital trust of the debtor's spouse because that trust had received community property assets from a joint revocable trust that the debtor and his spouse had executed together. Because the debts were not allocated in a proceeding under Prob C §11440, the court held that the creditor could reach those assets, but the action was barred because it was not brought within the 1-year limitations period. 60 CA4th at 33. Similarly, the 1-year limitations period will bar a former spouse who is trying to reach trust assets under a marital settlement agreement covenant requiring the husband to provide monthly payments to the spouse following his death in the form of a lifetime annuity. *Embree v Embree* (2004) 125 CA4th 487, 22 CR3d 782.

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§22.52A C. Liability of Trustee for Distribution

The trustee has no duty to retain trust assets for the benefit of a deceased settlor's creditor while that creditor's claim remains unresolved. Thus, a creditor cannot have the trustee surcharged merely because the trustee distributed to beneficiaries before the claim was decided. *Arluk Med. Ctr. Indus. Group, Inc. v Dobler* (2004) 116 CA4th 1324, 11 CR3d 194. However, when the trustee knows that an order in favor of the creditor has been entered, distribution by that trustee might constitute a fraudulent conveyance under CC §3439.04 or might conceivably constitute a tort similar to interference with the creditor's prospective economic advantage. 116 CA4th at 1340.

Although the holding of *Arluk* will protect distributing trustees from most creditors, it will not protect them from complaining beneficiaries. Thus, if a beneficiary tries to surcharge the trustee for improper distribution, *Arluk* will provide no defense. *Cassel v Globerson (In re Kolb)* (Bankr ND Cal 2007) 2007 Bankr Lexis 1896.

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VIII. CLAIMS OF BENEFICIARIES' CREDITORS

§22.53 A. Execution on Spendthrift Trusts and Education or Support Trusts; Discretionary Payments

The creditor generally may not execute on an interest in a trust subject to transfer restrictions on income or principal ("spendthrift trust") or a trust that provides for payment of income or principal for education or support. Prob C §§15300-15302. Exceptions to this rule are provided in Prob C §§15301(b) and 15304-15307 (principal amounts that have become due and payable to the beneficiary, claims for child support, restitution judgment on conviction for the commission of a felony, claims for reimbursement for public support, the right of a general creditor to reach up to 25 percent of payments due a beneficiary, and amounts in excess of beneficiary's education and support needs). *Ammco Ornamental Iron, Inc. v Wing* (1994) 26 CA4th 409, 420, 31 CR2d 564. See California Trust Administration §§10.50, 10.68-10.70A (2d ed Cal CEB 2001).

NOTE: Generally, the creditor cannot compel the trustee to pay any amount that may be paid only in the exercise of the trustee's discretion, even if the instrument provides a standard for the exercise of that discretion and the beneficiary could enforce that standard to compel payment. Prob C §15303. But this restriction does not apply when the settlor is the beneficiary. See §22.41. Furthermore, under the exception governing claims for spousal or child support, the court can override the trustee's discretion and compel payment when the trustee's refusal to satisfy an enforceable support judgment is in bad faith or the result of an improper motive. Prob C §15305. See also *Ventura County Dep't of Child Support Servs. v Brown* (2004) 117 CA4th 144, 155, 11 CR3d 489.

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§22.54 B. Procedure for Enforcement of Money Judgment

Code of Civil Procedure §709.010 is the exclusive procedure for enforcing a money judgment against the beneficiary of a trust. It is an exception to the CCP §699.720(8) prohibition against execution on the interest of a trust beneficiary. The judgment creditor enforces the judgment by bringing a petition in "the superior court having jurisdiction over the trust" under Prob C §§17000-17457. The court has discretion to determine appropriate application of the judgment debtor's beneficial interest in satisfaction of the judgment, "including but not limited to imposition of a lien on or sale of the judgment debtor's interest, collection of trust income and liquidation and transfer of trust property by the trustee." CCP §709.010(b). See CCP §709.020 regarding enforcement of money judgment against judgment debtor's nonvested beneficial interest in a trust.

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Source: Estate Planning/California Trust and Probate Litigation/22 Actions by and Against Trustee/§22.55 C. Form: Petition for Enforcement of Money Judgment

§22.55 C. Form: Petition for Enforcement of Money Judgment

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[*Title of court*]

In re _ _[*name*]_ _ Trust,	**)**	**No. _ _ _ _ _ _**
Established _ _[*date*]_ _	**)**	
	)	**PETITION TO ENFORCE**
	)	**JUDGMENT AGAINST TRUST**
	)	**BENEFICIARY (CODE OF**
_____	**)**	**CIVIL PROCEDURE §709.010)**

Petitioner, _ _[*name*]_ _, respectfully petitions:

1. Petitioner is a judgment creditor of _ _[*name*]_ _, beneficiary of the _ _[*name*]_ _ trust.

2. A copy of the judgment against the named beneficiary is attached hereto as Exhibit A.

[*Add one of the following alternatives*]

[*Alternative 1: Allegations for seeking principal under Prob C §15301*]

3. The _ _[*name*]_ _ trust provides that the named beneficiary's interest in principal is not subject to voluntary or involuntary transfer. Under the trust instrument, principal in the amount of _ _[*dollar amount*]_ _ will become due and payable to the named beneficiary on or about _ _[*date*]_ _.

[*Alternative 2: Allegations for seeking income, principal, or both under Prob C §15305*]

3. Under the terms of the _ _[*name*]_ _ trust, the named beneficiary has the right to compel the trustee to pay _ _[*income/principal/both income and principal*]_ _ to or for the benefit of the named beneficiary.

[*If appropriate, add*]

Under the terms of the _ _[*name*]_ _ trust, the trustee has discretion to make payments to or for the benefit of the named beneficiary.

[*Continue*]

The amount that the named beneficiary has the right to compel the trustee to pay is in excess of the amount that is or will be necessary for the education and support of the beneficiary.

[*If appropriate, add*]

No amount that the trustee has discretion to pay to or for the benefit of the named beneficiary is or will be necessary for the education and support of the beneficiary.

[*Alternative 3: Allegations for seeking income, principal, or both under Prob C §15307*]

3. The _ _[*name*]_ _ trust provides that the named beneficiary's interests in principal and income are not subject to voluntary or involuntary transfer. The named beneficiary is entitled _ _[*e.g., to payment of all income from the trust, to be paid quarterly*]_ _. The trustee may pay to or for the benefit of the named beneficiary such additional amounts of principal as the trustee, in the trustee's absolute discretion, deems appropriate. None of the income and none of the amount that the trustee has discretion to pay to or for the benefit of the named beneficiary is or will be necessary for the education and support of the beneficiary.

[*Continue*]

[*Add one of the following alternatives*]

[*Alternative 1*]

4. The names and addresses of the beneficiaries of the trust are as follows: _ _[*List names and addresses.*]_ _

[*Alternative 2*]

4. Petitioner does not know the names and addresses of all the beneficiaries of the trust. The name and address of the beneficiary-judgment debtor is _ _[*name and address*]_ _**.**

[*Continue*]

Petitioner requests:

1. That the court order payment of the judgment entered against _ _[*name*]_ _ **from** _ _[*his/her*]_ _ **interest in the trust in the following manner:** _ _[*Specify requested manner of payment, e.g., Trustee is ordered to pay over to petitioner all income now payable or that becomes payable to* _ _[*name*]_ _ *above the amount of* _ _[*dollar amount*]_ _ *quarterly. Trustee is further ordered to make no discretionary payments to* _ _[*name*]_ _ *until the judgment referred to above together with all interest on the judgment is paid in full***;** *and is ordered, when exercising discretion to make payments to or for the benefit of* _ _[*name*]_ _**,** *to make the payments to petitioner until the judgment referred to above together with all interest on the judgment is paid in full.*]_ _

2. That all other proper orders be made.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Petitioner

Date: _ _ _ _ _ _ **By:** __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Petitioner

[*Verification; see §§17.56, 17.61*]

Comment: These sample allegations rely on Prob C §15307, which permits application of any amounts over those required for the education and support of the beneficiary, rather than Prob C §15306.5, which limits the amount that can be reached to 25 percent of the payment that otherwise would be made to the beneficiary.

For discussion of court requirements for format of papers and a complete sample caption, see §§10.4-10.6.

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23

Appeals

Matthew P. Matiasevich

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§23.1 I. INTRODUCTION

The threat of appellate litigation will confront every trust and estate practitioner in time. Counsel who accept responsibility for appellate work owe a duty of competence to their clients, and should not undertake this aspect of the case unless they either satisfy that obligation or associate experienced co-counsel. Cal Rules of Prof Cond 3-110. In general, the duty of competence requires that counsel understand appellate procedure and the substantive law pertaining to the case at hand. But there are a number of pitfalls and misconceptions that trust and estate practitioners tend to run into when they venture from the probate court into the appellate arena, and counsel should take care to review the applicable rules and consider the various issues that will shape the outcome on appeal. For a comprehensive treatment of appellate matters in general, see California Civil Appellate Practice (3d ed Cal CEB 1996).

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II. CONSIDERATIONS AT THE UNDERLYING HEARING

§23.2 A. Plan Ahead

The informality of most trust and estate litigation stands in stark contrast to the rigors that counsel will face at certain stages of an appeal. Attorneys who are accustomed to a *laissez faire* approach may be uncomfortable at having a record reviewed for the purpose of determining whether they filed a timely notice of appeal or whether they preserved important arguments. No matter how counsel prefer to conduct their business in the trial courts, they should understand that as far as the law is concerned, trust and estate disputes are subject to the normal rules of civil practice. Prob C §1000. Furthermore, what some may regard as a useless technicality may be indispensable at certain stages of an appeal, when counsel may find the rules to be both unexpected and unforgiving.

Experienced counsel will plan for the appeal before the underlying hearing takes place. In most circumstances, counsel should have a sense of the possible outcomes in advance and should know whether the matter is of sufficient importance for any of the parties to challenge. When counsel fails to protect the record or otherwise take a step that would further the client's interest on appeal, it should be because counsel thought those matters over and deemed them to be counterproductive, not because counsel never bothered to consider them at all.

When faced with a hearing of consequence, many attorneys find it useful to assume that they will receive an unfortunate result and that they will have to vindicate the client's rights on appeal. This forces counsel to think ahead. Attorneys who discipline themselves in this manner will identify the important arguments, consider evidentiary issues that merit attention, and decide if anything should be done to memorialize the trial court's findings. By thinking about these matters ahead of time, counsel will avoid mistakes and increase the chances of success both at the trial and appellate levels.

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§23.3 B. Identify the Issues

For planning purposes, counsel should assume that he or she will be limited to the arguments made in the trial court. Appellate courts generally refuse to consider new issues. *In re Aaron B.* (1996) 46 CA4th 843, 846, 54 CR2d 27. Some courts hold that the failure to raise a matter in the trial court constitutes an implied waiver, while others hold that parties must adhere to their "theory of the case" and are thus barred from changing positions. *North Coast Bus. Park v Nielsen Constr. Co.* (1993) 17 CA4th 22, 28, 21 CR2d 104; *Richmond v Dart Indus., Inc.* (1987) 196 CA3d 869, 874, 242 CR 184. Whatever the terminology, the result is the same; counsel who fail to raise an issue in the trial court should not assume that they can do so on appeal.

There is an exception to this rule for questions of law. The court has discretion to consider legal issues that are raised for the first time on appeal, as long as they are based on an uncontroverted record and do not require any factual determinations. *Mattco Forge, Inc. v Arthur Young & Co.* (1997) 52 CA4th 820, 847, 60 CR2d 780. Thus, a party might be able to raise new issues concerning statutory interpretation or the legal effect of undisputed evidence.

NOTE: The respondent has the better chance of asserting a new legal theory on appeal, because the reviewing court should affirm if the decision is correct on any theory of law. *D'Amico v Board of Med. Exam'rs* (1974) 11 C3d 1, 19, 112 CR 786. Thus, the respondent should be able to defend with an issue that was not raised below, as long as it does not turn on a question of fact that the other party was deprived of an opportunity to litigate.

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Source: Estate Planning/California Trust and Probate Litigation/23 Appeals/§23.4 C. Preserve Objections

§23.4 C. Preserve Objections

Counsel must object in the trial court to be able to argue on appeal that evidence was improperly admitted. Evid C §353(a). See §10.77. If there is no objection to the contrary, declarations and verified pleadings can constitute evidence. *Evangelho v Presoto* (1998) 67 CA4th 615, 620, 79 CR2d 146 (also noting that statements of fact in unverified memoranda could be considered as evidence in the absence of objections); but see *Estate of Nicholas* (1986) 177 CA3d 1071, 1090, 223 CR 410 (declarations were evidence, but unverified memoranda and the trial judge's previous knowledge of the case were not).

Evidentiary objections can be more difficult to preserve than many trust and estate practitioners realize. To preserve an objection, counsel must (1) object when the evidence is offered, (2) state the specific ground for the objection, and (3) obtain a ruling from the trial judge, unless the judge takes the matter under submission or unless it is clear from the record that the ruling must have been adverse. Evid C §353(a); *People v Jacobs* (1987) 195 CA3d 1636, 1650, 241 CR 550.

PRACTICE TIP: Having the ability to preserve objections does not mean that counsel should object at every opportunity. Many trust and estate litigators will forego valid objections and allow the submission of testimony by written declarations, reasoning that it saves money, allows counsel to handle the case more efficiently, and decreases the burden on the trial judge. This is particularly appropriate when the factual dispute is minimal and the case turns primarily on legal issues. In addition, experienced litigators tend to be selective about what objections they assert, because the improper admission of evidence is a ground for reversal only if it is prejudicial (Evid C §353(b)) and because a "scorched-earth" approach runs the risk of alienating the trial judge. Counsel should weigh these factors when considering whether to assert evidentiary objections at an upcoming hearing.

In addition, counsel must take appropriate steps at the hearing, or any argument that the trial court improperly *excluded* evidence will be waived. To preserve the argument for appeal, counsel must inform the trial court of the substance, purpose, and relevance of the evidence that was excluded. Evid C §354.

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§23.5 D. Memorialize Court's Ruling

The appellant bears the responsibility of preserving the record for appeal. The rules pertaining to statements of decision provide a common example. A statement of decision is a written set of findings that the court will issue after a bench trial, if requested to do so by one of the parties. CCP §632. When the appellant fails to request a statement of decision, the appellate court will presume that the trial court made whatever findings are needed to support the judgment, as long as the record contains substantial evidence in support of those implied findings. *Michael U. v Jaime B.* (1985) 39 C3d 787, 792, 218 CR 39. The court takes the same approach when the appellant fails to object to omissions in the statement of decision. *Marriage of Cohn* (1998) 65 CA4th 923, 928, 76 CR2d 866. These rules should apply in the trust and estate context, since the Probate Code does not specify otherwise. Prob C §1000.

But there is a question whether the probate court must issue written findings even when no one has requested a statement of decision. Some cases decided under previous law hold that when the proceeding necessitates factual determinations, the court is obligated to make precise fact findings and to specify the grounds on which the decision rests, although the court may do so in the order rather than in a separate document. *Conservatorship of Pelton* (1982) 132 CA3d 496, 502 n3, 183 CR 188; *Estate of Anderson* (1997) 60 CA4th 436, 440, 70 CR2d 266. These cases, however, rely on authority that was decided when former CCP §§632 and 634 required findings in all bench trials, regardless of whether a party requested them. Because these statutes were amended to delete this requirement, this line of cases might no longer be viable.

AUTHOR'S ADVICE: Experienced practitioners usually will request a statement of decision for important matters that turn on contested facts and that do not lie within the trial court's discretion—that is, for matters that feel like an ordinary civil trial (*i.e.*, will contests or Prob C §850 property disputes).

Neither CCP §632 nor case law requires findings when there is no underlying factual dispute, which may be the case with regard to various administrative matters.

NOTE: To request a statement of decision, counsel must act in a timely manner. For trials of one day or less than eight hours spread over several days, counsel must request the statement of decision before the matter is submitted. For longer trials, counsel must request the statement within 10 days after the court announces its tentative decision. The request must specify the controverted issues for which the party wants a statement of decision. CCP §632. Failure to specify may result in a waiver of the statement as to those issues.

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III. CONSIDERATIONS FOR THE FIDUCIARY

§23.6 A. Duty to Appeal

The fiduciary must take reasonable steps to enforce claims of the trust or estate. Prob C §16010; *Estate of McCarthy* (1970) 5 CA3d 158, 166, 85 CR 50. Thus, when pursuing a claim, the fiduciary may have an obligation to appeal. In deciding whether to proceed, the fiduciary should consider factors such as the likelihood of success, the costs of suit, and the chance that a judgment might not be collectible.

The duty to enforce claims, however, does not require the fiduciary to interfere when heirs or beneficiaries are litigating over internal matters rather than the payment of a debt to the trust or estate. Thus, when heirs or beneficiaries are fighting among themselves over their respective rights to an estate, the fiduciary does not need to take a position unless required to do so by another duty, such as the duty to carry out the terms of the governing instrument. Prob C §16000; *Estate of Ferrall* (1948) 33 C2d 202, 204, 200 P2d 1.

Beneficiaries and heirs often spearhead litigation that the fiduciary also has standing to bring. For example, both fiduciaries and interested parties have standing to file a Prob C §850 petition to retrieve assets held by an outsider. In these circumstances, the fiduciary might reasonably allow others to take the lead, since they are spending their own money rather than that of the trust or estate. But the fiduciary cannot abdicate the responsibility for enforcing claims. When this duty has been triggered, the fiduciary is not a passive stakeholder and must instead use reasonable judgment in deciding what steps to take with regard to litigation that affects the estate.

PRACTICE TIP: The fiduciary should independently determine whether the other parties are sufficiently protecting the interests of the estate or trust. If they are not, the fiduciary may have an obligation to intervene. To ensure that attorney fees will be reimbursed from the estate or trust, some fiduciaries will ask the court for instructions before proceeding. But counsel should be aware that a petition for instructions will not stay the time in which to file a notice of appeal. See, *e.g.*, *Conservatorship of Coombs* (1998) 67 CA4th 1395, 79 CR2d 799 (only those motions listed in Cal Rules of Ct 8.108 will extend the time to appeal). See §23.14.

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§23.7 B. Duty to Defend

The fiduciary must take reasonable steps to defend against claims that may result in a loss to the trust or estate. Prob C §16011; *Estate of Turino* (1970) 8 CA3d 642, 87 CR 581. This includes the duty to defend against an appeal. *Gray v Union Trust Co.* (1915) 171 C 637, 639, 154 P 306. Under certain circumstances, the fiduciary might be justified in capitulating or in relying on others to provide a defense, but only if these steps are consistent with the fiduciary's duty of reasonable care.

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§23.8 C. Liability for Relying on Order Before It Is Final

An appealable order is not final until the time for appeal has elapsed. This raises the question of what the fiduciary should do when the parties are contentiously litigating administrative matters. The fiduciary might comply with an order only to see it overturned later.

The fiduciary can avoid this problem by obtaining stipulations or consent to the effect that no appeal will be forthcoming or that the fiduciary will be held harmless for acting on the order immediately. In some cases, however, a party might be unwilling to cooperate, leaving the fiduciary with the choice of whether to accept the risk. When a distribution is involved, the fiduciary can pay and rely on the fact that the receiving party should be liable for any overpayment. *Estate of Hill* (1957) 149 CA2d 779, 786, 309 P2d 39. But if a beneficiary detrimentally changed position in the meantime, that beneficiary might not have to repay anything, which puts the fiduciary at greater risk. 149 CA2d at 786. Although the fiduciary can withhold from that party's share to make up for the overpayment, the status of administration might render this a hollow option, if for example, the distribution in question is the final distribution. Moreover, the fiduciary does not have this option if the payment is to third party creditors, because they have no further interest to withhold. In short, payment before the order directing it becomes final can raise a number of concerns when the parties are continuing to litigate and when they refuse to ease the fiduciary's worries by stipulation. Rather than take unnecessary risks, many fiduciaries prefer to wait until the order becomes final.

If the court has issued the order to prevent immediate harm, however, the fiduciary might be unreasonable in waiting. In that case, the fiduciary could move for an order under Prob C §1310(b), which allows the court to authorize a fiduciary's actions regardless of the pendency of an appeal and its eventual outcome, if it is necessary to prevent imminent harm.

If the order of appointment is overturned, the law protects the fiduciary from liability as long as the fiduciary's acts were otherwise proper and done in good faith. Prob C §1311.

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IV. OVERVIEW OF APPELLATE PROCEDURE

§23.9 A. Appealable Orders

In proceedings governed by the Probate Code, generally only orders that are expressly made appealable by statute are appealable. Prob C §§1300-1304; CCP §904.1(a)(10). Other orders must be challenged by petitioning for an extraordinary writ or by filing suit. *McDonald v Structured Asset Sales, LLC* (2007) 154 CA4th 1068, 65 CR3d 366 (order rejecting personal representative's creditor claim not appealable; claiming personal representative's remedy is to file suit). This rule prevents delay in the administration of estates. *Varney v Superior Court* (1992) 10 CA4th 1092, 1098, 12 CR2d 865.

In general, only those orders that would constitute the judgment on a special proceeding, that is, those orders that resolve a dispute on the merits rather than disposing of some interlocutory matter, are appealable under the Probate Code. For example, one may appeal an order settling a fiduciary's account; an order surcharging, removing, or discharging a fiduciary; an order pertaining to the admission of a will to probate; or an order that resolves an internal trust dispute under Prob C §§17200-17211. For a list of appealable orders, see Prob C §§1300-1304.

The substance of the order determines whether it falls within the ambit of Prob C §§1300-1304. The form does not affect appealability. *Estate of Martin* (1999) 72 CA4th 1438, 1442, 86 CR2d 37.

If the order is not appealable, the court must dismiss the appeal unless it elects to treat the appeal as a petition for extraordinary writ. *Estate of Hearst* (1977) 67 CA3d 777, 781, 136 CR 821. Furthermore, the automatic stay is not triggered if the court treats the appeal as a writ petition. See Prob C §1310(a).

PRACTICE TIP: To avoid raising expectations that will be disappointed, counsel for the potential appellant should determine whether the order is appealable before going forward. Counsel should not assume that review will take place if the opponent fails to spot the issue. The court has an independent duty to determine whether it has jurisdiction over the matter, and thus the court will scrutinize the order regardless of whether anyone raises the issue of appealability. Indeed, the rules of court will force the appellant's hand, because the opening brief must explain why the order is appealable. Cal Rules of Ct 8.204(a)(2)(B).

If the order is not appealable, the respondent can move to dismiss. For a discussion of appellate motions, see California Civil Appellate Practice, chap 11 (3d ed Cal CEB 1996).

PRACTICE TIP: If the probate court believes that the automatic stay is in effect, the respondent might be well served by moving to dismiss the appeal, because without a motion, the respondent might have to wait months before putting the issue before the court. Furthermore, under ordinary circumstances, the respondent should move to dismiss sooner rather than later; a delay might prevent the court from granting the motion before the briefing becomes due, which could force the respondent to expend unnecessary funds. The failure to make a motion, however, does not waive the issue of nonappealability. The respondent's brief can bring this defect to the court's attention.

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§23.10 B. Standing to Appeal

Ordinarily, a person must be a party of record and must be aggrieved by the ruling to be able to appeal. CCP §902. However, the party requirement is relaxed in the probate context. Thus, an aggrieved beneficiary can appeal even if that beneficiary did not appear at the underlying hearing. *Estate of Zabriskie* (1979) 96 CA3d 571, 575, 158 CR 154. This protection extends to heirs and beneficiaries, but not to creditors. *Estate of Partridge* (1968) 261 CA2d 58, 60, 67 CR 433.

The general rule that nonappealing parties are bound by a ruling even if the appellant succeeds is also relaxed in the trust and estate context. When the rights of heirs or beneficiaries are interwoven, a successful appeal by one should extend to the benefit of all. *Estate of McDill* (1975) 14 C3d 831, 840, 122 CR 754.

Fiduciaries can appeal in a wide variety of circumstances. For example, they have standing when they are defending the estate, pursuing claims on behalf of the estate, or litigating matters that pertain to their own accounts. Case law, however, states that fiduciaries do not have standing to appeal in their representative capacity when the order determines merely which heirs or beneficiaries are entitled to share in a particular fund. *Estate of Ferrall* (1948) 33 C2d 202, 204, 200 P2d 1.

For discussion of standing to appeal in will contests, see §17.94.

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§23.11 C. Filing Timely Notice of Appeal

Counsel must file the notice of appeal in a timely manner. This requirement is jurisdictional; if the notice is late, the appeal will be dismissed. Cal Rules of Ct 8.104(b). For a form notice and instructions on filing, see §23.12-23.13.

The notice of appeal must be filed on or before the earliest of (1) 60 days after the court clerk serves the appealing party with notice of entry of judgment or a file-stamped copy of the judgment, showing the date either was served; (2) 60 days after the appealing party serves or is served by a party with notice of entry of judgment or a file-stamped copy of the judgment, accompanied by proof of service; or (3) 180 days after entry of the judgment. Cal Rules of Ct 8.104(a)(1)-(3). Service that triggers the 60-day period may be by any method permitted by the Code of Civil Procedure, including electronic service when permitted under CCP §1010.6 and Cal Rules of Ct 2.250-2.261. Cal Rules of Ct 8.104(a)(4). Service by mail does not extend the period for filing the notice of appeal. CCP §1013a. As used in Rule 8.104, notice of entry of judgment also includes an appealable order.

The notice of appeal divests the probate court of jurisdiction and vests it in the appellate court. CCP §916(a). If the respondent wants the order altered rather than just affirmed, the respondent must cross-appeal. The notice of cross-appeal must be filed within 20 days after the superior-court clerk mails notice of the original appeal. Cal Rules of Ct 8.108(f).

If the notice of appeal is untimely, the respondent can move to dismiss for lack of jurisdiction.

For a form for Notice of Appeal, see §23.12.

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Source: Estate Planning/California Trust and Probate Litigation/23 Appeals/§23.12 1. Form: Notice of Appeal (Superior Court)

§23.12 1. Form: Notice of Appeal (Superior Court)

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23.12-1 Notice of appeal

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _

Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

NOTICE OF APPEAL

To the clerk of the Superior Court of the State of California for the County of _ _[*name*]_ _**:**

PLEASE TAKE NOTICE that _ _[*name of party/plaintiff/defendant*]_ _ **hereby appeals from**

[*Option 1: If appeal is from the judgment*]

the judgment entered on or about _ _[*date*]_ _**.**

[*Option 2: If appeal is from an appealable order*]

the order _ _[*specify order*]_ _ **entered on or about** _ _[*date*]_ _**.**

[*Option 3: If two or more matters are appealed*]

the judgment entered on or about _ _[*date*]_ _**, in favor of** _ _[*name of party*]_ _**, plaintiff, and the order entered on or about** _ _[*date*]_ _**, granting plaintiff a limited new trial on the issue of damages.**

[*Option 4: If appeal is from part of the judgment*]

the judgment, except the portion determining that _ _[*specify portion of judgment not appealed from*]_ _**.**

Notice of entry of judgment was served by mail by plaintiff on _____.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _**,** _ _[*plaintiff and appellant/ defendant and appellant*]_ _

Comment: The alternatives shown are suggestions and should be modified as needed to suit the facts of the particular case. When the appeal is taken from only part of a judgment, counsel must take special care in drafting the notice of appeal. It may be necessary to quote in full the portion of the judgment from which the appeal is taken. In other cases, a simple specification as in Option 4 will suffice.

The notice of appeal is not required to set forth the date of mailing or service of the notice of entry of judgment/order (which triggers the running of the 60-day period under Cal Rules of Ct 8.104(a)), but counsel may wish to include this information for the court's convenience.

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§23.13 2. Filing Fees

The current fee for filing a notice of appeal in a civil case is $655 and should be in the form of a check or money order, although cash is also acceptable. Govt C §§68926, 68926.1(b); Cal Rules of Ct 8.100(b)(1). A separate filing fee is required for each separate notice of appeal or cross-appeal, although multiple parties may appeal in a single notice.

The notice of appeal must be accompanied by a $100 deposit for preparation of the clerk's transcript. Govt C §68926.1(a); Cal Rules of Ct 8.100(b)(2). This deposit is in addition to the $655 filing fee and is forfeited if the appeal is abandoned or dismissed before the record is filed in the reviewing court. Govt C §68926.1(a).

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§23.14 3. Effect of Posttrial Motions

Posttrial motions can alter the deadline for an appeal, but they do not extend that time indefinitely, and counsel should make sure to ascertain the correct date. In general, a posttrial motion will extend the time to appeal a judgment until 30 days after the trial court denies the motion. Cal Rules of Ct 8.108. The appellant, however, must still act at some point within 180 days after the judgment was entered. For example, a motion for new trial will extend the deadline to the earliest of the following: (1) 30 days after the trial court denies the motion, (2) 30 days after the motion is denied by operation of law, or (3) 180 days after entry of the judgment. Cal Rules of Ct 8.108(b). For a list of motions that will extend the time to appeal, as well as a list of the applicable deadlines, see Cal Rules of Ct 8.108.

Certain posttrial motions are not available in the trust and estate context, and might not extend the deadline for appeal. For example, Prob C §7220 bars a motion for new trial in all but a few circumstances. Thus, parties who erroneously bring a motion for new trial run the risk that it will not extend the time in which to appeal. These parties might litigate their motion only to find that, on its denial, their time to appeal has already expired.

Motions for reconsideration present a similar problem. Although Cal Rules of Ct 8.108(e) states that a motion for reconsideration will stay the time in which to appeal, this might not apply in the trust and estate context, because the motion might be an empty act. The order on a petition is conceivably the judgment in a special proceeding, and after judgment has been entered, a motion for reconsideration is void. *Ramon v Aerospace Corp*. (1996) 50 CA4th 1233, 1236, 58 CR2d 217. Accordingly, counsel should not assume that a motion for reconsideration is the appropriate mechanism for challenging an order of the probate court.

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Source: Estate Planning/California Trust and Probate Litigation/23 Appeals/§23.15 D. Designating the Record

§23.15 D. Designating the Record

The record on appeal usually consists of a reporter's transcript and a clerk's transcript. For sample forms, see §23.16 (notice to prepare reporter's transcript) and §23.17 (notice to prepare clerk's transcript). A reporter's transcript is a verbatim transcription of what was said in court, while a clerk's transcript is an assembly of the documentary evidence admitted at the hearing, as well as relevant pleadings from the court's file. Within 10 days after the notice of appeal is filed, the appellant must designate the material to be included in the reporter's transcript and the clerk's transcript. Cal Rules of Ct 8.121. Thereafter, the respondent has 10 days to request the inclusion of additional material. Cal Rules of Ct 8.122(a)(2), 8.130(a)(3).

The rules provide other options for presenting the record on appeal. Many parties elect to proceed by appendix in lieu of a clerk's transcript. See Cal Rules of Ct 8.124. For sample forms, see §§23.19-23.20. Furthermore, the parties can agree to replace the transcripts with an agreed statement. Cal Rules of Ct 8.134(a)(1). For a sample form, see §23.21. The rules also provide various procedures for augmenting and correcting the record (Cal Rules of Ct 8.155; for a sample form, see §23.18), as well as procedures for dealing with sealed records. Cal Rules of Ct 8.160. For additional forms, see California Civil Appellate Practice, chap 9 (3d ed Cal CEB 1996).

PRACTICE TIP: Rather than purchase a copy, the respondent can force the appellant to lend the record for use in connection with the respondent's brief. The respondent must make this demand within 20 days after the record is filed in the reviewing court. Cal Rules of Ct 8.153(a). Some practitioners make this demand in the form of a pleading and file it with the superior court, so that there can be no dispute over the fact or timeliness of the demand.

Original exhibits may be important to the appeal. In some circumstances, counsel might want the court to review the original holographic will or the decedent's handwritten letter, particularly when copies fail to do justice to the original. In these instances, counsel must request the superior court to transmit original exhibits to the reviewing court. Within 10 days after the respondent's brief could be filed, the party who wants original exhibits reviewed must serve and file a notice in the superior court designating the original exhibits to be transmitted. Thereafter, the other parties have 10 days to designate any other original exhibits for transmittal. Cal Rules of Ct 8.224. The rule only provides for the transmission of originals that were not copied in a clerk's transcript or appendix (Cal Rules of Ct 8.224(a)(1)), but this should not preclude a party from requesting the transmission of other originals, although the party might have to apply for that relief.

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Source: Estate Planning/California Trust and Probate Litigation/23 Appeals/§23.16 1. Form: Notice to Prepare Reporter's Transcript (Appeal From Superior Court)

§23.16 1. Form: Notice to Prepare Reporter's Transcript (Appeal From Superior Court)

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23.16-1 Notice to prepare reporter's transcript (appeal from superior court)

__ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _

Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

NOTICE TO PREPARE REPORTER'S TRANSCRIPT

To the clerk of the court:

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _ **and appellant,** _ _[*name*]_ _**, request the preparation of a reporter's transcript, which shall include:**

All oral proceedings, whether in chambers or in open court, required by California Rules of Court 8.130, including without limitation all proceedings in the above-entitled case that were held on the following dates.

DATE	DEP'T	FULL OR HALF-DAY	NAME OF REPORTER	AMOUNT OF DEPOSIT
For example:				
Oct. 11, 2002	**22**	**Half**	**John Doe**	**$325**

A deposit of _ _[*e.g., $325 (one half-day at $325)*]_ _ **accompanies this notice, under Cal Rules of Ct 8.130(b).**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _ **and appellant**

Comment: Some courts use their own local form.

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Source: Estate Planning/California Trust and Probate Litigation/23 Appeals/§23.17 2. Form: Notice to Prepare Clerk's Transcript

§23.17 2. Form: Notice to Prepare Clerk's Transcript

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23.17-1 Notice to prepare clerk's transcript

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _

Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

NOTICE TO PREPARE CLERK'S TRANSCRIPT

To the clerk of the court:

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _ **and appellant,** _ _[*name*]_ _**, designates, under California Rules of Court 8.121, the following papers or records on file or lodged with the clerk of this court to be included in the clerk's transcript on appeal:**

1. The documents and records required to be included in the clerk's transcript under California Rules of Court 8.122(b).

[*Add if desired*]

2. The following additional documents and records: _ _[*List numerically by title and exact or approximate date of filing*]_ _**.**

[*Add if desired*]

3. The following exhibits are to be copied: _ _[*List separately each exhibit admitted in evidence or rejected that appellant desires copied*]_ _**.**

[*Add if desired*]

4. The clerk is requested not to copy the following designated papers, copies of which appellant will supply: _ _[*List each paper for which copies will be supplied*]_ _**.**

[*Add if desired*]

5. The following _ _[*record/portion of the record*]_ _ **on the prior appeal to the** _ _[*e.g., Court of Appeal, Fourth District, Division Two*]_ _**, No.** _ _[*appellate case number*]_ _ **in this same** _ _[*action/proceeding*]_ _ **is to be incorporated by reference in the clerk's transcript for this appeal under California Rules of Court 8.147(b):** _ _[*List all or a portion of the records desired, e.g., reporter's transcript, clerk's transcript, exhibits admitted and rejected, other desired special portions of the appellate record*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _ **and appellant**

Comment: Some superior courts use their own local form.

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Source: Estate Planning/California Trust and Probate Litigation/23 Appeals/§23.18 3. Form: Request for Correction of Transcript

§23.18 3. Form: Request for Correction of Transcript

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23.18-1 Request for correction of transcript

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _

Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

REQUEST FOR CORRECTION OF

_ _[*CLERK'S/REPORTER'S/CLERK'S AND REPORTER'S*]_ _ **TRANSCRIPTS**

To the clerk of the court:

_ _[*Name*]_ _**,** _ _[*plaintiff/defendant*]_ _ **and** _ _[*appellant/respondent*]_ _**, requests that the** _ _[*clerk's/reporter's/clerk's and reporter's*]_ _ **transcript(s) be corrected as follows:** _ _[*List specific corrections to be made*]_ _**.**

_ _[*Plaintiff/Defendant*]_ _ **and** _ _[*appellant/respondent*]_ _ **further requests that the clerk set a time for hearing for certification of the transcript(s) by the judge who tried the case under California Rules of Court 8.155(c)(1).**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _ **and** _ _[*appellant/respondent*]_ _

Comment: When a document that should be included in the clerk's transcript has been lost or misfiled, the party desiring inclusion of the document can attach a copy of it to the party's request for correction and request that the copy be ordered accepted as an official record and that it be included in the clerk's transcript. This form should be filed with the reviewing court.

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Source: Estate Planning/California Trust and Probate Litigation/23 Appeals/§23.19 4. Form: Notice of Election to Proceed by Appendix in Lieu of Clerk's Transcript

§23.19 4. Form: Notice of Election to Proceed by Appendix in Lieu of Clerk's Transcript

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23.19-1 Notice of election to proceed by appendix in lieu of clerk's transcript

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _

Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

NOTICE OF ELECTION TO PROCEED BY APPENDIX IN LIEU OF CLERK'S TRANSCRIPT

To the clerk of the court:

PLEASE TAKE NOTICE that _ _[*plaintiff/defendant*]_ _ **and appellant,** _ _[*name*]_ _**, elects to proceed by preparation of an appendix under California Rules of Court 8.124 in lieu of a clerk's transcript under California Rules of Court 8.122.**

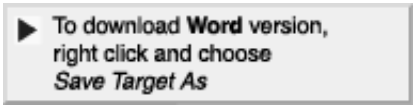
Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*plaintiff/defendant*]_ _ **and appellant**

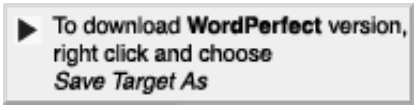
Comment: Some superior courts use their own local form. When preparing an appendix, a party has the right to obtain copies of exhibits that are in the possession of another party. Cal Rules of Ct 8.124(c).

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Source: Estate Planning/California Trust and Probate Litigation/23 Appeals/§23.20 5. Form: Stipulation Designating Contents of Joint Appendix

§23.20 5. Form: Stipulation Designating Contents of Joint Appendix





23.20-1 Stipulation designating contents of joint appendix

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _

Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

STIPULATION DESIGNATING CONTENTS OF JOINT APPENDIX

To the clerk of the court:

[*Option 1: Contents of appendix*]

It is hereby stipulated by and between appellant, _ _[*name*]_ _**, and respondent,** _ _[*name*]_ _**, through their attorneys of record, that the contents of the joint appendix shall consist of the following:** _ _[*List all papers to be included in the joint appendix*]_ _**.**

[*Option 2: Contents of appendix under Cal Rules of Ct 8.124*]

It is hereby stipulated by and between appellant, _ _[*name*]_ _**, and respondent,** _ _[*name*]_ _**, through their attorneys of record, that the attached joint appendix shall constitute a full and complete copy of the documents required by California Rules of Court 8.124 or otherwise essential to the proper consideration of the issues on appeal.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for appellant

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for respondent

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Source: Estate Planning/California Trust and Probate Litigation/23 Appeals/§23.21 6. Form: Preliminary Stipulation on Attempt to Prepare Agreed Statement (Cal Rules of Ct 8.134)

§23.21 6. Form: Preliminary Stipulation on Attempt to Prepare Agreed Statement (Cal Rules of Ct 8.134)

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23.21-1 Preliminary stipulation on attempt to prepare agreed statement

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _

Attorney for _ _[*name*]_ _

[*Title of court*]

[*Title of case*]

PRELIMINARY STIPULATION ON ATTEMPT TO PREPARE AGREED STATEMENT (CAL RULES OF CT 8.134)

It is stipulated between appellant, _ _[*name*]_ _**, and respondent,** _ _[*name*]_ _**, through their attorneys of record, that the parties will attempt to prepare an agreed statement on appeal under California Rules of Court 8.134.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for appellant

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for respondent

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§23.22 E. Briefs, Calendar Preference, and Oral Argument

The appellant has 40 days in which to serve and file the opening brief after the record or reporter's transcript is filed in the reviewing court, or 70 days after filing an election to use an appendix under Cal Rules of Ct 8.124 without a reporter's transcript. Cal Rules of Ct 8.212(a)(1). The respondent's brief is due 30 days after appellant files the opening brief. Cal Rules of Ct 8.212(a)(2). Thereafter, the appellant has 20 days to file and serve a reply. Cal Rules of Ct 8.212(a)(3). The parties can stipulate to a 60-day extension for each brief, but they need court approval for further time. Cal Rules of Ct 8.212(b). Stipulations must be signed by and served on all parties. Cal Rules of Ct 8.212(b)(1).

Probate matters are entitled to calendar preference on appeal. CCP §44. The court should give this preference automatically, but counsel might want to confirm this with the clerk of the division that is hearing the case. If a motion is necessary, counsel must promptly serve and file it in the reviewing court. Cal Rules of Ct 8.240.

Most panels will send counsel a notice stating that oral argument will be deemed waived unless requested within a certain amount of time. If no one does so, the court will decide the matter on the briefs. Oral argument, if conducted, is governed by Cal Rules of Ct 8.256.

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F. Resolution

§23.23 1. Opinion and Remittitur

The court decides an appeal by rendering a written opinion, which concludes by affirming, reversing, or modifying the subject order. After its judgment becomes final, the court issues a remittitur, which vests jurisdiction back in the trial court. Cal Rules of Ct 8.272. If there are subsequent proceedings, any rule of law necessary to the appellate court's decision becomes the law of the case. See California Civil Appellate Practice §§17.86-17.89 (3d ed Cal CEB 1996).

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§23.24 2. Petition for Rehearing

A party who wants to petition for rehearing must do so within 15 days after (1) the filing of the appellate opinion; (2) the issuance of a publication order that restarts the finality period, if the party has not already petitioned for rehearing; (3) the issuance of a modification order changing the appellate judgment; or (4) the filing of a consent to the increase or decrease of a money judgment. Cal Rules of Ct 8.268(b)(1). Rehearing is rarely granted, although a party must make the attempt before the supreme court will consider an argument that the court of appeal omitted or misstated an issue or material fact. Cal Rules of Ct 8.500(c)(2).

A party must not file an answer to a petition for rehearing unless the court requests an answer. Cal Rules of Ct 8.268(b)(2).

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Source: Estate Planning/California Trust and Probate Litigation/23 Appeals/§23.25 3. Petition for Review

§23.25 3. Petition for Review

A party can petition the supreme court for review of the appellate court's decision. Cal Rules of Ct 8.500(a)(1). In general, the supreme court will grant review only when it appears necessary to secure uniformity of decision or to settle important questions of law. Cal Rules of Ct 8.500(b). The petition must be filed within 10 days after the appellate court's decision becomes final in that court. Cal Rules of Ct 8.500(e).

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§23.26 G. Attorney Fees on Appeal

The rules that govern attorney fees in the trial court also govern fees on appeal. Thus, the parties must bear their own attorney fees in the absence of a contract, statute, or law to the contrary. CCP §1033.5(a)(10). In the trust and estate context, fee entitlement often depends on whether the party is a fiduciary or other interested person. For further discussion of attorney fees, see §§3.28-3.39, 5.38-5.45.

Fiduciaries can obtain reimbursement for attorney fees incurred on appeal if those fees constitute a reasonable expense of the trust or estate, as they do when the fiduciary successfully defends the account or withstands an attempt at removal. *Estate of Gump* (1991) 1 CA4th 582, 604, 2 CR2d 269. A fiduciary can also petition the court for instructions in an attempt to obtain prior authorization for a fee expenditure, as some fiduciaries do before pursuing debatable claims of the estate or trust. In addition, a fiduciary's attorneys have standing to recover for extraordinary services that they provided in connection with an appeal, even when that appeal was to establish their own fee entitlement. *Estate of Condon* (1998) 65 CA4th 1138, 1148, 76 CR2d 922.

Interested parties, on the other hand, have fewer options for recovering attorney fees from an estate or trust. A beneficiary or heir can recover fees under the common fund doctrine for successfully engaging in litigation that provides a financial benefit for the estate or trust, but this lies within the trial court's discretion. *Estate of Gump* (1982) 128 CA3d 111, 118, 180 CR 219. Furthermore, a beneficiary might be entitled to reimbursement for attorney fees that were needed to establish the beneficiary's position as such, if it would be contrary to the trustor's intent to require that the beneficiary pay his or her own fees. *Wells Fargo Bank v Marshall* (1993) 20 CA4th 447, 458, 24 CR2d 507.

In most cases when a party seeks reimbursement of fees from a trust or estate, the party must claim them by petitioning the probate court, even if those fees were incurred on appeal. Fiduciaries will usually seek to have fees approved in connection with the approval of an account; some fiduciaries, however, will request prior authorization from the court through a petition for instructions. But if the case involves fee shifting from a statute or contract rather than issues of reimbursement or equity, the party seeking fees will probably have to follow the procedure set forth in Cal Rules of Ct 3.1702(c), which requires a motion within the time that a cost memorandum is due. For example, if a trustee prevails against a third party in a breach of contract suit, the trustee could petition to have his attorney fees reimbursed from the trust. In this case, there would be no need for the trustee to comply with Rule 3.1702. But if the trustee wanted to collect attorney fees from the third party under the contract's fee-shifting clause, the trustee would have to follow the procedure set forth in Rule 3.1702.

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Source: Estate Planning/California Trust and Probate Litigation/23 Appeals/§23.27 H. Costs

§23.27 H. Costs

The appellate court will generally award costs to the prevailing party. Thereafter, that party must file a cost memorandum in the trial court within 40 days after the clerk mails notice of remittitur. Cal Rules of Ct 8.278(c).

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V. THE STAY OF ENFORCEMENT

§23.28 A. The Automatic Stay

Unless an exception applies, an appeal will stay an order listed in Prob C §§1300-1304. Prob C §1310. If the order does not fall within the ambit of those sections, the normal civil rules will determine whether a stay is in effect. CCP §916.

The scope of the stay depends on the notice of appeal. If the probate court made several orders at once, an appeal from one would not necessarily stay the others. For example, if the court issued an order approving a fiduciary's account, authorizing a preliminary distribution, and approving the payment of attorney fees, a notice of appeal that mentioned only the fee ruling would neither delay approval of the fiduciary's actions nor halt the preliminary distribution. However, the stay will stop any proceeding that would impact the effectiveness of the appeal. *Elsea v Saberi* (1992) 4 CA4th 625, 629, 5 CR2d 742.

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B. Exceptions to the Automatic Stay

§23.29 1. To Prevent Injury During Pendency of Appeal

The probate court can negate the stay by ordering a fiduciary to take action as if no appeal is pending, if the court must do so to prevent injury or loss to a person or property. Prob C §1310(b). Under this section, the fiduciary's acts are valid regardless of the outcome of the appeal, and the order directing the fiduciary will not be stayed if someone appeals it. Because this effectively abrogates appellate review, the court will use this section only when clearly justified by a risk of imminent injury or loss. *Conservatorship of Hart* (1991) 228 CA3d 1244, 1256, 279 CR 249 (discussing predecessor statute). See *Kane v Superior Court* (1995) 37 CA4th 1577, 44 CR2d 578 (administrator directed to release decedent's frozen sperm notwithstanding outcome of the pending appeal, when decedent's girlfriend was at risk of imminent loss if she had to wait out the appellate process before impregnation; discussing predecessor statute).

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§23.30 2. Court Can Require a Bond

In limited circumstances, the probate court can require that the appellant provide an undertaking, and if the appellant does not do so, the stay will not take effect. Prob C §1310(d). The court can require an undertaking as set forth in CCP §917.9, which gives the court discretion when (1) the appellant was found to possess money or property belonging to the respondent; (2) the judgment or order on appeal requires the appellant to perform an act for the respondent's benefit; or (3) the judgment is solely for costs awarded to the respondent. In these situations, the court can require an undertaking in an amount sufficient to cover any damages that the respondent might sustain as a result of the stay. Prob C §1310(d).

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§23.31 3. Money Judgments or Orders Directing Payment of Money

The automatic stay does not apply if the appeal is taken from a money judgment or an order directing the payment of money. Prob C §1310(e). There are two instances, however, in which the stay will apply even though the ruling appealed is a money judgment or order for the payment of money. First, the stay will take effect if the appellant posts a bond under CCP §917.1. Prob C §1310(e)(1). Second, the stay will take effect if payment is to be made from a decedent's estate, although the court can still order the appellant to post a bond under CCP §917.9. Prob C §1310(e)(2).

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VI. STANDARDS OF REVIEW

§23.32 A. Importance in the Appellate Process

The standard of review is the appellate court's touchstone for deciding any issue brought before it. To adequately represent a client on appeal, counsel must have a working knowledge of the various standards. The standard of review provides the threshold analysis and determines to what extent the court will defer to the trial court's decision. Counsel cannot evaluate the chances of success on appeal without understanding the applicable standards of review.

In most instances, the standard turns on whether the issue presented is a question of law or a question of fact. But counsel should understand that determining the appropriate standard of review can be a complicated endeavor. The same case might require the court to apply different standards of review for different issues. See, *e.g., Estate of Wong* (1995) 40 CA4th 1198, 1204, 47 CR2d 707. Furthermore, the standard of review can vary based on the circumstances of the case and the way in which the parties have framed their arguments. Thus, the same issue can present a question of law, a question of fact, or a mixed question of law and fact, depending on the circumstances. See *Estate of Stickelbaut* (1960) 54 C2d 390, 394, 6 CR 7.

For discussion of standard of review in will contests, see §17.95.

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§23.33 B. De Novo Review

The court will review questions of law de novo. Thus, the court will ignore the trial court's decision and start anew. Questions of law involve the selection of a rule or the application of law to undisputed facts. *Ghirardo v Antonioli* (1994) 8 C4th 791, 799, 35 CR2d 418. The de novo standard of review is appropriate for questions of law because the appellate courts have more time to debate legal issues and because there is a need for uniformity of decision. *Harustak v Wilkins* (2000) 84 CA4th 208, 213, 100 CR2d 718.

In the trust and estate context, the courts have applied de novo review to issues that include the following:

- Interpretation of a will or trust when there is no conflict in the extrinsic evidence or issue of credibility. *Estate of Dodge* (1971) 6 C3d 311, 318, 98 CR 801.
- Statutory interpretation. *Crook v Contreras* (2002) 95 CA4th 1194, 1203, 116 CR2d 319.
- Application of the Probate Code to undisputed facts. *Harustak v Wilkins* (2000) 84 CA4th 208, 212, 100 CR2d 718 ("the application of a statutory standard to undisputed facts is reviewed de novo").

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§23.34 C. Substantial Evidence

The court will review questions of fact under the substantial evidence rule. Under this standard, the court will defer to a factual determination of the trial court as long as the record contains substantial evidence in support of it. *Winograd v American Broad. Co.* (1998) 68 CA4th 624, 632, 80 CR2d 378. Thus, the court will not substitute its own findings for those of the trial court. This deferential standard of review recognizes that the trial court is in the better position to make findings of fact and that, as a jurisdictional matter, the trial court should have responsibility for deciding those questions. *Harustak v Wilkins* (2000) 84 CA4th 208, 213, 100 CR2d 718. This standard of review applies even if the evidence was presented by written declarations. *Shamblin v Brattain* (1988) 44 C3d 474, 479, 243 CR 902.

To constitute substantial evidence, the evidence must be reasonable, credible, and of ponderable legal significance. *DiMartino v City of Orinda* (2000) 80 CA4th 329, 336, 95 CR2d 16. In addition, it must prove the essentials that the law requires in that particular case. *DiMartino v City of Orinda, supra*. The testimony of one witness can constitute substantial evidence. *Marriage of Mix* (1975) 14 C3d 604, 614, 122 CR 79.

But aside from determining whether the evidence is substantial, the court will not reweigh it. The substantial evidence rule requires that the court resolve all conflicts in favor of the respondent. *Marriage of Mix, supra*. Furthermore, this standard requires the court to draw all inferences in the respondent's favor. *Winograd v American Broad. Co.* (1998) 68 CA4th 624, 633, 80 CR2d 378.

In the trust and estate context, the courts have used the substantial evidence rule to uphold a wide variety of factual determinations, including:

- Interpretation of a will or trust when it turns on a conflict in the extrinsic evidence or an issue of credibility. *Estate of Verdisson* (1992) 4 CA4th 1127, 1135, 6 CR2d 363.
- Failure to rebut the presumption of undue influence. *Estate of Shinkle* (2002) 97 CA4th 990, 1007, 119 CR2d 42, disapproved on other grounds in *Bernard v Foley* (2006) 39 C4th 794, 815 n14, 47 CR3d 248.
- Decedent acting voluntarily rather than as a result of undue influence. *Estate of Kreher* (1951) 107 CA2d 831, 238 P2d 150.
- Forgery of decedent's signature. *Estate of Zalud* (1972) 27 CA3d 945, 104 CR 329.
- Lack of testamentary capacity. *Estate of Clegg* (1978) 87 CA3d 594, 151 CR 158.
- Presence of testamentary capacity. *Goodman v Zimmerman* (1994) 25 CA4th 1667, 1678, 32 CR2d 419.
- Equal probability that a will was destroyed by someone other than the decedent. *Estate of Obernolte* (1979) 91 CA3d 124, 153 CR 798.
- Trustee failed to exercise independent discretion. *Estate of Talbot* (1956) 141 CA2d 309, 296 P2d 848.

But for matters in which the court reversed for lack of substantial evidence, see the following:

- *Estate of Bonaccorsi* (1999) 69 CA4th 462, 472, 81 CR2d 604 (reversing surcharge of personal representative for selling property at a loss because there was no substantial evidence that the representative was at fault);
- *Estate of Nicholas* (1986) 177 CA3d 1071, 1088, 223 CR 410 (reversing order instructing trustee because there was no substantial evidence that the proposed action was a reasonable exercise of the trustee's discretion);
- *Estate of Mann* (1986) 184 CA3d 593, 602, 229 CR 225 (reversing decision that decedent lacked testamentary capacity, for lack of substantial evidence);
- *Estate of Fritschi* (1963) 60 C2d 367, 33 CR 264 (reversing decision that decedent lacked testamentary capacity and was unduly influenced, for lack of substantial evidence).

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§23.35 D. Mixed Questions of Law and Fact

Counsel may have difficulty characterizing some questions when trying to determine the appropriate standard of review. In these instances, counsel may be dealing with a mixed question of law and fact. Questions of law relate to the selection of a rule, while questions of fact concern the establishment of historical fact. *Crocker Nat'l Bank v City & County of San Francisco* (1989) 49 C3d 881, 888, 264 CR 139. A mixed question of law and fact, however, concerns the application of the rule to the facts and the consequent determination of whether the rule is satisfied. *Crocker Nat'l Bank v City & County of San Francisco, supra*. Thus, a mixed question of law and fact is presented when the historical facts are established, the rule of law is undisputed, and the question is the application of law to the established facts. *Board of Admin. v Wilson* (1997) 52 CA4th 1109, 1128, 61 CR2d 207.

When confronted with a mixed question of law and fact, the court must choose between standards of review. This decision requires a case-by-case analysis. The court will resolve some mixed questions by applying de novo review and others by deferring in large part to the trial court.

Case law provides the analysis for determining which standard applies. The court will begin by trying to separate an issue into its component parts, resolving questions of fact under the substantial evidence rule and questions of law de novo. *Ghirardo v Antonioli (*1994) 8 C4th 791, 801, 35 CR2d 418. If a question remains about whether the established facts actually violate the law, the court makes a decision. If the application of law to fact is essentially factual in nature, the court will defer to the trial court and review its determination under the clearly erroneous standard. 8 C4th at 800. But if the inquiry requires the consideration of legal principles and their underlying values, the court will review the matter de novo. 8 C4th at 801.

For examples in the trust and estate context, see:

- *Harustak v Wilkins* (2000) 84 CA4th 208, 213, 100 CR2d 718 (if the sufficiency of a notice provided under Prob C §16061.7 was not a question of law, it was a mixed question of law and fact that was dominated by legal principles and thus subject to de novo review).
- *Estate of Joseph* (1998) 17 C4th 203, 217, 70 CR2d 619 (whether the decedent would have adopted the appellant but for legal barrier was a mixed question that was predominantly one of fact, and thus the court applied the substantial evidence rule).

PRACTICE TIP: The line between one type of question and another can become hazy. But if mixed questions are concerned, this rarely seems to affect the outcome, because the choice usually lies between questions that trigger the same standard of review. For example, the court will review a question of law the same way it would review a mixed question of law and fact predominated by legal issues, applying de novo review in each instance, and thus there is no effect on the outcome if the court does not bother to be precise. *Harustak v Wilkins, supra*. Still, counsel should consider any standard of review issues that present themselves. When the question does happen to be mixed and the court must decide between de novo review and a deferential standard, that choice might determine the outcome of the appeal.

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§23.36 E. Abuse Of Discretion

The court will review discretionary trial court rulings under the abuse of discretion standard. This rule prevents the court from substituting its own judgment for the trial court's. To reverse, the court must find that the trial judge exceeded the bounds of reason and that the error was prejudicial. *Estate of Gilkison* (1998) 65 CA4th 1443, 1448, 77 CR2d 463; *Estate of Billings* (1991) 228 CA3d 426, 430, 278 CR 439.

To properly exercise any discretion that it might have, the trial court must refrain from arbitrary determination, capricious disposition, or whimsical thinking. *Estate of Gilkison, supra*. Furthermore, the trial court must consider all of the material facts in evidence, together with the legal principles essential to an informed and just decision. *Estate of Gilkison, supra*.

Litigants have a better chance of proving an abuse of discretion if they can show that the trial court made a mistake regarding the underlying law or facts. The trial court abuses its discretion when it applies the wrong legal standard to the issue at hand. *Paterno v State of California* (1999) 74 CA4th 68, 85, 87 CR2d 754. In addition, the trial court abuses its discretion when it rules against uncontradicted evidence. *In re Marriage of Rosevear* (1998) 65 CA4th 673, 683, 76 CR2d 691. But, regardless, the error must amount to a miscarriage of justice before the court will reverse. *Estate of Gilkison* (1998) 65 CA4th 1443, 1449, 77 CR2d 463.

In general, the court invokes the abuse-of-discretion standard when reviewing a lower court's procedural decisions or discovery rulings. This standard of review, however, enjoys wider use in the trust and estate context, since the probate courts exercise discretion when ruling on many administrative issues. The court has applied this standard of review to matters that include the following:

- Removal of a fiduciary. *Estate of Hammer* (1993) 19 CA4th 1621, 1642, 24 CR2d 190 (reversing order denying removal for abuse of discretion).
- Appointment of an administrator when no one had statutory priority. *Estate of Selb* (1949) 93 CA2d 788, 792, 210 P2d 45 (order reversed for abuse of discretion).
- Preliminary distributions. *Estate of Beard* (1999) 71 CA4th 753, 780, 84 CR2d 276.
- Extraordinary attorney fees. *Estate of Gilkison* (1998) 65 CA4th 1443, 1448, 77 CR2d 463.
- Trustee compensation. *Estate of Gump* (1991) 1 CA4th 582, 597, 2 CR2d 269.
- Whether a party is an interested person under Prob C §48(b). *Arman v Bank of America* (1999) 74 CA4th 697, 702, 88 CR2d 410.

NOTE: The court will use the abuse of discretion standard to review decisions made by the trial judge, not decisions made by the fiduciary. When the appeal challenges a fiduciary's exercise of discretion, the court will review that matter under another standard of review, with the applicable standard to be determined by the circumstances of the case and the arguments made by the parties. See *Estate of Nicholas* (1986) 177 CA3d 1071, 1088, 223 CR 410 (using the substantial evidence rule to determine whether a proposed act would be a reasonable exercise of trustee's discretion).

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Source: Estate Planning/California Trust and Probate Litigation/Table of Statutes, Regulations, and Rules

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Smith v Premier Alliance Ins. Co. (1995) 41 CA4th 691, 48 CR2d 461: §§15.28-15.29

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St. James Armenian Church of Los Angeles v Kurkjian (1975) 47 CA3d 547, 121 CR 214: §14.21

Stafford v California Canning Peach Growers (1938) 11 C2d 212, 78 P2d 1150: §20.28

Stanton v Wells Fargo Bank (1957) 150 CA2d 763, 310 P2d 1010: §§21.4, 21.34

Stare v Tate (1971) 21 CA3d 432, 98 CR 264: §11A.13

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State v Broderson (1967) 247 CA2d 797, 56 CR 58: §§18.5, 18.11, 18.53

Stauffer, Estate of (1959) 53 C2d 124, 346 P2d 748: §§3.29, 10.91, 17.4, 17.88

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Stephens, Estate of (2002) 28 C4th 665, 122 CR2d 358: §11A.18

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Stokley, Estate of (1980) 108 CA3d 461, 166 CR 587: §4.28

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Sweebe v Sweebe (Mich 2006) 712 NW2d 708: §6A.4

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Trompeter, Emanuel, Estate of, TC Memo 1998-35, vacated on other grounds (9th Cir 2002) 279 F3d 767: §5.55

Truck Ins. Exch. v Fireman's Fund Ins. Co. (1992) 6 CA4th 1050, 8 CR2d 228: §3.14

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Valentine v Read (1996) 50 CA4th 787, 57 CR2d 836: §22.52

Van Arsdale v Hollinger (1968) 68 C2d 245, 66 CR 20, overruled on other grounds by Privette v Superior Court (1993) 5 C4th 689, 21CR2d 72: §5.3B

Van Camp v Van Camp (1921) 53 CA 17, 199 P 885: §§12.9, 15.13, 18.44

Van Noy v U.S. (D Or 1998) 81 AFTR2d 1943: §22.10

Van de Kamp v Bank of America (1988) 204 CA3d 819, 251 CR 530: §§13.56, 21.7, 21.9, 21.11-21.12, 21.19, 21.35, 21.47

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Victor Oil Co. v Drum (1920) 184 C 226, 193 P 243: §20.18

Vokal, Estate of (1953) 121 CA2d 252, 263 P2d 64: §§14.33, 21.6-21.7, 21.19

Vournas v Fidelity Nat'l Title Ins. Co. (1999) 73 CA4th 668, 86 CR2d 490: §21.26A

Voyce v Superior Court (1942) 20 C2d 479, 127 P2d 536: §17.93

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Walton v Bank of Cal. (1963) 218 CA2d 527, 32 CR 856: §§6.4, 6.11, 6.17, 6.31, 20.30

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Wells Fargo Bank v Superior Court (2000) 22 C4th 201, 91 CR2d 716: §§5.27, 10.76, 14.21, 16.1, 21.50A

Wemyss, Estate of (1975) 49 CA3d 53, 122 CR 134: §§14.25, 21.16

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Zimmer Constr. Co. v White (1935) 8 CA2d 672, 47 P2d 1087: §22.23

Zwirn v Schweizer (2005) 134 CA4th 1153, 36 CR3d 527: §5.5

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Table of References

Ascher, Mark L., Austin W. Scott, & William F. Fratcher. Scott & Ascher on Trusts. Multivolume. Chicago, 5th ed 2007: §§21.5, 21.20, 21.53, 21.68, 22.6

Blakiston's Gould Medical Dictionary. New York, McGraw-Hill, 4th ed 1979: §6.19

Bogert, George Gleason, George Taylor Bogert, & William K. Stevens. The Law of Trusts & Trustees. St. Paul, Minn., West Publishing Co., rev 2d and 3d ed 1978-2008: §§14.21, 20.16, 21.54, 21.56, 21.58

California Attorney Fee Awards (3d ed Cal CEB 2010): §10.91

California Civil Appellate Practice (3d ed Cal CEB 1996): §§10.1, 17.83, 23.1, 23.9, 23.15, 23.23

California Civil Discovery Practice (4th ed Cal CEB 2006): §§10.15, 10.21, 10.24-10.27

California Civil Litigation Forms Manual. (Cal CEB 1980): §15.26

California Civil Procedure Before Trial (4th ed Cal CEB 2004): §§3.21, 5.36, 10.2, 10.4, 10.9-10.13, 10.38, 10.41-10.42, 10.44-10.46, 10.53, 11.24, 16.18, 17.77, 17.93, 20.19, 22.15

California Conservatorship Practice (Cal CEB 2005): §8.26

California Decedent Estate Practice. (2d ed Cal CEB 2009): §§3.34, 4.11, 4.15, 6A.17, 9.14, 10.46, 10.60, 13.27, 13.60, 15.8, 15.12, 15.19, 15.21, 15.31A, 15.32, 15.36, 16.18, 17.3-17.4, 17.20, 19.2, 19.16, 22.45, 22.48, 22.51

California Domestic Partnerships (Cal CEB 2005): §18.36

California Elder Law Litigation: An Advocate's Guide (Cal CEB 2003): §§8.1, 8.5, 8.7, 8.15-8.16, 8.26

California Expert Witness Guide. (2d ed Cal CEB 1991): §10.66

California Powers of Attorney and Health Care Directives (Cal CEB 2008): §4.16

California Real Property Remedies and Damages (2d ed Cal CEB 2002): §19.9

California Tort Damages (2d ed Cal CEB 2002): §§8.6, 8.17

California Trial Practice: Civil Procedure During Trial. (3d ed Cal CEB 1995): §§10.43, 10.47-10.50, 10.54, 10.57-10.58, 10.62, 10.67, 10.84, 17.77, 17.80-17.81, 17.83, 19.15, 20.19

California Trust Administration (2d ed Cal CEB 2001): §§13.6, 13.11, 13.20, 20.12, 21.31, 22.24, 22.39, 22.49, 22.53

California Will Drafting (3d ed Cal CEB 1992): §§5.2, 14.3, 17.34

Debt Collection Practice in California (2d ed Cal CEB 1999): §10.33

Drafting California Irrevocable Trusts (3d ed Cal CEB 1997): §§12.17, 22.44

Drafting California Revocable Trusts (4th ed Cal CEB 2003): §§5.2, 14.3, 14.21, 14.28A

Effective Direct & Cross-Examination (Cal CEB 1986): §10.61

Fee Agreement Forms Manual (2d ed Cal CEB 2007): §3.42

House, Susan T., & Bruce S. Ross. Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel. San Francisco, State Bar of California Estate Planning, Trust and Probate Law Section, 2d ed 2008: §3.12

Jefferson's California Evidence Benchbook. (3d ed CJA-CEB 1997): §18.29

Practice Under the California Family Code: Dissolution, Legal Separation, Nullity (Cal CEB Annual): §§18.41, 18.45

Prosser, William & W. Page Keeton. Prosser & Keaton on the Law of Torts. St. Paul, Minn., West Publishing Co., 5th ed 1984: §7.8

Scott & Ascher on Trusts. See Ascher, Mark L., et al.

Selecting & Forming Business Entities (2d ed Cal CEB 2007): §3.4

Toker, John A. California Arbitration & Mediation Practice Guide. Westport, Conn., Lawpress, 2003: §11.24

West Group. Restatement of Restitution. Eagan, Minn., 1937: §§7.8, 14.21, 20.30

———. Restatement of the Law Governing Lawyers. Eagan, Minn., 2000: §4.21

———. Restatement (Second) of Property. Eagan, Minn., 2000: §2.7

———. Restatement (Second) of Torts. Eagan, Minn., 1965: §§7.8, 8.6, 14.21

———. Restatement (Second) of Trusts. Eagan, Minn., 1959: §§2.7, 5.32, 5.39, 9.13, 14.21, 20.3, 21.1, 21.3-21.4, 21.15, 21.34, 21.40, 21.46B, 21.59, 21.64-21.65, 21.67, 22.1, 22.6

———. Restatement (Third) of Trusts. Eagan, Minn., 2007: §§2.7, 3.20, 4.26, 6.4, 6.27, 6.30-6.31, 7.7, 9.13, 21.4-21.5, 21.15, 21.18, 21.26, 21.29-21.30, 21.40, 21.68, 22.3-22.4, 22.24, 22.40

Witkin, Bernard E. California Procedure. Multivolume. San Francisco, Witkin Legal Institute, 5th ed 2008: §§7.4, 11.26

———. Summary of California Law. Multivolume. San Francisco, Bancroft-Whitney, 10th ed 2005: §§6.3-6.4, 17.53

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