Annual Review of the Probate and Trust Appellate Decisions

SAN LUIS OBISPO COUNTY BAR ASSOCIATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

BASF
YEAR IN REVIEW

January 11, 2022

Presented By:
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Estate Litigation Summary:

As the pandemic continues to force litigators to become more reliant on technology, depositions and routine court appearances continue to occur through Zoom, Microsoft Teams, and the like. The past year birthed two, significant opinions from the courts of appeal.

Under *Breslin v. Breslin* (2021) 62 Cal.App.5th 801, the Second District Court of Appeal held that a probate court may order parties to mediation under Probate Code section 17206, and any non-participating parties may be found to have waived the right to object to any consequent petition to approve any settlement agreement arising from the mediation. Under *Dunlap v. Mayer* (2021) 63 Cal.App.5th 419, the Fourth District Court of Appeal limited the application of Probate Code section 17206 in holding that a probate court does not have the power to dismiss an action *sua sponte* and without notice when there are disputed issues of fact.

Estate Administration Summary:

Legislative developments highlight this year's summary of estate and conservatorship administration. The legislature could not help itself, and joined in on the FreeBritney movement via AB 1194, liberalizing who may act as counsel for a conservatee, making clear they are a "zealous advocate", and clarifying when the court must order termination of a conservatorship, among other things. SB 315 has turned the transfer on death deed process into a mini administration…so much for simple. AB 1079 clarifies what arguable already was the law by codifying accounting and other requirements owed by a non-settlor trustee to contingent remainder beneficiaries during the administration of a revocable trust where the settlor is incapacitated.

Several cases remind us of not so obvious rights which a decedent may have, and which ought to be pursued during the administration, including rights to undistributed trust income and pro tanto interests (both which survive death). Further, what should an estate administration attorney do when faced with a premarital agreement negotiated by the decedent where one side was unrepresented? And, once again, the court grapples with the issue of revocation

v. amendment of trusts, leaving the door wide open for further litigation post-death over the validity of certain trust modifications.

Estate Planning Summary:

Even though Congress is still in session, it appears estate planners and their clients dodged many legislative bullets. Possible regulation projects are still out there. The new "millionaire tax" (assuming it makes it through the Senate) will create many issues for trusts – an extra 5% tax on income over $200,000, with another 3% on income over $500,000. The Tax Court gives every estate planner a critical reminder on the mismatch between estate tax value and estate tax deductions. We also experience substance over form in the context of interspousal transfers. QTIP Trusts are front and center again, this time with IRS reminding us of the landmines under QTIP Trusts. On the California side, real estate transfers are front and center – rejection and wipe out are the themes for the year. Finally, a cautionary tale about being helpful leading to disinheritance based on false understandings.

A. RECENT CALIFORNIA CASE LAW DEVELOPMENTS (PLANNING, ADMINISTRATION, PROPERTY TAX, AND CONSERVATORSHIPS)

Selected cases of interest to trust and estate attorneys published between November 27, 2020, and November 27, 2021.

1. Transfers In Which Proportional Interests Of Transferors And Transferees Remain Exactly The Same; If Via Stock, Then "Stock" Means "All Stock"

PRANG v. AMEN (2020) 58 Cal.App.5th 246 [December 7, 2020]

Notice: THE SUPREME COURT OF CALIFORNIA HAS GRANTED REVIEW IN THIS MATTER. March 17, 2021, S266590.

Short Summary: The general rule is a transfer of real property either to or from a legal entity triggers a reassessment for property tax purposes. Of utmost importance to practitioners is the exception to this rule when the proportional ownership interests in real property of the transferor and transferee - "whether represented by stock" or another measure – remain the same after the transfer. Revenue and Taxation Code section 62(a)(2).

Here, Super A Foods, Inc. had two classes of stock - voting and non-voting. The voting stock was held by the Amen Trust, and the nonvoting stock was held by the Amen Trust and several other individuals, including a company employee. Super A transferred real estate held by the corporation to the beneficiaries of the Amen Trust only.

After the Assessor reassessed the property based on the non-voting stockholders not receiving their proportionate interest, the Trust was successful in persuading the Assessment Appeal's Board to reverse the assessment. Principal among the Trust's various arguments was that section 64 and related sections of the Revenue and Taxation Code essentially use "stock" and "voting stock" interchangeably. After the Superior Court vacated the reversal, the Trust appealed.

The Appellate Court did not find the Trust's position at all persuasive. Although "voting stock" appears in other statutes, the court held that this does not lead to ambiguity, and the fact that "stock" is used in section 62(a)(2) means "stock" is what is to be considered.

Comment: Do you think the taxpayer here was totally off base? The Board of Equalization filed an amicus brief arguing "stock" as per section 62(a)(2) is ambiguous. And, Justice Baker's dissent pointed out that BOE regulations

interpreting related statutes (see, Revenue and Taxation Code section 64(d); California Code of Regulations title 18, section 462.180) and its guidance issued to county assessors discussing Revenue and Taxation Code section 62(a)(2), interpreted the term "stock" to mean voting stock. So, the Amen Trust had support for its position. There may certainly be practitioners out there not attending programs like these that may rely upon such prior guidance, unaware of the holding of *Prang v. Amen*. Be careful!

2. A CONSERVATEE RETAINS THE POWER TO CONTROL WHOM SHE SEES UNLESS OTHERWISE ORDERED BY THE COURT

CONSERVATORSHIP OF NAVARRETE (2020) 58 Cal.App.5th 1018 [December 4, 2020; modified December 21, 2020]

Short Summary: Anna Navarrete is an adult child of Maria Navarrete (Mother) and Rodolfo Navarrete, Sr. (Father), who separated during the dispute that led to this appeal. Anna is a 33-year-old woman who has cerebral palsy and a speech disorder which limit her ability to answer questions and express her needs and desires. Mother has been her primary caregiver. Mother filed a petition asking to be appointed Anna's conservator in Riverside County Superior Court. Anna's Father and older brother objected to Mother's petition, and her brother filed a competing petition asking to be appointed instead. Mother and Father also sought domestic violence restraining orders against each other. Lurking behind this dispute is the accusation that Father sexually assaulted and raped Anna. The trial court interviewed Anna, but concluded she was not a competent witness before eliciting any testimony from her about the assaults. Though the trial court expressed uncertainty about what had happened, it found Mother had not proven the accusations of sexual assault by a preponderance of the evidence, but it also found Anna had a genuine fear of her Father and did not want to see him. Ultimately, the trial court appointed Mother as Anna's conservator and denied the brother's petition. Later, after further hearings, the trial court granted Father visitation and ordered Anna to attend joint counseling sessions with her Father. The trial court concluded, over the objection of Anna, her conservator, and her attorney, that such visits were in her best interest because it would allow reconciliation in the event the accusations of sexual assault were not true.

The visitation order is the only part of the case challenged on appeal. Anna attacks the order in several ways. First, she argues the conservatorship statute reserves to her as an adult conservatee the choice to refuse visitors. Second, she says the trial court order violates her constitutional right to privacy and autonomy under the California Constitution. Third, she says the trial court abused its discretion by determining visitation with her Father was in her best interest despite her accusations and her genuine fear of him. In the alternative, she argues the trial court was wrong to bar her testimony, which would have

established her Father abused her and made plain that visits are not in her best interest. Father and the older brother did not file briefs.

The Fourth District Court of Appeal held the trial court did not have the authority to order Navarrete to attend joint counseling sessions with her father and therefore reversed the order. In doing so, the Court of Appeal reasoned that under Probate Code section 2351(a), the conservator's "control shall not extend to personal rights retained by the conservatee, including, but not limited to, the right to receive visitors, telephone calls, and personal mail."

3. Negligent Lawyer Saved By *Brace*: Deed Of Trust On Community Property Voidable By Non-Signing Spouse

TRENK v. SOHEILI (2020) 58 Cal.App.5th 1033 [December 21, 2020; modified December 22, 2020]

Short Summary: Lawyer was sued for malpractice and settled with his clients in 2003. Lawyer agreed to pay $100,000 and executed a promissory note and a trust deed on his residence to secure the obligation. After lawyer stopped making payments, and over 10 years later, former clients began nonjudicial foreclosure proceedings. Lawyer and his spouse filed a lawsuit to clear title to their house, alleging that the trust deed was no longer enforceable.

Why? Lawyer and his spouse argued the real property was community property, and spouse did not sign the deed of trust. Therefore, it was "subject to set aside." Per Family Code section 1102(a) ["both spouses, either personally or by a duly authorized agent, are required to join in executing an instrument by which … community real property or an interest therein is … encumbered"].) The trial court agreed.

On appeal, clients argued that the property was not community property, as lawyer and his spouse held title to the property as joint tenants.

Family Code section 760 provides that, "[e]xcept as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property." This provision establishes a presumption affecting the burden of proof, which may be rebutted by a preponderance of the evidence.

Further, the Court of Appeal looked to *In re Brace*, which held that the form of the title as a joint tenancy did not rebut the presumption under the Family Code that the residence was community property. See generally *In re Brace* (2020) 9 Cal.5th 903. The court also held that the joint tenancy deed did not suffice to accomplish a transmutation of the residence from community to separate property. Rather, under Family Code section 852(a), such a transmutation

requires a written declaration expressly stating that "the character or ownership of the property is being changed." (*Brace,* p. 938.)

Lawyer and his spouse acquired the property in 1988 while they were married. Thus, under the holding in *Brace*, the fact that they took title as joint tenants is not sufficient in itself to show that lawyer had a separate interest that he could lawfully encumber with a deed of trust.

The clients had no other evidence to rebut the presumption other than the legal title to the property. Although the trial court found that lawyer and his spouse "held title" as "joint tenants," that does not show that the court found that the residence in fact was separate property. At best, it is ambiguous on the point.

Comment: A deed of trust voidable by the lawyer's spouse is no security at all. Did a successor lawyer help the clients in settling with their prior lawyer? Are they now filing another malpractice action? If so, I expect they will demand cash this time.

A less important aspect of this case had to do with a deed of trust securing an underlying debt on which the statute of limitations has run. The beneficiary may still seek a nonjudicial (but not judicial) foreclosure…that is of course unless a non-consenting spouse is able to void the security.

4. A Different Court Has Jurisdiction Over A Matter Involving Trust Property Arising Years After The Decedent's Probate Transferring Assets To The Trust Was Closed

CAPRA v. CAPRA (2020) 58 Cal.App.5th 1072 [December 22, 2020]

Short Summary: In 1948, Frank R. Capra (Frank Sr.) and his wife Lucille (Lucille Sr.) acquired a cabin built on federal land in June Lake, Mono County. In 1974, Frank Sr. and Lucille Sr. created the Capra Family Trust. The Trust's corpus was to include all property which would be transferred by will to the trust. Lucille Sr. died in 1984, and ownership of the cabin and the permit passed to Frank Sr. After his Lucille Sr.'s death, Frank Sr. confirmed the Trust and named his children, Frank Capra Jr. (Frank Jr.), plaintiff Lucille Capra (Lucille), and defendant Thomas Capra (Thomas) as successor trustees of the Trust. Frank Sr. died in 1991 and probate was opened in Riverside County. On May 26, 1993, the probate court settled Frank Sr.'s estate and ordered final distribution. Pursuant to Frank Sr.'s will, the probate court ordered that all of Frank Sr.'s residual property be transferred to Frank Jr., Lucille, and Thomas as trustees of the Trust, including the cabin. In 2001, Lucille transferred her interests in the cabin to her personal trust. Frank Jr. died in 2007 intestate in North Carolina. His estate passed to his wife and his three children, two of whom are plaintiffs in this action: Frank III and Jonathan. In 2011, Thomas told Lucille that FCP

(and entity Frank Sr. created to manage the cabin) was no longer generating enough income to pay all the cabin's costs. As such, Thomas asked Lucille to begin contributing money to help defray the expenses. In 2012, Thomas continued to represent to Lucille that the cabin belonged to the entire family. In July 2015, Thomas asked Lucille for $25,000 to cover cabin expenses for the years 2013-2015, and he instructed her to send the check to FCP's accountant. In September 2015, Thomas declared that he owned the cabin exclusively, and that the plaintiffs had no right or interest in it. He asserted the right to deny anyone access to the cabin. He changed the door locks and asserted exclusive control over all personal property at the cabin.

Plaintiffs filed this action in Los Angeles County Superior Court on February 5, 2016 because Thomas and his wife, defendant Kris Capra, reside in Los Angeles County. Plaintiffs entered into a stipulation transferring the case to Mono County. In September 2016, Plaintiffs filed a motion to disqualify Thomas's counsel, Emanuel Barling, Jr., from representing Thomas because they claimed Barling was FCP's past and current corporate counsel and that he had represented its shareholders, including Plaintiffs. The trial court denied the motion, finding no evidence of concurrent representation and no evidence that Barling had represented the Plaintiffs or had a relationship with them. Plaintiffs appealed from this order. The trial court also sustained Thomas's demurrer to the Plaintiffs' Third Amended Complaint without prejudice. The trial court held it did not have jurisdiction to try this matter, believing that the Riverside County Superior Court had exclusive jurisdiction under Probate Code section 17000 to try this matter as Frank Sr.'s estate was probated in that court and the probate court had ordered the cabin to be transferred to the Trust. Plaintiffs appealed from the judgment of dismissal following the sustaining of the demurrer. On February 27, 2017, Lucille filed a petition with the Riverside County Superior Court, seeking relief under Probate Code section 850, but that court abated the petition because of the pendency of the appeals.

The Third District Court of Appeal held that that the Mono County Superior Court had jurisdiction to try this matter and erred by dismissing it on that basis. In so holding, the Court of Appeal reasoned that (a) this action did not arise from the probate of Frank Sr.'s estate, (b) did not concern the settlement of the estate or a testamentary trust, or (c) did not involve the enforcement of the probate court's orders. Rather, it concerns what the parties did with the cabin after the estate had been settled and those assets had been transferred into an inter vivos trust that existed outside of probate. The Court of Appeal further reasoned that the probate court's *in rem* jurisdiction over a decedent's assets does not exist in the absence of a probate estate. (The Court of Appeal chastised the parties for having failed to address venue, i.e., whether the action involved a dispute over land, which would have made Mono County the proper venue or if it concerned an action involving the internal affairs of the Trust, which would have made Los Angeles County the proper venue because Thomas resides there.) Therefore, the

Court of Appeal reversed, with instructions to the trial court to address the venue on remand.

With respect to the motion to disqualify counsel, the Court of Appeal affirmed, reasoning that the trial court did not abuse in discretion in denying the motion because even though counsel represented FCP, there was no showing that counsel represented Plaintiffs.

5. *Pro Tanto* Interests v. Community Property Expenditures To Maintain Separate Property...And Application Post-Death

IN RE MARRIAGE OF NEVAI (2020) 59 Cal.App.5th 108 [December 29, 2020]

Short Summary: Wife owned a property in Tahoe prior to marriage. This separate property asset had a mortgage on it, which was paid from a joint account during marriage. During the dissolution, the trial court ordered reimbursement for the community's payment of mortgage interest and property taxes on the Tahoe property, as well as acknowledging the community had received a *pro tanto* interest in the Tahoe property (which includes reimbursement for payment of the mortgage principal).

On appeal, wife argued the community is not also entitled to reimbursement for payment of property taxes on separate property.

The appellate court reversed the trial court, confirming first that community payments are similar to an investment and create a present property interest. Specifically, in calculating the community's *pro tanto* interest, the following principles apply. First, the separate property estate is credited with both premarital and post-separation appreciation in the value of the property. Next, the community's contributions to equity are considered. Finally, the community's interest in the property, expressed as a percentage, is multiplied by the appreciation in the property's value during the marriage.

Second, expenditures for interest and taxes are more properly considered as expenses incurred to maintain the investment. Because they are not assets or debts of the community, they may not be considered by the court at dissolution.

If payments for taxes and mortgage interest were considered part of the community interest, then "fairness would also require that the community be charged for its use of the property."

Takeaway: Estate planners often meet with clients who own separate property assets that have a community *pro tanto* interest component. A surviving spouse is entitled to a *pro tanto* interest. *Estate of Neilson* (1962) 57 Cal.2d 733. It is prudent to be reminded of the formula to be followed in such a situation.

The community's *pro tanto* interest is determined using the Moore/Marsden Calculation. When the community in a marriage pays down principal, the community may receive a dollar-for-dollar reimbursement as well as a *pro tanto* share of the property's appreciation from the date of marriage to the date of the trial. The calculation is as follows:

- Add together the dollar-for-dollar reimbursement and the *pro tanto* share and you get the community interest in the property. Multiply this by this equation:
    - Numerator = Community property payments of principal
    - Denominator = Purchase price of the home

Here is an example of the Moore/Marsden formula at work: assume wife purchased the Tahoe home for $800,000. Wife made a down payment of $100,000 and paid an additional $200,000 before marriage. At this point, the price of the home is $1,000,000. Once married, both parties paid another $300,000 of principal. On the date of the trial, the home is worth $1,500,000.

Using the Moore/Marsden calculation, the community would receive $300,000 for reimbursement of the pay down of principal. In addition, the community would get $500,000 (the appreciation of the home from marriage to trial) multiplied by the fraction $300,000 (community property payment of principal) over $800,000 (purchase price of home). The community interest would thus be $487,500 ($300,000+$500,000) x ($300,000/$800,000).

However, on the other hand, the right to reimbursement for separate property contributions to community property pursuant to Family Code section 2640(b) does not survive death.

6. Rejection of Transfer Makes Deed and Agreement to Transfer Ineffective

IN RE MARRIAGE OF WOZNIAK (2020) 59 Cal.App.5th 120 [December 29, 2020]

Short Summary: In this divorce action, wife owned a residence prior to marriage. During marriage, she transferred the property to joint tenancy with husband for refinancing. Thereafter, husband prepared and delivered a deed to wife that would transmute the property back to her separate property ("Husband's Deed"). Wife refused Husband's Deed and it remained unrecorded for six years. After a protective order was issued in favor of husband against wife (domestic violence), wife took Husband's Deed and recorded it. The trial court found that under Family Code section 2581, the residence was presumed to be community property, unless wife could overcome the rebuttable presumption. Wife failed to overcome that presumption. Furthermore, wife could not overcome

the presumption of undue influence for the alleged transmutation and a transmutation was not intended at the time the wife recorded the deed. Thus, the property remained community at the time of divorce. Wife was awarded the residence, but had to make an equalizing payment to husband. The Fourth District affirmed, adding: (i) under Family Code section 850 there must be a "transfer" and an "agreement" to have a transmutation; (ii) a "transfer" requires delivery and acceptance, and if acceptance is not given at delivery, the deed become ineffective to transfer title; (iii) there was no offer and acceptable to make a valid agreement because wife rejected Husband's Deed and there was no evidence the offer remained open at the time of recordation

7. Too Late To Walk Back Filed Prop 58 – A Lesson On Parent-Child Exclusion Planning

BOHNETT v. COUNTY OF SANTA BARBARA (2021) 59 Cal.App.5th 1128 [January 19, 2021]

Short Summary: After settlor-parent's death, the successor trustee filed a claim for reassessment exclusion for transfer between parent and child (first Proposition 58 claim), listing 13 children as transferees. The county allowed the claim.

Over a year later, a grant deed was recorded transferring the property from the successor trustee to only one child and his wife (the Bohnetts). A preliminary change of ownership report signed by the Bohnetts listed the trust as the seller/transferor, stated that the purchase was from a family member and was a transfer between parent(s) and child(ren), and listed the sale price as $1.03 million. A deed of trust secured a $417,000 loan to the Bohnetts from Parkside Lending, LLC, to purchase the property. The trustee distributed the purchase money in equal shares to the 13 siblings, including Bohnett.

After the sale, a second Proposition 58 claim was filed, listing only the Bohnetts as transferees. The county found that there was a 92.3 percent (i.e., 12/13) change in ownership and reassessed the property.

The trial court denied a claim for refund, and the appellate court confirmed. The death of the settlor resulted in the transfer of "the property's primary economic value" to the 13 children. The parties recognized and ratified this transfer when the trustee filed the first Proposition 58 claim listing the 13 children as the transferees and owners of the property. The change in ownership occurred then, as certified in the first Proposition 58 claim, not when "a deed [was subsequently] recorded transferring title out of the trust," and not when possession was transferred. While the trustee held "bare legal title," the beneficiaries held equitable title. "For purposes of determining change in ownership, the relevant inquiry is who has the beneficial or equitable ownership of the property, not who holds legal title."

Bohnett later purchased the interests of his siblings. This constituted a sibling-to-sibling sale rather than a sale or transfer from parent to child. The fact that Bohnett received title from the trustee does not negate the earlier transfer of the equitable interest in the property to the 13 children. The transfer to the 13 children was excluded from reassessment, but the subsequent transfer to Bohnett was not.

Takeaway: There were several issues here. First, after death, the siblings could not decide what to do with the property, but a Prop 58 was filed listing all of them as transferees. In such situations it is my practice to mark the Prop 58 as "*Provisional*." Once distribution is then clarified, a second Prop 58 may be submitted, marked "*Final*."

Second, the mechanics regarding the "sale" where handled wrong. Instead of a sale, the trustee ought to have secured a third-party loan. The trust granted the trustee the authority to distribute property in divided or undivided interests, and to adjust resulting differences in valuation. The trustee also had the power to encumber trust property. The court implied that had the trustee used financing and other assets to equalize the distribution between the other 12 beneficiaries, which was within the trustee's powers, one child may have been able to receive the property as his distributive share of the trust, encumbered by debt obtained by the trustee, and other 12 beneficiaries would have received cash or other assets.

Third, has the trust terms granted a child-beneficiary an option to purchase the property, this legal right to purchase the property would have had priority over the vesting of equitable ownership in the beneficiaries.

These common planning and administration issues have been substantially mitigated by Prop 19.

8. Restraining Order Petitions Under Code Of Civil Procedure Section 527.6 Cannot Be Served Via Posts To Social Media; They Must Still Be Personally Served

SEARLES v. ARCHANGEL (2021) 60 Cal.App.5th 43 [January 22, 2021]

Short Summary: In this matter, the Los Angeles Superior Court dismissed Queen Searles's petition for a civil harassment restraining order when she was unable to personally serve Michael Archangel with a copy of the petition and notice of hearing as required by Code of Civil Procedure section 527.6(m).

Searles moved to waive traditional service and for authorization to serve Archangel by social media. Specifically, Searles stated that Archangel followed her public Facebook, YouTube and Twitter postings, so Searles requested leave to serve him by simultaneously posting the documents "to the Scribd website

and linked to Facebook, Twitter and YouTube." In her supporting declaration, Searles stated Archangel was intentionally making himself unavailable and described the efforts she had made to effect personal service, primarily requesting that employees and customers at various businesses where Searles had seen Archangel serve him with her papers if they saw him near their stores. In a legal memorandum Searles quoted several out-of-state cases in which service of process by social media had been permitted. Searles asserted that Archangel could not be personally served and, because no one knew where he lived, he also could not be served by mail. Accordingly, she argued the trial court had discretion pursuant to section 413.30 (of the Code of Civil Procedure) to authorize service in a different manner provided it was reasonably calculated to give actual notice to the party to be served, as she asserted use of social media would be in this case. At an initial hearing, the trial court, after hearing Searles's description of what she had done to date in her efforts to effect personal service, denied the motion to allow service by an alternative method and directed her to keep trying to serve Archangel personally, as required by section 527.6, subdivision (m). The trial court explained the Los Angeles County Sheriff's Department could assist her and suggested she ask for help at the sheriff's office located in the courthouse. The trial court continued the hearing and ordered a temporary restraining order to remain in effect until that date. At the continued hearing, Searles repeated her arguments. The trial court provided Searles two more continuances in an effort to serve Archangel. Ultimately, the trial court, noting that Archangel had not been personally served as required, dismissed Searles's petition for a civil harassment restraining order without prejudice and dissolved the temporary restraining order. Searles appealed.

The Second District Court of Appeal, although noting that a number of other state and federal court decisions either directly or impliedly allowed for service by similar means, the California legislature has not yet so allowed. Most importantly, the Court of Appeal reasoned that civil harassment restraining order petitions must be personally served under section 527.6, for which there is no exception for alternative methods of service unlike Probate Code section 1212, which expressly directs the court to section 413.30 and authorizes alternative methods of service.

9. A Finding Of Bad Faith Is Not Required For "Double Damages" Under Probate Code Section 859

KEADING v. KEADING (2021) 60 Cal.App.5th 1115 [February 18, 2021]

Short Summary: In this matter, Hilja Keading sued her brother, Kenton Keading, for financial elder abuse committed against their deceased father, Lewis Keading. Lucille and Lewis Keading, wife and husband, died within a few months of each in September 2015 and January 2016, respectively. Decades before their deaths, they created a family trust for the benefit of their two children, Kenton and Hilja, who were to split the trust assets equally after their parents' deaths.

During their lifetimes, Lucille and Lewis provided financial assistance to Kenton but not to Hilja. This was in part to help Kenton after he was imprisoned for nine years following felony convictions. Also, for many years, Hilja and her parents were estranged from each other as a result of the parents' inability to accept Hilja's sexual orientation. After Lucille died, Lewis's attitude towards Hilja changed. He executed a durable power of attorney designating Hilja his attorney-in-fact in late September 2015. Around the same time, he contacted his estate planning attorney Peter Sproul about undoing the earlier amendment and amending the trust to equalize the assets distributed to his children after his death. Lewis executed an "'equalizing amendment'" to his trust in early October 2015.

Kenton later discovered an email Hilja sent to an attorney friend stating she was looking for a lawyer to pursue Kenton for claimed elder abuse. In the email, she wrote, "I need the best bad-ass, take-no-prisoner Probate Attorney that I can find who is willing to litigate if necessary, and will not put up with the antics of my brother, a homophobic felon who has manipulated and engaged in every literal category of elder abuse with his parents... I need someone to represent me on every level so I do not have to interact with my brother in any way. He is dangerous to me." Kenton promptly shared the email with Lewis, who was upset by it. According to Kenton, upon reading the email, Lewis stated, " 'I have misjudged your sister' " and " 'I have made a big mistake,' " and he wished to change the disposition of his estate. Kenton took Lewis to a UPS store, where Lewis executed a new power of attorney designating Kenton as attorney-in-fact, which was notarized. Lewis executed a typed declaration on December 19, 2015, stating he was not the victim of elder abuse.

On December 30, 2015, acting under the recently conferred power of attorney, Kenton executed a grant deed transferring the Property out of the trust and to himself and Lewis in joint tenancy with right of survivorship. He did not show Hilja the deed before Lewis's death. On New Year's Day, January 1, 2016, Lewis transferred to Kenton nearly 99,678 shares of stock in Freedom Motors, which had been purchased years earlier for $1 per share.

After Lewis died shortly thereafter, Hilja petitioned the trial court *ex parte* to suspend Kenton's powers and remove him as trustee of the family trust, appoint a successor trustee, and confirm trust ownership of the Property. Through this petition, which functioned as the operative pleading in the litigation, Hilja also sought to set aside the December 30, 2015 grant deed, recover any assets Kenton attempted to transfer from the trust to himself, and hold Kenton liable for damages resulting from elder abuse, fraud, conversion, and intentional interference with an expected inheritance. After a 4-day bench trial on Hilja's elder abuse action against Kenton, the trial court concluded Kenton was liable for elder abuse. The trial court's amended judgment, entered on September 19, 2017 ordered Kenton to pay damages in the amount of $1,548,830.

On appeal, Kenton argued substantial evidence did not support the trial court's finding of elder financial abuse. The Court of Appeal disagreed. Kenton also argued the trial court erroneously construed Probate Code section 859 by imposing double damages for his commission of elder financial abuse without a finding of bad faith. The Court of Appeal again disagreed. The Court of Appeal reasoned that section 859 uses the disjunctive "or" in connection with the imposition of double damages for the taking of property by the use of undue influence, bad faith, or through elder abuse.

10. The Discounted Estate Tax Charitable Deduction – Watch Out!

ESTATE OF WARNE v. COMMISSIONER (2021) 121 T.C.M. (CCH) 1134 [February 18, 2021]

Short Summary: The decedent died owning 100% of an LLC. Her estate plan left a 75% interest in the LLC to the Warne Family Charitable Fund and a 25% in the LLC to John's Lutheran Church. The estate claimed an estate tax charitable deduction for the entire value of the LLC without discounts because the entire interest passed to charity. However, IRS argued and the Tax Court agreed, that the estate tax charitable deduction for each bequest should reflect the fair market value of what each charity received. Thus, the interests should be discounts. Based on the Court holding and stipulations, the 75% interest was discounted by 4% and the 25% interest was discounted by 27.385%. In short, a $25.6 million asset in the estate, yet only a $23 million estate tax charitable deduction ($2.6 million subject to estate tax without a corresponding deduction). This is the correct outcome because: (i) under *Ahmanson Foundation v. United States*, 674 F.2d 761 (9th Cir. 1891), the entire property interest held by an estate is valued in the estate (i.e., no discount for a 100% interest); and (ii) the estate tax charitable deduction may be claimed only for what is received by the charity.

11. Income Tax Charitable Deduction – Do Not Forget the Qualified Appraisal for Non Cash Gifts Over $5,000

PANKRATZ v. COMMISSIONER (2021) T.C. Memo 2021-26; 121 T.C.M. (CCH) 1178 [March 3, 2021]

Short Summary: Another in a long line of cases that confirms the requirement for an income tax charitable deduction for non cash gifts over $5,000. Case confirms that a taxpayer may not lose the income tax deduction if the taxpayer can show failure to submit an appraisal "is due to reasonable cause and not to willful neglect." Quote from the Tax Court referring to Form 8283: "We think that four mentions of 'appraisal', 'appraiser', or 'appraised' on one page of one form is pretty good notice that substantial noncash donations need to be backed

up by an appraisal." The Tax Court denied the taxpayer's income tax charitable deductions.

12. Income Tax Charitable Deduction – Substantiate Those Gifts of Clothing

CHIARELLI v. COMMISSIONER (2021) T.C. Memo 2021-27; 121 T.C.M. (CCH) 1188 [March 3, 2021]

Short Summary: The taxpayer donated clothing in "excellent condition" in 2012, 2013 and 2015 among the Salvation Army and Goodwill (amount each year averaged $80,000). Some of the items had a value in excess of $250, and there were also items or groups of items that exceeded the $500. The receipts and records submitted by the taxpayer did not describe in detail the items of property donated, petitioner failed to provide required information (for items or groups of items over $500), and failed to attached a Qualified Appraisal to his income tax return (for items over $5,000). The Tax Court found that the taxpayer did not "comply, either strictly or substantially, with the regulatory reporting requirements for noncash charitable contributions." The charitable deductions were denied.

13. Trustees, Who Are Also Settlors Of A Trust, Are Natural Persons For Purposes Of Invoking San Francisco's Rent Ordinance Owner Move-In Provisions

BOSHERNITSAN v. BACH (2021) 61 Cal.App.5th 883 [March 12, 2021]

Short Summary: Rimma Boshernitsan and Mark Vinokur (Appellants) brought this unlawful detainer action in San Francisco Superior Court against respondents Belvia Bach and four of her children (the tenants). Appellants sought to evict the tenants under a provision of San Francisco's rent control ordinance that allows a "landlord" to evict renters from a unit to make the unit available for a close relative of the landlord (the family move-in provision). (Rent Ord., § 37.9, subd. (a)(8)(ii).) A rule enacted by the San Francisco Rent Stabilization and Arbitration Board (Board) defines "landlord" for purposes of the family move-in provision as "a natural person, or group of natural persons, … who in good faith hold a recorded fee interest in the property." (Rule 12.14(a).) The tenants demurred to the complaint, arguing that their landlord is not such a natural person or group of natural persons because title to the apartment building is held by appellants' revocable living trust. The trial court agreed, sustaining the demurrer without leave to amend, and entering judgment for the tenants.

The First District Court of Appeal, in recognizing this situation as an issue of first impression, reasoned that in sustaining the demurrer, the trial court correctly ruled that a trust is not a "natural person." (Citing to *Kadison, Pfaelzer,*

Woodard, Quinn & Rossi v. Wilson (1987) 197 Cal.App.3d 1, 4.) But the Court of Appeal also reasoned that the trial court was mistaken in assuming that the Appellants' trust is the landlord. As a matter of law, only trustees—not trusts—can hold legal title to property. A trust is " 'a fiduciary relationship with respect to property.' " (*Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1132, fn. 3, quoting Rest.2d Trusts, § 2, p. 6.) Ultimately, the Court of Appeal held that natural persons who are acting as trustees of a revocable living trust and are also the trust's settlors and beneficiaries qualify as a "landlord" under the family move-in provision. Accordingly, the Court of Appeal concluded that Appellants are not barred from seeking to evict the tenants under that provision, so it reversed and remanded for further proceedings. (Note: The Court of Appeal limited its holding to the situation in which a landlord is settlor, trustee, and beneficiary of a revocable living trust.)

14. No Attorney's Fees For Parties Who Petition to Establish A Conservatorship And Reach A Settlement Before A Conservatorship Is Established

CONSERVATORSHIP OF BROKKEN (2021) 61 Cal.App.5th 944 [March 15, 2021]

Short Summary: Respondents are the adult children of Appellant Doris Mae Brokken. Over their Mother's vigorous objection, Respondents petitioned to establish a conservatorship. They alleged that Appellant suffered from ongoing mental health issues and that her behavior had become increasingly erratic. After two years of litigation and negotiation, the parties settled the matter without the need for a conservatorship. Appellant voluntarily agreed to engage in professional mental health services and the petition was dismissed. Respondents sought to recover their attorney's fees as part of the settlement. Appellant did not believe they are legally entitled to fees, but to facilitate settlement, she agreed to let the probate court decide whether respondents are entitled to fees and, if so, the amount of such fees. Relying upon Probate Code section 2640.1, Respondents filed a motion seeking $12,584 in attorney fees. The Santa Barbara Superior Court, although it expressed some reservation, granted the fee request.

The Second District Court of Appeal reversed, reasoning that the plain language of section 2640.1 does not apply. Section 2640.1(a) provides that if a person petitioned for the appointment of "a particular conservator" and another is appointed while that petition is pending, the court may award attorney fees and costs to that person if it "determines that the petition was filed in the best interests of the conservatee." No conservator was appointed. Yet, Respondents attempted to rely on *Conservatorship of Cornelius* (2011) 200 Cal.App.4th 1198, to support their argument that section 2640.1 may be read broadly. However, the Court of Appeal reasoned that Respondent was reading *Cornelius* too broadly

because all it states is that section 2640.1 applies regardless of whether a temporary or permanent conservatorship is established.

15. No Good Deed Goes Unpunished – Making A Loved One Feel They Are in the Way of Their Own Money

EYFORD v. NORD (2021) 62 Cal.App.5th 112 [March 18, 2021]

Short Summary: Grandmother died in December 2016 at age 90. She executed a trust about eight months prior to her death leaving her entire $2 million estate to St. Jude Children's Hospital. The trust document disinherited her surviving son and her two granddaughters, and all three of them filed a petition to contest the validity of the trust instrument. At trial, they alleged grandmother had a mental disorder with symptoms including delusions or hallucinations that allegedly caused grandmother to disinherit them. The trial court found that appellants failed to carry their burden of proving grandmother was suffering from delusions within the meaning of Probate Code section 6100.5(a)(2) at the time she executed the trust instrument.

The granddaughters appealed and the appeals court affirmed the trial court, rejecting a de novo review and instead reviewing only to determine whether there was substantial evidence to support the trial court's holdings. The appeals court found that grandmother had delirium at certain points (near death of husband and a UTI – which can cause delirium) but no evidence of delirium at the time she executed the trust instrument. The presumption of capacity therefore stands. Thus, appellants failed to carry their burden of showing there was insufficient evidence for the trial court's rulings.

16. The Court May Order Mediation, And Non-Participating Parties Waive The Right To Object To Approval Of A Consequent Settlement Agreement

BRESLIN v. BRESLIN (2021) 62 Cal.App.5th 801 [April 5, 2021]

Short Summary: Don Kirchner died in 2018 leaving an estate valued at between $3 and $4 million. Kirchner had no surviving wife or children, but he was survived nieces and nephews. Kirchner's estate was held in a living trust dated July 27, 2017. The Trust was amended and restated on November 1, 2017 (Restated Trust). David Breslin (Breslin) was named the successor trustee in the Restated Trust. Breslin found the Restated Trust, but he initially could not find the original Trust. The Restated Trust makes three $10,000 specific gifts and directs that the remainder be distributed to the persons and charitable organizations listed on exhibit A in the percentages set forth. The Restated Trust, however, did not have an exhibit A attached to it, and no such exhibit A was found. But in a pocket of the estate planning binder containing the Restated Trust, Breslin found a document titled "Estates Charities (6/30/2017). The

document listed 24 charities with handwritten notations that appear to be percentages. Breslin then filed a petition in the probate court to confirm him as successor trustee and to determine the beneficiaries of the trust in the absence of an attached exhibit A. Breslin served each of the listed charities, including the Pacific parties. Only three of the listed charities filed formal responses. The Pacific parties did not.

The probate court confirmed Breslin as successor trustee and ordered mediation among interested parties, including Kirchner's intestate heirs and the listed charities. The mediator's fees were to be paid from the Trust. One of the listed charities, the Thomas More Law Center (TMLC), sent notices of the mediation to all the interested parties, including the Pacific parties. Approximately four notices of continuances were sent to all the parties, including the Pacific parties, before the mediation took place. The mediation notice included the following language:

> Non-participating persons or parties who receive notice of the date, time and place of the mediation may be bound by the terms of any agreement reached at mediation without further action by the Court or further hearing. *Smith v. Szeyller* (2019) 31 Cal.App.5th 450, 242 Cal.Rptr.3d 585. Rights of trust beneficiaries or prospective beneficiaries may be lost by the failure to participate in mediation.

Only five of the listed charities appeared at the mediation, including TMLC. The intestate heirs also appeared. The Pacific parties did not appear. The appearing parties reached a settlement. The settlement agreement awarded specific amounts to various parties, including the appearing charities, and attorney fees with the residue to the intestate heirs. The agreement did not include the Pacific parties.

TMLC filed a petition to approve the settlement. When the Pacific parties received notice of this petition, they filed objections. The probate court granted Breslin's petition to approve the settlement. The probate court overruled the Pacific parties' objections on the grounds that they did not file a response to Breslin's petition to determine the beneficiaries and did not appear at the mediation. The Pacific parties appealed.

The Second District Court of Appeal affirmed, reasoning that (a) under Probate Code section 17206, the probate court had the power to order the parties to mediation and (b) under *Smith v. Szeyller*, *supra*, 31 Cal.App.5th 450, 458, a party who chooses not to participate in the trial of a probate matter cannot thereafter complain about a settlement reached by the participating parties. The Pacific parties argued that unlike the situation in *Smith*, there was no trial here. While true, the mediation ordered by the probate court, like the trial in *Smith*, was an essential part of the probate proceedings. The Court of Appeal concluded

that the Pacific parties could not ignore the probate court's order to participate in the proceedings and then challenge the result. The probate court's mediation order would be useless if a party could skip mediation and challenge the resulting settlement agreement.

17. Successors In Interest To Deceased Beneficiaries Entitled To Pursue Accounting

DUNLAP v. MAYER (2021) 63 Cal.App.5th 419 [April 23, 2021]

Short Summary: Pursuant to a settlement agreement following litigation over her deceased husband's estate, Josephine was the sole income beneficiary of the Marital Trust during her lifetime, and Maria was the sole principal beneficiary upon Josephine's death. The court appointed Maria as the sole trustee of the Marital Trust.

The Marital Trust was to be funded with Josephine's deceased husband's 99% interest in a limited partnership and his stock in a corporation. Josephine, as executor of her deceased husband's estate, and Maria, as trustee of the Marital Trust, were responsible for funding the Marital Trust with the limited partnership interest and stock. Maria allegedly remained ignorant of any of these facts.

Maria's husband at that time was the president of the corporation, and the partnership was affiliated with the corporation. Maria and her husband subsequently divorced.

After Josephine died, her executor filed a petition for an accounting of the Marital Trust from January 21, 1995, through September 30, 2016.

Maria filed a verified objection to the petition. The objection stated that Maria did not know if the Marital Trust was ever funded; she never acted as a trustee of the Marital Trust; to the best of her knowledge, she never possessed the assets as a trustee of the Marital Trust; and upon investigation, information and belief, the entities that were to fund the Marital Trust had been defunct for more than 15 years. Pursuant to its powers under Probate Code section 17202 to dismiss a petition if it appears that the proceeding is "not reasonably necessary" to protect the interests of the trustee or beneficiary, and section 17206 granting it broad discretion to "make any orders and take any other action necessary or proper to dispose of the matters presented by the petition," the trial court dismissed the petition.

The appellate court however found that persons with a present or future interest in a trust include those person's successors in interest. Josephine's estate, as her successor in interest in the trust, could pursue an accounting for the time

when Josephine was the beneficiary of the trust, i.e., during her lifetime. The general rules of survivability apply to proceedings under the Probate Code.

Further, there was no hearing here, and no evidence was presented. The court relied on Maria's objection to the petition, which stated that Maria did not know if the Marital Trust was ever funded, she never took title to or controlled any of the assets of the Marital Trust, and two businesses that were to fund the trust were defunct. The latter two statements were "to the best of her knowledge" and "upon information and belief," respectively. Josephine's estate contested these statements and produced documents showing that money had been transferred to the two entities that were the assets of the Marital Trust.

"When a petition is contested, as it was here . . . absent a stipulation among the parties to the contrary, each allegation in a verified petition and each fact set forth in a supporting affidavit must be established by competent evidence." *Estate of Lensch* (2009) 177 Cal.App.4th 667, 676. Josephine's estate contested Maria's declarations. The appellate court further stated that the trial court's powers under Probate Code sections 17202 and 17206 comprise only the inherent power to decide all incidental issues necessary to carry out the court's express powers to supervise the administration of the trust. Dismissal of a petition altogether is not an incidental issue; it is the complete resolution of the petition. The probate court does not have the power to dismiss an action *sua sponte* and without notice when, as here, there are disputed issues.

The court remanded the matter for further proceedings.

Takeaway: The court construed "beneficiary" under Probate Code section 24 to include the successor in interest of a deceased beneficiary. Where appropriate, such successors may want to open a probate proceeding to confirm standing to pursue an accounting on behalf of a deceased beneficiary, and then do so.

Second, even if the judge likes your arguments, without taking evidence on contested factual issues, a dismissal may be invalid. See *Estate of Lensch.*

18. Trustee Of Spendthrift Trust Liable For Family Code Section 2030 "Need Based" Attorney's Fees In Marital Dissolution Proceedings

IN RE MARRIAGE OF WENDT AND PULLEN (2021) 63 Cal.App.5th 647 [April 28, 2021]

Short Summary: Wife's father created an irrevocable spendthrift trust ("Trust"), with her as beneficiary. Respondent Trustee administered the Trust exclusively in Indiana. The Trust provisions stated that governing law would be Illinois, and the law for purposes of administration would be where the principal place of the administration of the Trust occurred (i.e., Indiana).

Wife and Husband married in 1997. Wife filed for dissolution in 2013. Wife made a written request to Trustee to disburse trust funds to meet her support needs, which Trustee denied in 2016. Husband filed a motion to join Trustee and the Trust to the dissolution action and to compel Trustee to disburse funds to Wife as necessary to ensure payment of spousal or child support orders and for attorney fees. The Family Court granted the motion as to child support.

Husband next filed a request for attorney fees based upon Family Code section 2030, seeking attorney fees and costs from Trustee for expenses incurred in bringing the motion to join the Trust and Trustee. The Family Court denied the request, citing *Ventura County Dept. of Child Support Services v. Brown* (2004) 117 Cal.App.4th 144, and indicating that attorney fees could only be awarded from a spendthrift trust when there is a finding of bad faith by the trustee.

The California Court of Appeal reversed the Family Court's decision on the basis that *Ventura* dealt with a Probate Code section allowing a court to compel the trustee of a spendthrift trust to pay a beneficiary's child support obligations. Instead, Husband's request for attorney fees was pursuant to Family Code section 2030, which provides for parity between spouses in their ability to obtain effective legal representation. Accordingly, the purpose of Family Code section 2030 is to allow a court to order the other party to pay one's attorneys' fees where they can demonstrate financial need and the other party has the ability to pay. This ensures that the overall cost of litigating a proceeding for the dissolution of marriage is apportioned equitably depending on what is just and reasonable under the relative circumstances of the respective parties.

Parties to the dissolution proceeding other than spouses can be required to pay under this statute. California has a strong public policy in favor of ensuring a level playing field between the parties in a dissolution action. There is no requirement that a party must prevail or establish a prima facie case to obtain attorney fees from a third party joined in the case. Therefore, the court found that conditioning relief on the third party's bad faith was inconsistent with the purpose of Family Code section 2030.

In addition, there is no case law holding that a spendthrift trust is not required to pay debts related to its administration, and the court saw no reason to create an exemption. Husband's claim against the Trust was a debt arising from its administration—specifically, his successful efforts to join the Trust and the Trustee in the dissolution proceeding. Therefore, the claim was also exempt from the Trust's spendthrift provision, and the Family Court erred in not awarding attorney fees in the absence of a showing of bad faith.

Finally, the trust's administration in Indiana was immaterial to the court's analysis as both Indiana and California follow the modern interpretation regarding the liability of trusts and trustees to third parties.

Takeaway: It is difficult for planners, on one hand, to create irrevocable trusts that favorably benefit the beneficiary, while on the other hand "locking" the trust down from a credit protection standpoint. The standard of practice is not to appoint third party trustees with absolute discretion, with multiple current beneficiaries, to maximize protection from unknown future creditors.

Under the Probate Code, spendthrift provisions are generally valid as to both trust income and trust principal. Yet creditors need not always wait for distributions to reach the debtor's hands. Spendthrift provisions are invalid as to claims for spousal or child support, as per the granting of the payment of child support here.

A further point here is that creditors can also reach a spendthrift trust's assets if the trust is involved in litigation. Specifically, the trust, if joined as a party in a dissolution action, may be liable for attorney fees related to those proceedings even when the trust's beneficiary makes no claims against the trust. Needs-based attorney fees awarded per Family Code section 2030 become a debt related to the trust's administration, and are not protected by a spendthrift clause.

19. The Billion Dollar Estate Tax Case – And a Primmer

ESTATE OF JACKSON v. COMMISSIONER (2021) T.C. Memo 2021-48; 121 T.C.M. (CCH) 1320 [May 3, 2021]

Short Summary: This is the estate tax case for the legendary pop star (the King of Pop) Michael Jackson. IRS asserted: (i) an undervaluation of about $1.125 billion; (ii) an estate tax deficiency of over $500 million; and (iii) penalties of nearly $200 million. Perhaps most on point, is that the case opinion is a primmer on estate tax valuation and should be read by every practitioner involved with estate tax returns and estate planning. Further, it is a biography of Michael Jackson and a primmer on rights in music intellectual property (that section is titled, "Rights in Music Intellectual Property…for Tax Lawyers") – all paid for by the taxpayers and free to all of us. Bottom line is that the estate fared well in the valuation disputes.

20. QTIP Trusts – IRC Section 2519 and Other Land Mines Abound

CCA 2021118008 [May 7, 2021]

Short Summary: This CCA involves the termination of a QTIP Trust and distribution of all assets to the surviving spouse (the remainder beneficiaries wound up with no assets on termination). This transaction triggers IRC Section 2519 such that surviving spouse is making a deemed gift of the remainder value of the QTIP Trust (the income interest was owned by and received by the surviving spouse, and thus is not a gift – but watch out for the income tax issues).

The remainder beneficiaries made gifts to the surviving spouse because they gave up their interests. The deemed gift by the surviving spouse (IRC 2519) and the gift by the remainder beneficiaries to the surviving spouse (IRC 2511) cannot be offset. This is a great legal review of QTIP Trusts, 2519, the reciprocal trust doctrine, and why one must be careful with QTIP Trusts.

21. Split-Dollar Can Work, Just Watch Out for the Valuation (and Let's Avoid Song Titles)

ESTATE OF MORRISSETTE v. COMMISSIONER (2021) T.C. Memo 2021-60; 121 T.C.M. (CCH) 1447 [May 13, 2021]

Short Summary: This 2021 case is the second reported case in the Morrisette matter. In short, it involves mom (decedent) making funds available to trusts for her sons to fund cross purchase agreements on stock in a closely held business.

The first Morrisette case came out of the Tax Court in 2016 (Morrisette I) - 146 T.C. 171 (2016). In Morrisette I, the Tax Court upheld a split-dollar arrangement under the economic benefit regime under the split-dollar regulations. The Morrisette I court held that: (i) the split-dollar agreements complied with the economic benefit regime; (ii) Mrs. Morrissette did not make taxable gifts of the premiums in 2006 and made annual gifts only of the cost of current protection for gift tax purposes; (iii) although the dynasty trusts were the named owners of the policies in the policy documents, the CMM trust was the deemed owner for gift tax purposes under the economic benefit regime; and (iv) the dynasty trusts did not have current access to the cash surrender values for any years before Mrs. Morrissette's death. Furthermore, the estate argued that IRC § 2703 should not apply as a matter of law. In citing Cahill, the Court held IRC § 2703 could apply and thus denied the estate's motion for summary judgment. The estate tax inclusion issues and estate tax valuation of the rights the estate held in the split-dollar arrangement were not addressed.

In addressing the estate issues, the Morrisette II court held that: (i) IRC sections 2036 and 2038 do not apply because the transfers related to the split-dollar agreements qualify for the bona fide sale exception of both sections; and (ii) IRC section 2703(a) would not require inclusion of the cash surrender values of the life insurance policies in the gross estate. These were favorable rulings for the estate and perhaps driven by the active business of the family.

The final issues for the Morrisette II court were the valuation of decedent's interest in the split dollar arrangement (advances make and rights of repayment) and whether a 40% gross valuation misstatement penalty applies. On the valuation question, the estate argued for a $7.5 million value – discounts driven by when repayment would happen – life expectancy of sons or an earlier date. On this point, the court found the discount period should be until December 31, 2013, and concluded the value of the estate's rights was approximately $28

million. Estate found liable for the 40% penalty because they knew earlier termination and repayment might occur (were emails discussing termination of the policies and earlier repayment, but advice to delay repayment until SOL ran on audit). The estate was found to not have acted with reasonable cause or in good faith, they knew the value was too low.

22. Divorce Under Religious Law Dodges Polygamy and Protects the Estate Tax Marital Deduction

ESTATE OF GROSSMAN v. COMMISSIONER (2021) T.C. Memo 2021-65; 121 T.C.M. (CCH) 1492 [May 13, 2021]

Short Summary: On competing motions for partial summary judgment before the U.S. Tax Court, IRS argued that no estate tax marital deduction is available for bequests to a surviving spouse ($79 million of a $87 million estate) on the basis that the surviving spouse was not lawfully the decedent's spouse. IRS argued that decedent was not lawfully divorced from a prior spouse, and thus not lawfully married to the surviving spouse due to laws against polygamy. Prior to marrying the surviving spouse in Israel, decedent and the former spouse appeared before an orthodox rabbinical court in New York and obtained a Jewish religious divorce. Thereafter, they presented evidence of divorce to the Israeli authorities and were married in Israel. For 140 years, New York has applied the place of celebration test. The Tax Court held that under Israeli law the marriage was valid, and thus the surviving spouse was such under IRC section 2056(a).

23. Insurance Agent is Agent of Whom? Company Held Not Liable for Elder Abuse or Negligence Related to Agent's Acts

WILLIAMS v. NATIONAL WESTERN LIFE INS. CO. (2021) 65 Cal.App.5th 436 [June 11, 2021]

Short Summary: The purchaser of an annuity contract sued the insurance company and the independent agent who sold the annuity for elder financial abuse, negligence per se, fraud and breach of fiduciary duty. The jury found the company and the agent liable for elder abuse and negligence, and punitive damages. The trial court entered judgment against the company the agent. The company's motion for judgment notwithstanding the verdict was denied by the trial court. The company appealed. The Appeals court reversed the trial court, holding that: (i) the company cannot be liable for negligence since the agent was an independent contractor and was an agent of the insured (not the company); (ii) the company had no duty to investigate the letter signed by the insured (but written by the agent); and (iii) the trial court should have granted the company's motion for judgment notwithstanding the verdict.

24. Supreme Court Confirms That On Reappointment Of LPS Conservator Whether LPS Conservatee Is Willing Or Able To Accept Treatment Is Not An Element Required To Be Proven

CONSERVATORSHIP OF K.P. (2021) 11 Cal.5th 695 [June 28, 2021]

Short Summary: This matter was reported on by this speaker as one of the 2019 "Recent Developments" cases. (See *Conservatorship of K.P.* (2019) 39 Cal.App.5th 254.) Specifically, following a jury trial the Los Angeles County Public Guardian was reappointed as LPS Conservator.

The LPS Conservatee appealed, arguing that the jury instructions failed to include whether the LPS Conservatee was unwilling or unable to accept meaningful treatment. The Appellate Court confirmed that this element is not required on a petition for reappointment.

Although, this element applies where a facility is attempting to initiate an LPS conservatorship over an uncooperative patient, on reappointment the issue is whether one is so gravely disabled as to be unable to provide for personal basic needs for food, clothing, or shelter.

The Supreme Court granted review and reached the same conclusion. Evidence that a person is willing and able to accept meaningful treatment is certainly relevant to the ultimate question of whether a conservatorship is necessary. But there is a difference between relevant evidence and the elements that must be proven to determine an action. In a conservatorship trial, the only elements that must be proven are that the person (1) suffers from a mental health disorder that (2) renders him or her gravely disabled. Welfare and Institutions Code section 5350. Evidence bearing on the person's ability and willingness to accept treatment may assist the fact finder in resolving that question. But such willingness is neither an element that must be proven nor itself dispositive of the issue of grave disability.

25. Court Appointed Counsel For Conservatees Where Public Guardian Is Conservator Take Note: A Primer On Review Of The PG's Fee Petition

CONSERVATORSHIP OF A.B. (2021) 66 Cal.App.5th 384 [July 7, 2021]

Short Summary: After the public guardian filed its fee petition, subsequent declarations clarified that it was requesting compensation for approximately 43 hours spent on "visits," approximately 30 hours spent on "court matters" and one hour spent on a phone call. At a contested hearing on the petition, A.B.'s appointed attorney argued, among other things, that the petition failed to include the specificity required by statute regarding the nature and necessity of the

services rendered, particularly in light of the fact that the most recent petition for reappointment was dismissed. Counsel also argued that A.B. had no assets or income from which to collect the ordered compensation and that it would be speculative to order compensation based on the idea that "at some point more money will come somehow else."

The court found that the request for compensation was just, reasonable and necessary and approved the petition. A.B. appealed, and the appellate court reversed and remanded for reconsideration, specifically as to consideration of A.B.'s financial circumstances.

First, Probate Code section 2942(b) authorizes payment to the public guardian from the estate of the conservatee for "[c]ompensation for services of the public guardian and the attorney of the public guardian … in the amount the court determines is just and reasonable." Section 2942(b) provides further, "In determining what constitutes just and reasonable compensation, the court shall, among other factors, take into consideration the actual costs of the services provided, the amount of the estate involved, the special value of services provided in relation to the estate, and whether the compensation requested might impose an economic hardship on the estate.

A.B. had objected on the basis that the court had no way of judging the benefit of alleged visits nor their necessity. For example, the public guardian declared it spent forty-three hours on visits; it did not state with whom the visits were, the purpose of the visits or whether the visits accomplished anything. The appellate court found the only reasonable reading of the public guardian's declarations, however, is that the visits were with A.B., his family, or his treatment team. Whether the visits "accomplished anything" is not the test for just and reasonable compensation. The public guardian is entitled to "compensation for expenses that the conservator believed were necessary to benefit the conservatee [if] that belief was objectively reasonable." (*Conservatorship of Cornelius (2011) 200 Cal.App.4th 1198, 1205.*)

Second, Probate Code section 2942(b) requires the court to consider whether imposition of the requested compensation would pose an economic hardship on the conservatee's estate.

Here, the written order expressly stated, "Collection of said compensation will be deferred to a future date if collection will be a hardship for conservatee." The intent of section 2942(b) is to strike a reasonable balance taking into account the actual costs incurred by local governments in providing these important services while seeking to ensure that courts reduce such compensation requirements when estates are small, or the particular compensation requested by the public guardian might impose an economic hardship on the particular estate involved. The court must however, after considering the foregoing, make

the call; it cannot delegate the authority to the public guardian to decide whether it will defer or not based on its determination of economic hardship.

Takeaway: Many of us serve as court appointed counsel, and some of us are from to time appointed in matters where the public guardian is acting as conservator. This case goes into detail on the thinking of the court on "objectionably reasonable" necessary services rendered, while downplaying an "outcome-based" critiquing of those services. This case should be re-read prior to objecting to the public guardian's fee petition.

26. An Attorney-In-Fact Owes A Fiduciary Duty To A Conservatee To Account

CONSERVATORSHIP OF FARRANT (2021) 67 Cal.App.5th 370 [August 2, 2021]

Short Summary: In 2008, Norma Farrant executed a durable power of attorney granting her son, Duan Farrant (Appellant), as her attorney-in-fact, with broad powers to manage her property. The power of attorney would become effective upon a determination that Norma was " 'incapacitated.' " In September 2015, when Norma was living in Missouri, a Missouri court ordered Appellant to account for all transactions conducted by him on behalf of Norma during the one-year period beginning on September 21, 2014. In 2016, Norma moved back to California. In January 2017, Angelique Friend, Respondent, was appointed conservator of Norma's person and estate. In November 2017, Diana Farrant (Diana), Norma's daughter, filed a petition in the Ventura County Superior Court to compel Appellant "to account for his actions on behalf of Norma Farrant for the period September 21, 2014, to date …" As an exhibit to her petition, Diana attached proof that a physician had examined Norma on June 12, 2015 in which he opined that Norma is "incapacitated" because "she is unable (completely & totally) to receive & evaluate information or to communicate decisions such that she lacks capacity to meet essential requirements for food, clothing, shelter and safety." In February of 2018, the probate court heard Diana's petition. At the hearing, Diana's counsel said his client was "just piggybacking on the Missouri order" that Appellant account for the one-year period beginning on September 21, 2014. He asserted that Appellant had "never complied with the Missouri order." Appellant, appeared *in propria persona*, told the court that on September 21, 2014, he had control over Norma's pension checks and her share of the rental income from the Newbury Park property. The probate court ordered appellant "to do a formal account -- for the period September 21, 2014, to January 31, 2018 -- … for any pension checks you received on behalf of [Norma] and any rental monies you received on [her] behalf …" The accounting was due on or before March 30, 2018. On January 29, 2019, at an "OSC" hearing, the court ordered sanctions to be imposed against Appellant of $1,000 per day until the accounting is filed. On May 31, 2019, Appellant finally filed his accounting, and subsequently, after having hired new counsel, obtained leave to file an amended

accounting. Appellant, however, never filed an amended accounting. After Respondent filed objections to the accounting, at a subsequent hearing, the court surcharged Appellant in the amount of $63,448.90 and ordered Appellant to pay sanctions totaling $121,000 for the 121-day period from January 29, 2019, to May 31, 2019, when Appellant filed his accounting.

The Second District Court of Appeal affirmed, reasoned that first, "a fiduciary relationship between the parties is not required to state a cause of action for accounting. All that is required is that some relationship exists that requires an accounting. The right to an accounting can arise from the possession by the defendant of money or property which, because of the defendant's relationship with the plaintiff, the defendant is obliged to surrender." (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 179-180.) Appellant admitted he had control over Norma's pension checks and her share of the rental income from the Newbury Park property. Appellant was obliged to surrender these payments to the conservatorship estate. Thus, there was a special relationship between appellant and Norma that warranted the order compelling appellant to account for the pension checks and rental income. Second, there was a fiduciary relationship between appellant and Norma because Probate Code section 39's definition of a fiduciary includes an attorney-in-fact. (The Court of Appeal rejected Appellant's arguments as to why sanctions were somehow improper.)

In addition, the Court of Appeal held that the probate court properly denied Appellant's request for an evidentiary hearing because instead of specifying the factual issues he intended to litigate and the relevant evidence (testimony and exhibits) he would produce at the hearing, Appellant's counsel simply made vague representations. Appellant did not identify the witnesses who would testify at the evidentiary hearing, nor did he make an offer of proof as to the substance of the evidence he would present at the hearing.

27. If A Will Is Not "Recorded" During The Testator's Lifetime, It Cannot Sever A Joint Tenancy

PEARCE v. BRIGGS (2021) 68 Cal.App.5th 466 [August 4, 2021]

Short Summary: Ruth Briggs (Ruth) married Charles John Briggs, Sr., who was known as Jack. At the time of the marriage, Ruth already had two biological children, Everett Earle Pearce, Jr. (Earle) and Flora Geraldene Crawford (Geri). After they married, Ruth and Jack adopted three children: Margaret Briggs (Margaret or Margaret Briggs Arroyo), Charles John Briggs, Jr. (John), and Teresa Briggs (Teresa or Teresa Briggs Schwerdt). On August 12, 1955, Briggs Oil Co., a 50-50 general partnership between Jack and his brother, Tom Briggs, bought the property located at 3940 Rosedale Highway, Bakersfield (the Rosedale property). On October 30, 1959, Ruth and Jack bought another property, the Gibson property, and took title as joint tenants. On May 6, 1980, Ruth and Jack conveyed an undivided 12.5 percent interest in the Gibson property to Jack's

sister, Marie Schweifler, leaving Ruth and Jack with an 87.5 percent interest held in joint tenancy. On September 8, 1983, Ruth executed a will (Ruth's will or Ruth's 1983 will) prepared by attorney Thomas Underhill. Ruth's will created an "A" trust and a "B" trust and ultimately provided for equal distribution of her estate to each of her five children after the death of Jack. Ruth's will included a provision stating that all property owned by Jack and her, including property to which they held title in joint tenancy, was intended to be their community property, and that her community property share was to be distributed according to the provisions in her will. Jack was named as executor of Ruth's will. On April 1, 1988, Ruth died. Thereafter, Underhill told Jack that he should probate Ruth's will, but Jack refused. On November 15, 1988, Jack executed a will prepared by Underhill. The will left Jack's estate to the five children in equal shares. A copy of this will was provided to Geri (one of the Pearce Parties) in 1988. Jack also executed an affidavit of death of joint tenant concerning the Gibson property and recorded it on January 30, 1989, against the advice of Underhill, who was of the view that doing so would violate Ruth's will. On February 7, 1989, Jack and his brother, Tom, dissolved Briggs Oil Co. and each partner received a 50 percent interest as tenants in common in the Rosedale property by recorded deed. On December 13, 1995, Jack created the Charles John Briggs Individual Living Trust (Jack's 1995 trust). Jack named himself as trustee and Margaret and John as successor trustees. Under the trust, Margaret, John, and Teresa were each one-third equal residual beneficiaries; Earle and Geri were not beneficiaries of the trust. In 1995, Jack also revoked his prior wills and executed a pour over will leaving any residual estate assets to his trust. On January 9, 1996, Jack recorded deeds with Kern County conveying his 50 percent interest in the Rosedale property and his interest in the Gibson property to his 1995 trust. (Jack had signed, on December 13, 1995, the deeds transferring to the trust his interest in the Rosedale property and the Gibson property.) Since the transfer, Jack, and/or Jack's trust, maintained possession of the properties and paid all the property taxes thereon. On April 27, 2010, Jack died.

The underlying judgment encompasses two probate petitions. The first petition was filed by the Appellants in this matter, Everett Earle Pearce, Jr., and Flora Geraldene Crawford (collectively, Pearce Parties), and was entitled "Petition to Determine Title to Property and Compel its Return and Transfer to Court Appointed Personal Representative of Ruth L. Briggs; Double Damages Under Probate Code § 859." The Pearce Petition involved both the Gibson Property and the Rosedale Property. The Pearce Petition sought confirmation of title in both the Gibson and Rosedale properties on behalf of the Estate of Ruth L. Briggs, in which estate the Pearce Parties had an interest. The parties objecting to the Pearce Petition were Charles J. Briggs, Jr., and Margaret Briggs Arroyo, individually and in their capacities as trustees of the Charles John Briggs Individual Living Trust Dated December 13, 1995, and Teresa Briggs Schwerdt. Charles J. Briggs, Jr., and Margaret Briggs Arroyo (collectively, Briggs Parties), in their capacities as trustees of the Charles John Briggs Individual Living Trust

Dated December 13, 1995, filed a petition entitled "Petition to Establish the Charles John Briggs Individual Living Trust Dated December 13, 1995's Claim of Ownership" (Briggs Petition). The Briggs Petition sought to quiet title to the Gibson and Rosedale properties in the name of the Charles John Briggs Individual Living Trust Dated December 13, 1995. The Pearce Parties objected to the Briggs Petition.

The Pearce Petition and Briggs Petition were tried concurrently in a bench trial.

The trial court denied the Pearce Petition and granted the Briggs Petition. The Pearce Parties requested a statement of decision. As such, the trial court issued a "Final Amended Statement of Decision" (statement of decision) regarding the Pearce and Briggs Petitions. The trial court found that the Pearce Parties failed to establish that Ruth's estate held a property interest in either the Gibson property or the Rosedale property and that the claims set forth in the Pearce Petition were time barred. The trial court also found that the Briggs Parties established legal title to both the Gibson and Rosedale properties and that the Pearce Parties failed to rebut the legal presumptions flowing from legal title. On the same date, the trial court entered a "Judgment After Trial," denying the Pearce Petition and granting the Briggs Petition. The Pearce Parties subsequently filed the instant appeal challenging the trial court's denial of the Pearce Petition.

The Fifth District Court of Appeal affirmed, reasoning that the presumption of title under Evidence Code section 662 controls and finding that Ruth and Jack held title to the Gibson property as joint tenants, which was established by a written instrument in the form of a grant deed. The Court of Appeal also found that Ruth's 1983 will was never probated, so its legality as a will was therefore never established. Moreover, the will could not have been construed as some other kind of document under Civil Code section 683.2, severing the joint tenancy in the Gibson property as of the time of its execution, because it was not recorded during Ruth's lifetime as is required under section 683.2(e). With respect to the Rosedale Property, the Court of Appeal held that under Family Code section 770, Jack's partnership interest and his interest in the Rosedale property were his separate property. The Court of Appeal held that there was no evidence that the Rosedale property was transmuted during the marriage per Family Code section 852. The Court of Appeal also confirmed that the Pearce Parties' claims were untimely under the 5-year period of limitations contained in Code of Civil Procedure sections 318 and 319 regarding actions to recover real property.

28. Drafters – Don't Ever Draft A Prenup When Other Side Is Unrepresented; Planning And Administration – Be Careful...Reliance On A Prenup May Be Foolhardy When One Party Was Unrepresented

KNAPP v. GINSBERG (2021) 67 Cal.App.5th 504 [August 5, 2021]

Short Summary: Grant Tinker was previously married to Mary Tyler Moore, and his company produced her show, among many others. Tinker was CEO of NBC from 1981- 1986. This case deals with his last marriage to Brooke Knapp, and their premarital agreement ("prenup") which required Tinker's estate to pay off the $4 million mortgage on the mansion located on the 8th hole of Bel-Aire Country Club (Tinker's interest in the home was also devised to Knapp). Tinker was not represented by counsel when negotiating the prenup, but instead was represented by his manager. However, the prenup stated that Tinker had been represented by, and consulted with, independent legal counsel. And, Tinker did not sign a separate writing expressly waiving representation by independent legal counsel, as required by Family Code section 1615.

Thereafter, on December 22, 2004, while represented in subsequent estate planning by attorney Frank Glabach, Tinker executed a "Second Amended and Restated Declaration of Trust of the Grant A. Tinker Trust" (Second Amended Trust). Knapp was not a party to and did not execute the restatement. The Second Amended Trust acknowledged the existence of the prenup and provided that, if Knapp survived Tinker by 90 days, the trust was to pay "the total amount of the encumbrances" on the mansion, "including any mortgage, deed of trust, and any real property taxes due."

After Tinker's death, probate litigation ensured between Knapp and Tinker's children. The question of validity of the prenup based on Tinker not having representation was raised. Ultimately, a global settlement was entered into which was less favorable to Knapp than the terms of the prenup.

Afterward, Knapp sued the attorney who had represented her in negotiating the prenup for legal malpractice. The attorney was successful in his motion for summary judgment, including among his positions that the prenup had been "ratified" by virtue of Tinker's acknowledging it in the Second Amended Trust. Knapp appealed.

The appellate court agreed with Knapp. Former section 1615(a)(1) provides "For the purposes of subdivision (a), it shall be deemed that a premarital agreement was not executed voluntarily unless the court finds in writing or on the record, among other factors, that the party against whom enforcement is sought was represented by independent legal counsel at the time of the signing the agreement or, after being advised to seek independent legal counsel, expressly waived, in a separate writing, representation by independent legal counsel.

Section 1615 states that a premarital agreement is not enforceable if the party against whom enforcement is sought did not execute the agreement voluntarily. The court went on to bluntly state "is not enforceable" means what it says: the agreement is void and cannot be enforced. If it is void, it cannot be ratified.

Takeaway: In the 2018 case *Marriage of Clarke & Akel* (2018) 19 Cal.App.5th 914, a premarital agreement that contained a recital that seven days' time was given between the date first presented and the date signed was unenforceable under Family Code section 1615 as evidence showed that less time intervened between presentation and execution. The agreement also was invalid for lack of seven days' notice as to the advisement to retain independent legal counsel or waived representation, in writing, after being advised to seek counsel, as required by Family Code section 1615(c)(3).

In response to these types of case, AB 1380 was chaptered in 2019, modifying Family Code section 1615. As a result, with respect to premarital agreements executed on or after January 1, 2020, the agreement will be deemed to not be executed voluntarily unless the court finds in writing or on the record that the party against whom enforcement is sought had at least 7 days between being first presented with the final agreement and signing the agreement, regardless of whether the party is represented by legal counsel.

Cases like *Knapp v. Ginsberg*, and especially *Marriage of Clarke & Akel*, are prudent reminders to decline representation where the other party refuses to retain counsel. And, when assisting in client in estate planning or estate administration, if a premarital agreement was negotiated while one side was unrepresented, the agreement may simply be void. Practitioners in such situations should be careful.

29. Form 706 - Discover all Lifetime Gifts!

LEIGHTON v. UNITED STATES (2021) 2021 U.S. Claims LEXIS 1567; 2021 WL 3486478 [August 9, 2021]

Short Summary: This case involves a claim for penalty refund for failure to timely pay estate tax and file the Form 706. Dad died with two surviving sons. One son accepted being executor and determined that no Form 706 needed to be filed. Two years after dad's death, non-executor son says, dad "may have" established and funded trusts during his lifetime. As it turns out, dad did make lifetime gifts, and the combined value of his remaining assets at death and the lifetime gifts exceeded the Form 706 filing threshold. The taxpayer asserted reasonable cause for the late payment of estate tax and late filing of the Form 706. The Court denied the Government's motion to dismiss because it is a factual basis as to whether the executor had an honest misunderstanding of fact or law that caused him to not pay or file timely.

30. Husband, Through Subterfuge And Evasiveness, Wins The Battle But Loses The War; Another Case On *Pro Tanto* Interests

IN RE MARRIAGE OF RAMSEY & HOLMES (2021) 67 Cal.App.5th 1043 [August 17, 2021]

Short Summary: During direct examination, Ramsey's counsel questioned Holmes about three income and expense declarations he had filed in 2017, 2018, and 2019. Each form declaration had a section for Holmes's average monthly expenses related to his home. His 2017 declaration had a box for mortgage, and generally listed the amount as "$3,000;" he did not fill in the amount of principal and the amount of interest paid. In each of the spaces asking for the amount of real property taxes and homeowner's insurance, Holmes wrote, "INC." In his 2018 declaration, Holmes reported an "average" of what was paid. After Ramsey rested her case-in-chief, counsel for Holmes immediately stated, "Your Honor, at this time I'll make a motion that [Ramsey] has failed to meet [her] burden according to *Moore-Marsden*. She hasn't provided an expert to figure anything out for the court. She's just gotten an opinion on some of the numbers. So I don't even think I need to bring my expert appraiser in at the moment."

During his closing argument, counsel for Holmes again addressed Ramsey's failure to establish the community property interest in the house saying, "As far as the *Moore-Marsden* is concerned, it's her burden to establish the case, establish the facts in order for the court to make that determination… We do not know what the value of the house was at that time. We don't know exactly what the mortgage payment was, how much of it went to principal, how much of it went to interest."

The trial court, based on the evidence it had, extrapolated the community's interest. Holmes appealed.

The appellate court held that where it is undisputed that there is a community property interest in real property, it is the obligation of *both* spouses to ensure that the family court has the information necessary to determine that interest, no matter which spouse brought the dissolution action. If the spouses fail to do so, the family court must direct them to furnish the missing information, reopening the case if necessary. Because the determination of the community property interest in the property at issue in this case was based upon incomplete information, the trial court's judgment was reversed, and the matter was remanded with directions to the family court to hold a limited retrial to determine the amount of community funds used to reduce the mortgage principal and to recalculate the community property interest.

Takeaway: Another case on *pro tanto* interests reminds us that disputes over this community property issue remain active. When clients or decedents' estates

have encumbered separate property real estate, keep the community *pro tanto* interest component in mind.

31. A Director Of A Foundation Who Sues Other Directors And Is Not Reelected Loses Standing To Maintain The Suit

TURNER v. VICTORIA (2021) 67 Cal.App.5th 1099 [August 17, 2021]

Short Summary: Conrad Prebys was known in San Diego for his successful construction and real estate ventures and for his generous philanthropy. He donated hundreds of millions of dollars to local medical, educational, and arts institutions during his lifetime. Prebys established the Conrad Prebys Trust in 1982 (the Trust) and created the Conrad Prebys Foundation (Foundation) in 2005 as a nonprofit public benefit corporation. The Trust provided that, after making specified distributions to identified beneficiaries, the trustee must distribute the remainder to the Foundation so it could continue to make grants and distributions for charitable purposes after Prebys's death. The Foundation's articles of incorporation provided that the "property of this corporation is irrevocably dedicated to charitable purposes and no part of the net income or assets of this corporation shall ever inure to the benefit of any director, officer or member thereof or to the benefit of any private person." The operative bylaws of the Foundation state the Foundation's "assets and income shall be held in charitable trust, to be administered and distributed as provided herein for the qualified charitable, religious, scientific, literary or educational purposes of the supported organization."

Debra Turner, who describes herself as Prebys's life partner, was formerly a director and president of the Foundation. She appeals judgments of dismissal in favor of the Foundation and its directors, following orders sustaining demurrers to her probate and civil actions. In those actions, Turner alleged the other Foundation directors breached their fiduciary duties in preapproving a settlement range for Laurie Anne Victoria, who served both as a Foundation director and as the Trustee of the Trust, to negotiate a settlement of a contest of the Trust by a disinherited heir. Turner also challenged Victoria's actions as trustee. Several months after commencing her action, Turner's term as a Foundation director and officer expired when she was not reelected to her positions during the annual election process. The civil and probate courts determined that Turner lost standing to maintain her causes of action.

On appeal, Turner contends she has standing under Corporations Code sections 5142, 5233, 5223, and/or 5710 to pursue the claims on behalf of the Foundation because she was a director and officer when she commenced the action and the statutory scheme for nonprofit benefit corporations does not require continuous directorship status to maintain standing since the claims belong to the corporation. The Fourth District Court of Appeal found that neither the text nor

the legislative history of the statutes suggests an intention to depart from the ordinary principles requiring a plaintiff to maintain standing throughout litigation. Accordingly, the Court of Appeal concluded that the statutory scheme and public policy considerations require a continuous relationship with the public benefit corporation that is special and definite to ensure the litigation is pursued in good faith for the benefit of the corporation. If a plaintiff does not maintain such a relationship, the statutory scheme provides the nonprofit public benefit corporation with protection through the Attorney General, who may pursue any necessary action either directly or by granting an individual relator status. Because Turner lost standing to pursue her causes of action, the Court of Appeal affirmed the judgments of dismissal as to Turner acting in her capacity as a former director and officer. The Court of Appeal remanded, however, with directions for the civil and probate courts to grant 60 days leave to amend, limited to the issue of whether a proper plaintiff may be substituted to pursue the existing claims. The Court of Appeal also held that the Attorney General may consider during that 60-day period whether granting relator status to Turner, or another individual, for these claims is appropriate.

The California Supreme Court has granted review.

32. Real Property Purchased In The Name Of One Spouse Only Is Presumptively Community Property Absent A Showing Of Clear And Convincing Evidence To The Contrary

ESTATE OF WALL (2021) 68 Cal.App.5th 168 [August 24, 2021]

Short Summary: After her husband Benny Wall (the Decedent) died, petitioner Cindy Wall (wife) petitioned the probate court to determine that a home, titled in the Decedent's name alone, was community property. The Decedent's children, objectors Timothy Wall and Tamara Nimmo (the Children) objected unsuccessfully.

On appeal, the Children contend the trial court erred in (1) determining that the Family Code section 760 community property presumption prevailed over the Evidence Code section 662 form of title presumption; (2) failing to consider tracing evidence rebutting the community property presumption; (3) determining the Family Code section 721 undue influence presumption prevailed over the Evidence Code section 662 form of title presumption; and (4) applying the undue influence presumption where there was no showing of unfair advantage. Even though the Third District Court of Appeal found that the first two contentions have merit, it affirmed the judgment. The Court of Appeal reasoned that the presumption arising from Family Code section 721 was properly applied, and substantial evidence supported the conclusion that it had not been rebutted.

33. A Case Of General Interest On How Special Immigrant Status May Deter The Return Of An Unmarried Immigrant Under 21 To Their Home Country

GUARDIANSHIP OF S.H.R. (2021) 68 Cal.App.5th 563 [September 2, 2021]

Short Summary: The probate court denied an 18-year old's special immigrant juvenile (SIJ) petition, seeking findings that the conduct of S.H.R.'s parents met the definition of 'neglect' under California law, so as to avoid his being returned to El Salvador for reunification with one or both his parents. The appellate court confirmed.

Although a probate court decision, this case is more one of general interest than substantively relevant to our practice.

The United States Citizenship and Immigration Services may consent to grant special immigrant juvenile status to an unmarried immigrant under 21 years of age if the immigrant is in the custody of an individual appointed by a state court with jurisdiction to determine the custody and care of juveniles, and that court makes two findings: (1) reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law; and (2) it is not in the immigrant's best interest to return to his or her home country or the home country of his or her parents. 8 U.S.C. § 1101(a)(27)(J), (b)(1).

Code of Civil Procedure section 155 confers jurisdiction on every California superior court—including its juvenile, probate, and family court divisions—to make the findings necessary to petition the United States Citizenship and Immigration Services for special immigrant juvenile status. The statute further provides that if an order is requested from the superior court making the necessary findings regarding special immigrant juvenile status, and there is evidence to support those findings, which may consist solely of, but are not limited to, a declaration by the child who is the subject of the petition, the court shall issue the order.

In this case, S.H.R. had the burden to prove the existence of the specified facts by a preponderance of evidence under Evidence Code sections 115 and 500. S.H.R. could not meet that burden merely by producing substantial evidence that could support findings because a substantial evidence standard would not satisfy the requirement to make actual factual findings.

34. A Conservatee May Seek To Set Aside An Order Settling A Conservator's Account Based On Extrinsic Fraud, Unless The Conservatee Becomes Aware Of Facts From Which A Reasonably Prudent Person Would Suspect Wrongdoing

HUDSON v. FOSTER (2021) 68 Cal.App.5th 640 [September 7, 2021]

Short Summary: A conservatee filed a motion in Los Angeles Superior Court (the Hon. Brenda Penny, presiding) asking the probate court to exercise its inherent equitable authority to set aside an order approving his former conservator's final account due to misrepresentations of material fact in the account. The probate court denied the motion after finding that the conservatee failed to show he was unaware of the defects in the account at the time it was approved, or failed to act with reasonable diligence to set aside the order in light of information that he should have known.

On appeal, the conservatee contends the order denying the motion to vacate is appealable, because it is based on the probate court's equitable power to set aside an order obtained through extrinsic fraud. The conservatee further contends that the order approving the account was not preclusive under Probate Code section 2103, because it was based on misrepresentations of material fact, and as a result, the trial court abused its discretion by refusing to set aside the order.

The Second District Court of Appeal agreed and reversed, finding that the order denying the motion to vacate for extrinsic fraud is appealable in this case and that misrepresentations of material fact in a conservator's account are treated as extrinsic fraud. The Court of Appeal reasoned that a conservatee has no duty to investigate representations of fact in the conservator's account, unless the conservatee becomes aware of facts from which a reasonably prudent person would suspect wrongdoing. Therefore, to set aside an order approving the conservator's account on the ground of extrinsic fraud, a conservatee is not required to establish that the misrepresentations of material fact in the account could not have been discovered prior to entry of the order approving the account. The Court of Appeal remanded for the probate court to exercise its discretion based on an accurate understanding of the applicable law.

35. Appellate Court Confirms That "Exclusive" Intent On Part Of Settlor Is Required To Make Amendment/Revocation Clauses As Method That Must Be Followed...And Throws Shade At *King* Decision

HAGGERTY v. THORNTON (2021) 68 Cal.App.5th 1003 [September 16, 2021]

Short Summary: In 2015, Aunt Jeane created a trust. It included the following reservation of rights: "The right by an acknowledged instrument in writing to revoke or amend this Agreement or any trust hereunder."

In 2016, Aunt Jeane herself wrote a first amendment, which was acknowledged before a notary public, and which named her niece as successor trustee and as a beneficiary.

In 2017, Aunt Jeane again wrote, but did not sign, a beneficiary list, which did not include her niece.

In 2018, Aunt Jeane herself again wrote an amendment, the beneficiaries under which also did not include her niece. Above her signature, Aunt Jeane wrote, "I herewith instruct Patricia Galligan to place this document with her copy of the Trust. She can verify my handwriting." Galligan was her former estate attorney.

After Aunt Jeane died, Thornton, a private professional fiduciary, filed a petition to confirm herself as trustee, alleging (for unclear reasons) that the 2016 amendment had been revoked, and confirming the 2017 and 2018 amendments as valid. The niece objected, and sought to confirm herself as trustee, based on her position that the 2016 amendment had been validly acknowledged, but the 2017 beneficiary list and 2018 amendment had not, and therefore each did not comply with the trust clause requiring an "acknowledged instrument."

The niece's argument relied primarily on *King v. Lynch* (2012) 204 Cal.App.4th 1186. She alleged this case reasoned that the trust agreement provided for a method of amendment, so that method must be followed in order to validly amend the agreement. The trial court ruled against the niece, who appealed.

The appellate court confirmed that the niece's interpretation of the holding of *King* was not exactly accurate. In *King*, a married couple created a revocable trust. For jointly owned property, the trust instrument described *separate* modification procedures and revocation procedures. The trust could be modified "by an instrument in writing signed by both Settlors and delivered to the Trustee," whereas revocation required "an instrument in writing signed by either Settlor and delivered to the Trustee and the other Settlor." The language in Aunt Jeane's trust differed significantly from the language in *King*, as it did not differentiate procedures for amendment and revocation.

The proper analysis is Probate Code Section 15401(a), which provides that a revocable trust may be revoked either (1) by compliance with any method of revocation provided in the trust instrument or (2) by a writing, other than a will, signed by the settlor or any other person holding the power of revocation and delivered to the trustee during the lifetime of the settlor or the person holding the power of revocation. However, if the trust instrument explicitly makes the method of revocation provided in the trust instrument the *exclusive* method of

revocation, the method in the trust instrument must be used. (See *Masry v. Masry* (2008) 166 Cal.App.4th 738.)

Aunt Jeane did not state an intent to bind herself to the specific method described in the trust agreement, to the exclusion of other permissible methods. Because the method of revocation and modification described in the trust agreement was not explicitly exclusive, the statutory method of revocation was available under section 15401 in addition to an acknowledged instrument. The niece's argument therefore failed.

Takeaway: The appellate court stated that it did "not need to comment on *King's* interpretation of its trust instrument." Nor did it need to "consider whether *King* was ultimately correctly decided on its facts." But, as a general matter, the court felt it necessary to nevertheless go on to say the *King* dissent more accurately captures the meaning of section 15402 than the majority opinion. Take note if you are in the Fourth Appellate District.

Cases such as *Huscher v. Wells Fargo Bank* (2004) 121 Cal.App.4th 956, *Masry v. Masry* (2008) 166 Cal.App.4th 738, and *Cundall v. Mitchell-Clyde* (2020) 51 Cal.App.5th 571, emphasize the court's openness to finding in favor of settlor's intent unless the revocation and/or amendment provisions are expressly to be exclusive. What are best practices when drafting for married couples? For elderly or vulnerable clients?

36. A Judge May Review A Court's Electronic Case Management System In Certain Circumstances To Make A Ruling

INDEPENDENT INVESTIGATION OF INFORMATION CONTAINED IN ELECTRONIC COURT CASE MANAGEMENT SYSTEMS (2021) CJEO Formal Opinion 2021-016; 2021 Cal. Jud. Ethics Op. LEXIS 2 [September 21, 2021]

Short Summary: The Committee on Judicial Ethics Opinions (CJEO) was asked to provide an opinion on whether, in a non-criminal matter, a judge may search the court's electronic case management system (CMS) for information regarding a party, attorney, or facts relevant to the matter before the judge. Canon 3B(7) of the California Code of Judicial Ethics provides that "[u]nless authorized by law, a judge shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed. This prohibition extends to information available in all media, including electronic" (Emphasis added). How this canon applies to using an electronic case management system (CMS) is the subject of this opinion. The committee's view that a judge may use a CMS to search for information that will assist in the proper performance of judicial duties. A judge may also use a CMS to independently investigate facts in a proceeding where the investigation is authorized by law. The committee advises that canon 3B(7) prohibits only those

CMS searches that are performed to independently investigate adjudicative facts where the investigation is not authorized by law or where the information is not the proper subject of judicial notice. Adjudicative facts are those that may resolve factual issues or relate to evaluating credibility in the matter before the judge. Probate Code section 2620, subd. (d) allows a court to consider any information necessary to determine the accuracy of a conservatorship accounting]. (See also *Conservatorship of Presha* (2018) 26 Cal.App.5th 487, 497-498 [a judge may consider a court-appointed conservator's billing practices in other cases to determine whether the conservator is properly discharging the conservator's duties]. As such, the Committee concluded that in certain matters, a judge may engage in an independent investigation as part of the court's supervisory duties. The Committee also concluded that a judge may also search the Court's CMS for case management purposes, which includes searching a CMS to determine whether to coordinate, relate, or consolidate cases.

37. Feds Loses Bid to Eliminate Discounts as a Matter of Law

BUCK v. UNITED STATES (2021) 2021 U.S. DIST. LEXIS 182958; 2021 WL 4391091 [September 24, 2021]

Short Summary: In this gift tax case, the U.S. District Court of Connecticut rejected the Feds' partial motion for summary judgment. The Feds argued that as a matter of law no discount should be allowed for a gift of a fractional interest in real estate unless the ownership was fractionalized before the gift. Donor acquired $83 million of timber land, then gifted 48% fractional interests to each of his two sons. Court denied the motion because a plethora of case law supports the notion that: (i) gifts are valued at the time of the gift; and (ii) each separate gift is valued separately.

38. No Contest Petitions Trigger "Anti-SLAPP" Scrutiny

DAE v. TRAVER (2021) 69 Cal.App.5th 447 [September 27, 2021]

Short Summary: Ian C. Dae (Dae) appeals from an order denying his motion to strike a probate court petition under the anti-SLAPP statute. (Code Civ. Proc., § 425.16.) Respondent Robert Traver (Robert) filed the petition in his capacity as trustee of a family trust. Robert's petition alleged that Dae violated a "no contest" clause in the trust by filing a previous petition challenging Robert's actions as trustee. The parties agree that Robert's petition (the No Contest Petition) arose from protected petitioning activity under Code of Civil Procedure section 425.16, subdivision (e)(1). Thus, under subdivision (b)(1) of that statute, to defeat Dae's motion Robert was required to show a probability that he would prevail on his No Contest Petition. The trial court found that Robert made such a showing.

The Second District Court of Appeal affirmed, finding that Dae's petition broadly challenged Robert's conduct in setting up a financial structure that Robert claimed was designed to avoid estate taxes. If Robert's claim were true, Dae's petition would implicate the no contest provision by seeking to "impair" provisions in the trust giving Robert the authority to manage trust assets. The Court of Appeal was careful to note that its holding was limited to the context in which it arises—an anti-SLAPP motion. Robert provided sufficient evidence of the trustors' intent to allow a change of beneficiary to make a prima facie showing of probability of prevailing on Robert's contention that Dae's claims are a "contest." The Court of Appeal expressed no opinion on how the probate court should ultimately rule on Robert's petition.

39. Close Family Relations Do Not Establish a Fiduciary Relationship, Conditional Delivery of a Deed Wipes Out Any Oral Conditions Not Included in the Deed

McMILLIN v. EARE (2021) 2021 Cal.App.LEXIS 893; 2021 WL 4949007 [September 30, 2021]

Short Summary: This multifarious case involves title to two parcels of real estate. In short, mom acquired both properties, and thereafter executed deeds transferring them to son with an oral understanding to not record the deeds until mom dies or son purchases the property from mom. These conditions were not included on the deeds. Son's wife recorded the deeds and six days later filed for marital dissolution from son. Mom sued her son and her son's wife to obtain ownership of the properties. The trial court found that son and his wife "have no right, title or equitable interest" in either property and awarded the properties to mom. The appeals court reversed the trial court on several grounds.

First, the appeals court held that title transferred to son. Why? California Civil Code section 1056 and supporting case law. Bottom line is that if a grantor delivers a deed intending to divest the grantor of title, but delivers it to the grantee to take effect on some oral condition, the grantee takes absolutely free of the condition. Thus, delivery of the deeds transferred title without the oral conditions. Note that if the condition does not occur, the grantor may be able to recover damages from the grantee. This is the result son's wife wanted so she could make claims against the real estate in the family law case.

Second, the trial court sua sponte amended mom's cause of action for constructive trust to state a cause for breach of fiduciary duty after the close of evidence when it issued its tentative ruling. Constructive trust is a remedy, not a cause of action. Son's wife asserted that the trial court could not make such an amendment under the circumstances. The trial court found that Son's wife "owed fiduciary duties to [mom]" because the "parties were family members and [mom] reposed trust and confidence in her daughter-in-law." The appeals court reversed holding: (i) the trial court erred in amending the pleadings because all

testimony was about mom's conversations with son, there was no evidence presented regarding son's wife, and she did not have a chance to defend against a breach of fiduciary claim against her; and (ii) there was no fiduciary relationship between mom and son's wife because there was no evidence that son's wife either knowingly undertook to act on behalf and for the benefit of mom, or entered into a relationship which imposes that undertaking as a matter of law.

Third, son's wife appealed the trial court's holding that she had no "no right, title or equitable interest" in either property. The Family Court proceeding had not been finally disposed of and the properties were at issue in that case. The trial court improperly asserted jurisdiction over issues in the Family Court. Thus, the appeals court remanded the case with instructions to the trial court to amend the language of the judgment to allow son's wife to raise claims under the family court's jurisdiction (i.e., community property, *Epstein* credits, *Watts* charges, or other similar claims).

40. Arbitration Agreement Signed By Agent of Resident within His Authority Is Enforceable

GORDON v. ALTRIA MGMT. CO., LLC (2021) 2021 Cal.App.LEXIS 904; 2021 WL 4988882 [

Short Summary: Mom executed a power of attorney. Acting as her agent under the power of attorney, son executed an arbitration agreement with a residential care facility on mom's behalf. While a resident at the care facility, mom fell and broke her hip. She thereafter sued the facility. The facility attempted to enforce the arbitration agreement. The trial court held that son lacked authority to bind mom to the arbitration agreement. The appeals court reversed, holding that son had the authority to execute the arbitration agreement and bind mom to it.

41. Substance Over Form Results in All Gifts Being Made by Husband, and Gift Tax

SMALDINO v. COMMISSIONER (2021) T.C. Memo 2021-127 [November 10, 2021]

Short Summary: In this gift tax case, donor made a gift to wife. Wife then gifted the same property to a Dynasty Trust for husband's descendants the next day. Court applied substance over form and held husband made all gifts and owes about $1 million of gift tax. The subject gift was an interest in the LLC. No LLC documents or tax returns showed wife as an owner (even for a day), the transfer to wife was not "expressly provided for" within the transfers restrictions of the LLC's operating agreement, documents appears to be signed after their effective date, husband changed his estate plan after wife signed the documents to increase her inheritance, and wife testified that before husband transferred the

LLC interest to her, she made "a commitment, a promise" to her husband to transfer it to the Dynasty Trust. The Court found that purported transfer of the LLC interest to wife was ineffective and in substance the Dynasty Trust received the LLC interest from husband.

B. REVENUE PROCEDURE 2021-45 – 2022 INFLATION ADJUSTMENTS

i. Applicable Exclusion Amount: $12,060,000 (+360,000)

ii. Annual Exclusion Amount: $16,000 (+1,000)

iii. Gifts to Non-US Citizen Spouse: $164,000

iv. Section 2032A Special Use: $1,230,000

v. Section 6166 2-Percent Portion: $1,640,000

vi. Section 6039F (Form 3520) Gifts from Foreign Persons Exceed: $17,339

vii. Trusts and Estates Highest Income Tax Backet: $13,450

C. CALIFORNIA LEGISLATION OF IMPORTANCE TO PROBATE, TRUST AND CONSERVATORSHIP MATTERS

Selected legislation of importance to trust and estate attorneys chaptered between October 1, 2020, and September 30, 2021, supplemented with AB 1079.

1. AB 1194 (Low) Conservatorship

Status: 9/30/21 Chaptered – Secretary of State – Chapter 417 Statutes of 2021

Per the Legislative Counsel's Digest:

"Existing law, the Guardianship-Conservatorship Law generally establishes the standards and procedures for the appointment and termination of an appointment for a guardian or conservator of a person, an estate, or both. Existing law, the Professional Fiduciaries Act, establishes the Professional Fiduciaries Bureau within the Department of Consumer Affairs, and requires the bureau to license and regulate professional fiduciaries. The act defines a "professional fiduciary" as, among other things, a person who acts as a guardian or conservator of the person, the estate, or the person and estate, for 2 or more individuals at the same time who are not related to the professional fiduciary or to each other. Existing law requires the court to be guided by what appears to

be the best interests of the proposed conservatee in selecting a conservator, and sets forth an order of preference for appointment if there are multiple persons equally qualified to be the conservator.

This bill would require a professional fiduciary with an internet website to post a schedule of the range of fees on their internet website and would require a professional fiduciary without an internet website to provide that schedule, as specified. The bill would require the bureau to impose specified sanctions on a professional fiduciary's license upon a finding of a violation of applicable statutes or regulations, a breach of fiduciary duty where there is a finding of serious financial or physical harm or mental suffering, or that the professional fiduciary has engaged in defined acts of abuse, as specified. If the court finds that a conservator who is a professional fiduciary has abused a conservatee, the bill would make the conservator liable for a civil penalty of up to $10,000 for each separate act of abuse, payable to the estate of the conservatee. The bill would make a conservator who is not a professional fiduciary who abuses a conservatee liable for civil penalties of up to $1,000 for each separate act of abuse, payable to the estate of the conservatee.

This bill would require the bureau to investigate specified allegations and would authorize the bureau to impose upon a professional fiduciary, as a sanction for violation of their duties, a restitution order, as specified. The bill would require the bureau to revoke a professional fiduciary's license if the person knowingly, intentionally, or willfully violated a legal duty or breached a fiduciary duty to a client or if the person caused serious physical or financial harm or mental suffering to a client through gross negligence or gross incompetence.

Existing law conditioned upon an appropriation by the Legislature a requirement that a court investigator undertake specified actions regarding a proposed conservatee, including interviewing the proposed conservatee. Existing law authorizes specified persons to petition the court to take specified actions regarding a conservatorship.

This bill would, also contingent upon an appropriation, revise the information that a court investigator is required to gather and review and the determinations the investigator is required to make. The bill would authorize an interested person, as defined, with personal knowledge of a conservatee to petition the court to investigate an allegation of physical abuse or financial abuse of a conservatee by a conservator, and would require the court to investigate those allegations that establish a prima facie case of abuse.

Existing law requires the court to appoint the public defender or private counsel to represent interests of a conservatee, proposed conservatee, or person alleged to lack legal capacity who is unable to retain legal counsel and requests the appointment of counsel to assist them in particular proceedings that include, among others, proceedings to establish a conservatorship or to remove the

conservator, whether or not that person lacks or appears to lack legal capacity. The law also requires the court to appoint the public defender or private counsel in these proceedings to represent the interests of a conservatee or proposed conservatee who does not plan to retain legal counsel and has not requested the court to appoint legal counsel, if the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee based on information contained in the court investigator's report or obtained from any other source, whether or not that person lacks or appears to lack legal capacity.

This bill would, instead, require the court to appoint the public defender or private counsel if the conservatee or proposed conservatee has not retained legal counsel and does not plan to retain legal counsel. The bill would generally require the court to allow representation by an attorney for whom a conservatee, proposed conservatee, or person alleged to lack legal capacity expresses a preference, even if the attorney is not on the court's list of court-appointed attorneys, unless the counsel cannot provide zealous advocacy or has a conflict of interest. The bill would specify that the role of legal counsel for a conservatee, proposed conservatee, or person alleged to lack legal capacity is that of a zealous, independent advocate, observing specified legal requirements.

Existing law prescribes the process for petitioning to terminate a conservatorship or limited conservatorship or to appoint a new conservator. Existing law specifies a process for hearings on the termination or revision of conservatorships and the review of conservatorships.

This bill would, contingent upon an appropriation by the Legislature in many cases, make various changes to those processes. The bill would require that the court, at specified hearings, consider terminating the conservatorship and would authorize the court in specified circumstances to modify the conservatorship so that the conservatorship is the least restrictive alternative needed for the protection of the conservatee.

Existing law prohibits a guardian or trustee who is not a trust company from hiring or referring business to an entity in which the guardian or trustee has a financial interest, except upon authorization of the court. Existing law prohibits compensating a guardian or trustee from the estate for the costs or fees they incurred in unsuccessfully opposing a petition or other action made by or on behalf of a ward or conservatee, unless the court determines the opposition was made in good faith, based on the best interests of the ward or conservatee. If the court removes the guardian or conservatee for cause, existing law requires the court to award the petitioner for that removal the costs of the petition and other expenses and costs of litigation, unless the court determines the guardian or conservator acted in good faith, based on the best interests of the ward or conservatee.

This bill would prohibit a guardian or trustee who is not a trust company, or an employee of such a guardian or conservator, to hire or refer business to an entity in which they have a financial interest. The bill would prohibit a guardian or conservator from being compensated from the estate for any costs or fees that they incurred in unsuccessfully defending their fee request petition, opposing a petition, or any other unsuccessful request or action made by, or on behalf of, the ward or conservatee. The bill would authorize the court to reduce the compensation requested in the petition if the court determines, by clear and convincing evidence, that the defense was made in good faith, was based on the best interest of the ward or conservatee, and did not harm the ward or conservatee. The bill would require the court to award the costs of the petition and other expenses and costs of litigation to a successful petitioner if a guardian or conservatee is removed for cause. The bill would require the Judicial Council to report to the Legislature, on or before January 1, 2024, regarding specified findings and recommendations on court effectiveness in conservatorship cases."

2. SB 315 (Roth) Revocable Transfer On Death Deeds

Status: 9/22/21 Chaptered – Secretary of State – Chapter 215 Statutes of 2021

Per the Legislative Counsel's Digest:

"Existing law governs the execution, revocation, and effectiveness of a revocable transfer on death (TOD) deed, defined as an instrument that makes a donative transfer of property to a named beneficiary, as defined, that operates on the transferor's death, and remains revocable until the transferor's death. Existing law establishes statutory forms for executing and revoking a revocable TOD deed that include provisions and instructions for the forms to be notarized by the transferor and recorded with the county recorder. Existing law requires that subsequent pages of the form to execute a revocable TOD deed include statutory "common questions" regarding the use of that form. Existing law requires that, in order to be effective, a revocable TOD deed be recorded on or before 60 days after the date it was executed. Existing law makes these provisions inoperative on January 1, 2022.

This bill would revise and recast those provisions, and instead make them operative until January 1, 2032. Among other things, the bill would redefine and newly define terms for these purposes, including, but not limited to, "beneficiary," "real property," "subscribing witness," and "unsecured debts." The bill would make changes to how and when a revocable TOD deed becomes effective or revoked, and would instead require the deed or revocation to be signed by the transferor, acknowledged by the transferor before a notary public, dated, and signed by 2 witnesses, as specified. The bill would add additional provisions to the statutory forms for executing and revoking a revocable TOD deed to conform to these changes, and would add additional information to the statutory "common questions" pages. The bill would require, after the death of

a transferor, that the beneficiary serve notice on the transferor's heirs, and would create a new statutory notice form for these purposes.

Under specified circumstances, the bill would authorize a court in which a transferor's estate is being administered to apply the doctrine of cy pres to reform a revocable TOD deed that was made by the transferor for a charitable purpose. The bill would also provide that an error or ambiguity in describing property or designating a beneficiary would not invalidate a revocable TOD deed if the transferor's intention can be determined by a court. The bill would establish new processes for, and add provisions relating to, among other things, the enforceability of unrecorded interests, the personal liability of a beneficiary, calculating a beneficiary's share of liability, the return of property to an estate by a beneficiary, and contesting the validity of a transfer or revocation, as specified. The bill would specify that the provisions relating to contesting a TOD deed do not limit the application of other law that imposes a penalty or provides a remedy for the creation of a revocable TOD deed by means of fraud, undue influence, menace, or duress.

The bill would specify that these changes do not apply to TOD deeds or revocation forms that were signed before January 1, 2022.

The bill would require the California Law Revision Commission to study the effect of these provisions, as specified, and report its findings and recommendations to the Legislature on or before January 1, 2031.

Existing law prohibits a deed or grant conveying any interest in or easement upon real estate to a political corporation or governmental agency for public purposes from being accepted for recordation without the consent of the grantee evidenced by a certificate or resolution of acceptance attached to or printed on the deed or grant pursuant to a specified form.

This bill would make these provisions inapplicable to a revocable TOD deed, and instead specify that title does not transfer under a revocable TOD deed until the political corporation or governmental agency records a resolution of acceptance or certificate of consent in a form substantially similar to the form described above."

3. AB-1079 (Gallagher) Trusts: Revocation

Status: 10/09/21 Chaptered by Secretary of State - Chapter 749, Statutes of 2021.

Per the Legislative Counsel's Digest:

Existing law establishes procedures for the creation, modification, and termination of a trust, and regulates the administration of trusts by trustees on behalf of beneficiaries. Except as specified, existing law authorizes the

revocation of a trust when the person holding the power to revoke the trust is competent. Existing law provides that, during this time, the duties of the trustee are owed to the person holding the power to revoke the trust.

This bill would impose additional requirements on the trustee of a trust if, during the time that a trust is revocable, no person holding the power to revoke the trust is competent, including, but not limited to, requiring the trustee to provide a copy of the trust instrument and any amendments to the beneficiaries under the trust instrument, as specified. The bill would authorize the trustee to rely on specified methods to establish incompetency, but would clarify that the bill does not affect any legal standard for establishing incompetency. The bill would make conforming changes to a related provision.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 15800 of the Probate Code is amended to read:

15800. (a) Except to the extent that the trust instrument otherwise provides or where the joint action of the settlor and all beneficiaries is required, during the time that a trust is revocable and at least one person holding the power to revoke the trust, in whole or in part, is competent, the following shall apply:

(1) The person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under this division.

(2) The duties of the trustee are owed to the person holding the power to revoke.

(b) Except to the extent that the trust instrument otherwise provides or where the joint action of the settlor and all beneficiaries is required, if, during the time that a trust is revocable, no person holding the power to revoke the trust, in whole or in part, is competent, the following shall apply:

(1) Within 60 days of the obtaining of information establishing the incompetency of the last person holding the power to revoke the trust, the trustee shall provide notice of the application of this subdivision and a true and complete copy of the trust instrument and any amendments to each beneficiary to whom the trustee would be required or authorized to distribute income or principal if the settlor had died as of the date of receipt of the information. If the trust has been completely restated, the trustee need not include the

trust instrument or amendments superseded by the last restatement.

(2) The duties of the trustee to account at least annually or provide information requested under Section 16061 shall be owed to each beneficiary to whom the trustee would be required or authorized to distribute income or principal if the settlor had died during the account period or the period relating to the administration of the trust relevant to the report, as applicable.

(3) A beneficiary whose interest is conditional on some factor not yet in existence or not yet determinable shall not be considered a beneficiary for purposes of this section, unless the trustee, in the trustee's discretion, believes it is likely that the condition or conditions will be satisfied at the time of the settlor's death.

(4) If the interest of a beneficiary fails because a condition to receiving that interest has not been satisfied or the trustee does not believe that the condition will be satisfied at the time of the settlor's death, the duties in paragraphs (1) and (2) shall be owed to the beneficiary or beneficiaries who would next succeed to that interest at the relevant time or period as determined under the trust instrument, as amended and restated.

(c) To establish incompetency for the purposes of subdivision (b), the trustee may rely on either of the following:

(1) The method for determining incompetency specified by the trust instrument, as amended or restated.

(2) A judicial determination of incompetency.

SEC. 2. Section 16069 of the Probate Code is amended to read:

16069. (a) The trustee is not required to account to the beneficiary, provide the terms of the trust to a beneficiary, or provide requested information to the beneficiary pursuant to Section 16061, in any of the following circumstances:

(1) In the case of a beneficiary of a revocable trust, as provided in subdivision (a) of Section 15800, for the period when the trust may be revoked.

(2) If the beneficiary and the trustee are the same person.

(b) Notwithstanding subdivision (a), in the case of a revocable trust, if no person holding the power to revoke the trust, in whole or in part, is competent, the trustee's duties to account shall be owed to those beneficiaries specified in paragraph (2) of subdivision (b) of Section 15800.

SEC. 3. The changes made by this act do not do either of the following:

(a) Diminish the right of a beneficiary to bring an action during the settlor's incompetency or after the trust becomes irrevocable, including an action related to the conduct of a trustee or a change to the terms of a trust.

(b) Affect any legal standard for establishing incompetency.

D. Proposition 19 [aka ACA 11]

Proposition 19, also referred to as Assembly Constitutional Amendment No. 11, is an amendment of the Constitution of California that was narrowly approved by voters in the general election on November 3, 2020, with just over 51% of the vote. According to the California Legislative Analyst, Proposition 19 is a large net tax increase "of hundreds of millions of dollars per year." The proposition was sponsored and heavily promoted by the California Association of Realtors, and became effective on February 16, 2021.

Proposition 19 does benefit seniors and victims of wildfires and natural disasters. Individuals over age 55 or those who are severely disabled now enjoy an ability to transfer the assessed value of their primary residence more broadly than that found under prior Propositions 60 and 90. These individuals may transfer their property tax basis to a replacement primary residence, provided the replacement purchase occurs within two years of the sale of an original primary residence. Transferors other than victims of wildfires may do so three times, via any county-to-county transfer. The replacement primary residence may have a higher fair market value than the original primary residence, in which event the transferred assessed value applies to the portion of the value of the replacement primary residence that is equal to the fair market value of the original primary residence. The remaining tax basis is calculated on the value of the replacement primary residence that exceeds the fair market value of the original primary residence.

Proposition 19 significantly decreased eligible transfers previously available under Proposition 58. Proposition 19 does not change the definition of parents, children, grandparents, or grandchildren. In order to be eligible for the exclusion from reassessment, the transfer must be a parent-child or grandparent-grandchild transfer as under prior law. However, only a primary residence, meaning a residence eligible for and then under the homeowner's exemption or the disabled veteran's exemption, (or a qualifying family farm) is eligible for

property tax basis transfer, provided the transferee occupies the primary residence within one year after transfer and takes either the homeowner's exemption or disabled veteran's exemption. Last, in such event, exclusion from reassessment will be limited to the property tax basis on $1,000,000 of fair market value as indexed for inflation.

Takeaway: See my colleague Jennifer Scharre's forthcoming article in the California Lawyers Association's *Trusts and Estates Quarterly* on Proposition 19 entitled "Postmortem of Proposition 19: the COVID-19 of the Estate Planning World."

Practitioners should also note the following:

- Proposition 19 was not written very succinctly. Pay attention to the guidance that has come out since it was passed, including:

    1. Letter to Assessors 2020/061 dated December 11, 2020: provided examples for calculations.
    2. Chief Counsel Memorandum provided by the Legal Department at the BOE on January 8, 2021: provided a question and answer format to common questions.
    3. Letter to Assessors 2021/007 dated February 5, 2021: provided new forms for base year transfers.
    4. Letter to Assessors 2021/008: confirmed many of the definitions of eligible individuals and deadlines for claiming relief remain the same.
    5. Letter to Assessors 2021/019: provided clarification of language and filing deadlines.
    6. Letter to Assessors 2021/026: provided clarification on relief available to victims of governor-proclaimed disasters.
    7. Proposed Property Tax Rule 462.520 and Proposed Property Tax Rule 462.540: provided clarifications so that there is consistent application among counties.
    8. Proposed Property Tax Rule 462.520: provided further examples.

Last, those lawyers that shepherded transfers prior to Proposition 19's effective date should have letters documenting advice as to administration necessary to ensure the ongoing efficacy of such transfers. For example, if parents simply continue to live in the residence without payment of rent the gift may be included in the parent's estate as a result of retained enjoyment of the property under Internal Revenue Code section 2036, and from a Proposition 58 perspective, post-transfer below market rent may prevent a completed transfer for property tax exclusion purposes. We are seeing some due diligence by the counties in this regard – see for example attached questionnaire received by our office following a "Prop 58" transfer prior to the Prop 19 effective date.

E. PROPOSED OR PENDING LEGISLATION OF INTEREST

1. Proposition 15 – Split Roll

Proposition 15 was also on the November 3, 2020, ballot in California as an initiated constitutional amendment. It would have amended the California State Constitution to require commercial and industrial properties, except those zoned as commercial agriculture, to be taxed based on their market value. This is known as split roll. California Proposition 15 was rejected 48.1%-51.9%.

Fresh off a win (Proposition 19) and a defeat (Proposition 15), it is unlikely we will see advocates for property tax reform pursue split roll in the immediate future. However, I would not be surprised to see the concept of split roll return on future ballots. And, with Proposition 15 off the table for now, concepts that have been proposed in the past, such as a sales tax on services, a wealth tax, and more corporation and individual income tax increases may move to the fore.

2. Wealth Tax – From AB 2088 to AB 310, and ACA 8

A bill from last year, AB 2088, would have imposed an annual tax at a rate of 0.4% of a resident of this state's worldwide net worth in excess of $30,000,000, or in excess of $15,000,000 in the case of a married taxpayer filing separately. The bill died in committee. However, this year we have AB 310, as amended (Lee. Wealth tax).

AB 310 would, for taxable years beginning on or after January 1, 2022, impose an annual tax at a rate of 1% of a resident of this state's worldwide net worth in excess of $50,000,000, or in excess of $25,000,000 in the case of a married taxpayer filing separately. The bill would also impose an additional tax at a rate of 0.5% of a resident's worldwide net worth in excess of $1,000,000,000, or in excess of $500,000,000 in the case of a married taxpayer filing separately. The bill would describe worldwide net worth with reference to specific federal provisions and would provide that worldwide net worth does not include specific assets, including personal property situated out of state, directly held real property, or liabilities related to directly held real property. The bill would also authorize the Franchise Tax Board to adopt regulations to carry out these provisions, including regulations regarding the valuation of certain assets that are not publicly traded.

The last action on AB 310 was it being re-referred to the Committee on Revenue & Taxation on April 6, 2021. Although its prospects of moving forward in the legislature are uncertain, it does merit attention.

The concept of a wealth tax, both at a federal and a state level, doesn't seem to be going away. There are obstacles to AB 310, though. Even if it were to pass,

a constitutional amendment would then be necessary. Accordingly, ACA 8 has been introduced as a resolution to amend the state constitution as necessary, correlative to AB 310. ACA 8 would then be added to the ballot to be approved as an initiated constitutional amendment.

Prior legislative attempts to modify Proposition 13 also died in committee, leading to both sponsorship and heavy promotion of Proposition 19 as a ballot initiative by the California Association of Realtors. Could a sponsorship group try to do an end-around the legislature and attempt to take a wealth tax straight to the ballot?

F. FURTHER LEGISLATION INVOLVING PROBATE, TRUST AND CONSERVATORSHIP MATTERS

Further legislation chaptered from October 1, 2020 – September 30, 2021, relevant to probate, trust, and conservatorship matters.

1. AB 439 (Bauer-Kahan) Certificates of Death: Gender Identity

Status: 7/9/21 Chaptered – Secretary of State – Chapter 53 Statutes of 2021

Per the Legislative Counsel's Digest:

"Existing law requires that each death be registered with the local registrar of births and deaths in the district in which the death was officially pronounced or the body was found. Existing law designates persons responsible for completing a certificate of death and the required contents of the certificate, including, but not limited to, the decedent's name, sex, race, a975nd other relevant identifying and medical information. Certain violations of these requirements are a crime.

Existing law requires a person completing the certificate of death to record the decedent's gender identity as reported by the informant, unless the person is presented with specified legal documents showing a different gender identity. Existing law requires the person completing the certificate of death to record the decedent's gender identity as indicated in the specified legal documents, or if the specified documents are not presented, as indicated by the person or a majority of persons with control over the disposition of the remains, as specified.

This bill would authorize the decedent's gender identity to be recorded as female, male, or nonbinary."

2. AB 633 (Calderon) Partition Of Real Property: Uniform Partition Of Heirs Property Act

Status: 7/23/21 Chaptered – Secretary of State – Chapter 119 Statutes of 2021

Per the Legislative Counsel's Digest:

"Existing law authorizes an owner of an estate in real property to commence and maintain an action for partition of the property against all persons having or claiming interests in the estate as to which partition is sought. If the court finds that the plaintiff is entitled to partition, it is required to make an interlocutory judgment that determines the interests of all owners of the property and orders that the property be divided among those parties in accordance with their interests or sold with the proceeds divided among them, as specified.

This bill would enact the Uniform Partition of Heirs Property Act, which would require specified procedures in an action to partition real property that is heirs property, defined as property for which there is no written agreement regarding partition that binds the cotenants of the property, one or more of the cotenants acquired title from a relative, and meets one of specified thresholds regarding cotenants who are relatives or who acquired title from a relative. If a cotenant requests partition by sale, the bill would give cotenants who did not request the partition the option to buy all of the interests of the cotenants that requested partition by sale, as specified. If all of those interests are not purchased or a cotenant who has requested partition in kind remains after purchase, the bill would require the court to partition the property in kind or by sale, as specified. The bill would provide procedures pursuant to which the property is appraised. The bill would permit the court to apportion the costs of partition among the parties in proportion to their interests, but would prohibit the apportionment of costs among parties that oppose the partition, except as specified. The bill would provide that these provisions supplement existing law and control over existing law that is inconsistent if an action is governed by these provisions."

3. SB 241 (Umberg) Civil Actions

Status: 9/22/21 Chaptered – Secretary of State – Chapter 214 Statutes of 2021

Per the Legislative Counsel's Digest:

"(1) Existing law provides for the licensure and regulation of shorthand reporters by the Court Reporters Board of California, which is within the Department of Consumer Affairs. Existing law subjects a person or entity to certain penalties if the person or entity engages in specified acts relating to shorthand reporting, including any act that constitutes shorthand reporting, except if the person or entity is a licensed shorthand reporter, a shorthand reporting corporation, or one of specified other persons or entities not subject to those provisions. Existing law makes a violation of these provisions a misdemeanor.

This bill, on and after July 1, 2022, and until January 1, 2024, would authorize an entity that is not a shorthand reporting corporation to engage in those specified acts if the entity is approved for registration by the board after meeting

specified requirements, including paying an annual registration fee to the board in an amount not to exceed $500 and designating a board-certified reporter-in-charge, as specified. The bill would require the board to approve an entity's registration or deny the entity's application upon making specified findings. The bill would make a registration valid for one year and would also provide for the suspension and revocation of a registration by the board under specified circumstances. The bill would require the board to make available on its internet website a directory of registered entities. The bill would authorize the board to adopt regulations to implement these provisions. Because a violation of the provisions regulating shorthand reporting is a crime, by expanding the provisions to apply to these new registrants the bill would expand the scope of a crime and impose a state-mandated local program.

(2) Existing law regulates the procedure of civil actions. Existing law authorizes a party in a general civil case, as defined, who has provided notice, to appear by telephone at specified conferences, hearings, and proceedings. Existing law authorizes a court to require a party to appear in person at these conferences, hearings, or proceedings if the court makes a specified determination on a hearing-by-hearing basis.

This bill would, until July 1, 2023, authorize a party to appear remotely and the court to conduct conferences, hearings, proceedings, and trials in civil cases, in whole or in part, through the use of remote technology. The bill would authorize the court to require a party or witness to appear in person at a conference, hearing, or proceeding, if any specified condition is present. The bill would require the court to have a process for a party, court reporter, court interpreter, or other court personnel to alert the judicial officer of technology or audibility issues. The bill would prohibit a court from requiring a party to appear remotely. The bill would allow self-represented parties to appear remotely only if they agree to do so. The bill would require the Judicial Council to adopt rules to implement these provisions, as specified.

(3) Existing law provides that, unless otherwise ordered by the court or agreed to by the parties, a continuance or postponement of a trial date extends any deadlines applicable to discovery, including the exchange of expert witness information, mandatory settlement conferences, and summary judgment motions, which have not already passed as of March 19, 2020, for the same length of time as the continuance or postponement of the trial date. Existing law provides that this extension is in effect only during the COVID-19 state of emergency proclaimed by the Governor on March 4, 2020, and for 180 days after the end of the state of emergency.

This bill would apply these provisions to the continuance or postponement of an arbitration date.

(4) Existing law authorizes the service of documents in a civil action by electronic means pursuant to rules adopted by the Judicial Council. Existing law authorizes a court to electronically serve any document issued by the court that is not required to be personally served on a party that has agreed or consented to accept electronic service, with the same legal effect as service by mail, except as specified.

This bill would, on and after July 1, 2024, instead require the court to electronically transmit those documents on a party that has agreed or consented to accept electronic service.

(5) Existing law authorizes a minor's parent to compromise, or execute a covenant not to sue or not to enforce a judgment on, a claim on behalf of the minor if the minor has a disputed claim for damages, money, or other property and does not have a guardian of the estate.

This bill would require the court to schedule a hearing on a petition to compromise a minor's disputed claim within 30 days from the date of filing and, if the petition is unopposed, would require the court to enter a decision at the conclusion of the hearing.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason."

4. AB 1243 (Blanca Rubio) Protective Orders: Elder And Dependent Adults

Status: 9/23/21 Chaptered – Secretary of State – Chapter 273 Statutes of 2021

Per the Legislative Counsel's Digest:

"Existing law authorizes an elder or dependent adult who has suffered abuse, or another person who is legally authorized to seek that relief on behalf of that elder or dependent adult, to seek a protective order and governs the procedures for issuing that order. Existing law defines protective order for purposes of these provisions to include an order enjoining a party from specified forms of abuse, including attacking, stalking, threatening, or harassing an elder or dependent adult, an order excluding a party from the elder or dependent adult's residence, or an order enjoining a party from specified behavior that the court determines is necessary.

This bill would include within the definition of protective order an order enjoining a party from isolating an elder or dependent adult. The bill would require certain

requirements to be met for that order to be issued, including a showing by a preponderance of the evidence that the respondent's past act or acts of isolation of the elder or dependent adult prevented contact with the interested party and that the elder or dependent adult desires contact with the interested party, as specified. The bill would authorize the order to specify the actions to be enjoined, including enjoining the respondent from preventing an interested party from in-person or remote online visits, including telephone and online contact, with the elder or dependent adult. The bill would also include within the definition of protective order after notice and a hearing, a finding that specific debts were incurred as the result of financial abuse of the elder or dependent adult, as specified. The bill would make those provisions operative January 1, 2023. The bill would require the Judicial Council to revise or promulgate forms as necessary to implement those changes on or before February 1, 2023."

5. SB 578 (Jones) Lanterman-Petris-Short Act: Hearings

Status: 9/28/21 Chaptered – Secretary of State – Chapter 389 Statutes of 2021

"Existing law, the Lanterman-Petris-Short Act, authorizes the involuntary commitment and treatment of persons with specified mental health disorders for the protection of the persons so committed, and authorizes a conservator of the person, of the estate, or of the person and the estate to be appointed for a person who is gravely disabled as a result of a mental health disorder or impairment by chronic alcoholism, and designates procedures for hearing a petition for that purpose. Existing law authorizes a party to a hearing under the act to demand that the hearing be public, and be held in a place suitable for attendance by the public.

This bill would require a hearing held under the act to be presumptively closed to the public if that hearing involves the disclosure of confidential information. The bill would authorize the individual who is the subject of the proceeding to demand that the hearing be public, and be held in a place suitable for attendance by the public. The bill would also authorize a judge, hearing officer, or other person conducting the hearing to grant a request by any other party to the proceeding to make the hearing public if the judge, hearing officer, or other person conducting the hearing finds that the public interest in an open hearing clearly outweighs the individual's interest in privacy. The bill would define "hearing" for these purposes to mean any proceeding conducted under the act, as specified."

6. SB 507 (Eggman) Mental Health Services: Assisted Outpatient Treatment

Status: 9/30/21 Chaptered – Secretary of State – Chapter 426 Statutes of 2021

Per the Legislative Counsel's Digest:

"The Assisted Outpatient Treatment Demonstration Project Act of 2002, known as Laura's Law, commencing January 1, 2022, requires each county to offer specified mental health programs, unless a county or group of counties opts out by a resolution passed by the governing body, as specified. Existing law authorizes participating counties to pay for the services provided from moneys distributed to the counties from various continuously appropriated funds, including the Mental Health Services Fund, when included in a county plan, as specified. Existing law authorizes a court in a participating county to order a person who is suffering from mental illness and is the subject of a petition to obtain assisted outpatient treatment if the court makes various findings including, among others, there has been a clinical determination that the person is unlikely to survive safely in the community without supervision, the person's condition is substantially deteriorating, and, in view of the person's treatment history and current behavior, the person is in need of assisted outpatient treatment in order to prevent a relapse or deterioration that would be likely to result in grave disability or serious harm to the person or to others. Existing law requires the petition to be accompanied by an affidavit of a licensed mental health treatment provider. Existing law authorizes the petition to be filed by the county behavioral health director, or the director's designee, in the superior court in the county in which the person who is the subject of the petition is present or reasonably believed to be present, in accordance with prescribed procedures.

This bill would, among other things, instead require that the above-described findings include a clinical determination that the person is unlikely to survive safely in the community without supervision and that the person's condition is substantially deteriorating, or that assisted outpatient treatment is needed to prevent a relapse or deterioration that would be likely to result in grave disability or serious harm to the person or to others. This bill would allow the subject of the petition or the examining mental health professional to appear before the court for testimony by videoconferencing, as specified.

The bill would additionally authorize the filing of a petition to obtain assisted outpatient treatment under the existing petition procedures for a person if the court makes a prescribed determination, including that the person is an eligible conservatee, as defined."

7. SB 539 (Hertzberg) Property Taxation: Taxable Value Transfers

Status: 9/30/21 Chaptered – Secretary of State – Chapter 427 Statutes of 2021

Per the Legislative Counsel's Digest:

"The California Constitution generally limits ad valorem taxes on real property to 1% of the full cash value of that property, defined as the county assessor's

valuation of real property as shown on the 1975–76 tax bill and, thereafter, the appraised value of the property when purchased, newly constructed, or a change in ownership occurs after the 1975 assessment, subject to an annual inflation adjustment not to exceed 2%. Existing property tax law provides that the purchase or transfer of the principal residence, and the first $1,000,000 of other real property, of a transferor in the case of a transfer between parents and their children, or between grandparents and their grandchildren if all the parents of those grandchildren are deceased, is not a "purchase" or "change in ownership" for purposes of determining the "full cash value" of property for taxation.

Existing provisions of the California Constitution, adopted as Proposition 19 by the voters at the November 3, 2020, general election, beginning on and after February 16, 2021, exclude from the terms "purchase" and "change in ownership" for purposes of determining the "full cash value" of property the purchase or transfer of a family home or family farm, as those terms are defined, of the transferor in the case of a transfer between parents and their children, or between grandparents and their grandchildren if all the parents of those grandchildren are deceased, as specified. In the case of a transfer of a family home, existing law requires that the property continue as the family home of the transferee. Existing law authorizes, if certain conditions are fulfilled, the new taxable value, defined as the base year value determined as provided above plus any inflation adjustment, of the purchased or transferred family home or family farm to be the sum of (1) the taxable value of the property, subject to adjustment, as determined as of the date immediately prior to the transfer or purchase, and (2) a portion, if any, of the assessed value of the property, as specified. In the case of property tax benefits provided to a family home under these provisions, existing law requires the transferee to claim the homeowner's or disabled veteran's exemption within one year of the transfer.

This bill would implement these newly adopted constitutional provisions, as provided. The bill would require that the principal residence transferred be the principal residence of the transferor, and that it become the principal residence of the transferee within one year of the transfer. The bill would require, in order to claim the exclusion, that a claim be filed with the assessor. Because the bill would require county assessors to provide new services in relation to family farms, it would impose a state-mandated local program. The bill would require the State Board of Equalization to prescribe a form for claiming eligibility for the exclusion to be filed as provided. The bill would require the State Board of Equalization to adopt emergency regulations in order to implement these provisions, as provided. The bill would also provide that a claim filed under this section is not a public document and is not subject to public inspection, except to specified parties.

Existing property tax law authorizes, pursuant to constitutional authorization, a person over 55 years of age, or any severely and permanently disabled person, who resides in property eligible for the homeowners' exemption to transfer the

base year value of the property to a replacement dwelling, subject to certain conditions and limitations.

Existing provisions of the California Constitution, adopted as Proposition 19, beginning on and after April 1, 2021, instead authorizes an owner who is over 55 years of age, severely disabled, or a victim of a wildfire or natural disaster to transfer the taxable value, defined as the base year value determined as provided above plus any inflation adjustment, of a primary residence eligible for either the homeowner's exemption or the disabled veteran's exemption to a replacement primary residence located anywhere in this state, regardless of the value of the replacement primary residence, that is purchased or newly constructed as that person's principal residence within 2 years of the sale of the original primary residence. Under the California Constitution, a person who is 55 years of age or severely disabled may transfer the taxable value of their primary residence up to 3 times. The California Constitution requires that a person seeking to transfer the taxable value of a primary residence under these provisions file an application, containing specified information, with the assessor of the county in which the replacement primary residence is located.

This bill, in accordance with the above-described constitutional provisions, on and after April 1, 2021, would authorize any person who is over 55 years of age, any severely and permanently disabled person, or a victim of wildfire or natural disaster who resides in property that is eligible for the homeowner's exemption or the disabled veteran's exemption to transfer the taxable value of that property to a replacement dwelling that is purchased or newly constructed as a principal residence within 2 years of the sale of the original property, as provided. The bill would require that any claim be filed within 3 years of the date that the replacement dwelling was purchased or the new construction of the replacement dwelling was completed. The bill would limit a person to 3 transfers of taxable value under these provisions, except with respect to claims filed by victims of wildfire or natural disaster, and would require each county assessor to report quarterly to the State Board of Equalization specified information regarding all approved claims. By adding to the duties of local tax officials with respect to the transfer of the taxable value of real property, this bill would impose a state-mandated local program. The bill would require the State Board of Equalization to adopt emergency regulations in order to implement these provisions, as provided. The bill would also provide that a claim filed under this section is not a public document and is not subject to public inspection, except to specified parties.

Existing constitutional provisions require that a statute that limits the right of access to the meetings of public bodies or the writings of public officials and agencies be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

This bill would make legislative findings to that effect.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

This bill would take effect immediately as a tax levy."

8. SB 667 (Roth) Property Taxation: Disabled Veterans' Exemption

Status: 9/30/21 Chaptered – Secretary of State – Chapter 430 Statutes of 2021

Per the Legislative Counsel's Digest:

"Existing property tax law, pursuant to the authorization of the California Constitution, provides a disabled veterans' property tax exemption for the principal place of residence of a veteran, the veteran's spouse, or the veteran and veteran's spouse jointly, and the unmarried surviving spouse of a veteran, as provided, if the veteran is blind in both eyes, has lost the use of 2 or more limbs, or is totally disabled as a result of injury or disease incurred in military service, or if the veteran has, as a result of a service-connected injury or disease, died while on active duty in military service. Existing property tax law requires any person claiming the disabled veterans' property tax exemption to file a claim, which is required to be filed under penalty of perjury, with the assessor giving any information required by the State Board of Equalization, as provided.

This bill would authorize (1) the executor, administrator, or personal legal representative of the claimant's estate or (2) the trustee of the deceased claimant's trust assets to file a claim with the assessor in the manner described above.

By expanding the duties of local government officials relating to claims for the disabled veterans' property tax exemptions, and by expanding the crime of perjury, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that with regard to certain mandates no reimbursement is required by this act for a specified reason.

With regard to any other mandates, this bill would provide that, if the Commission on State Mandates determines that the bill contains costs so

mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above."

G. CALIFORNIA 2020-2021 ACTIVE LAW REVISION STUDIES AFFECTING PROBATE, TRUST AND ESTATE PLANNING MATTERS

1. Study L-3032.1 – Revocable Transfer on Death Deeds – Follow-Up Study

In 2006, the Commission recommended that California authorize the use of a revocable transfer on death deed, to transfer real property outside of probate. See Revocable Transfer on Death (TOD) Deed, 36 Cal. L. Revision Comm'n Reports 103 (2006).

In 2015, the Legislature enacted AB 690 (Gatto), which largely implemented the Commission's recommendation. See 2015 Cal. Stat. ch. 293. Section 21 of that bill assigned the Commission responsibility to conduct a follow-up study:

> (a) The California Law Revision Commission shall study the effect of California's revocable transfer on death deed set forth in Part 4 (commencing with Section 5600) of Division 5 of the Probate Code and make recommendations in this regard. The commission shall report all of its findings to the Legislature on or before January 1, 2020.
>
> (b) In the study required by subdivision (a), the commission shall address all of the following:
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> (1) Whether the revocable transfer on death deed is working effectively.
> (2) Whether the revocable transfer on death deed should be continued.
> (3) Whether the revocable transfer on death deed is subject to misuse or misunderstanding.
> (4) What changes should be made to the revocable transfer on death deed or the law associated with the deed to improve its effectiveness and to avoid misuse or misunderstanding.
> (5) Whether the revocable transfer on death deed has been used to perpetuate financial abuse on property owners and, if so, how the law associated with the deed should be changed to minimize this abuse.

As Per Memorandum 2021-14 and 2021-18, the results of this study have resulted in chaptered legislation via SB 315 (Roth).

2. Study L-3032.5 – Stock Cooperatives and Uniform TOD Security Registration Act

The California Law Revision Commission is studying whether the Uniform Transfer on Death Security Registration Act could be used as a method to transfer an interest in a stock cooperative, without probate administration.

Per *Tentative Recommendation • April 22, 2021*:

"In 2005, the Law Revision Commission was assigned the task of evaluating whether California should authorize the use of a "beneficiary deed" to transfer real property on death, outside of the probate process.[1] In 2006, the Commission completed its study, recommending that California authorize the use of such an instrument (now known as a revocable transfer on death deed, or RTODD). The recommendation included draft legislation to accomplish that result.[2]

The Commission's recommendation was enacted into law in 2015, with some significant changes to the recommended legislation.[3]

For present purposes, the most important of those changes are as follows:

- A "sunset" provision was added, which would repeal the statute by operation of law on January 1, 2021 (unless the provision were amended or repealed before then).[4]

- The Commission was assigned a new "follow-up" study of the RTODD, to be completed by January 1, 2020. Among other things, the Commission was charged with making a recommendation on whether the sunset date should be extended or removed.[5]

- The statutory definition of real property was revised to significantly narrow 20 the types of property that can be conveyed by RTODD. Condominiums 21 were included in the definition, but other kinds of common interest developments, including stock cooperatives, were not.[6]

In 2016, the scope of the Commission's assigned follow-up study was expanded slightly. Among other things, the Commission was specifically directed to consider whether the RTODD should be able to transfer an interest in a stock

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1 2005 Cal. Stat. ch. 422.
2 *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103 (2006).
3 2015 Cal. Stat. ch. 293.
4 Prob. Code § 5600(c). In 2020, the sunset date was extended by one year, to January 1, 2022. See 2020 Cal. Stat. ch. 238.
5 2015 Cal. Stat. ch. 293, § 21.
6 Prob. Code § 5610.

cooperative.[7] The Commission completed its study of that issue and released a final recommendation in 2019.[8] In that report, the Commission recommended against authorizing the use of an [sic] RTODD to transfer an interest in a stock cooperative. As the Commission explained:

> A stock cooperative is a kind of common interest development where the entirety of the development is owned by a corporation formed for that purpose. The owners of separate interests hold shares in the corporation, which entitle them to the exclusive right to occupy a specified apartment. Owners do not hold title to any part of the development. As a result, ownership of a separate interest in a stock cooperative is not evidenced or conveyed by deed. Instead, it is conveyed by the sale of a share of stock. For that reason, a deed would not be an appropriate instrument to use to transfer ownership of a separate interest in a stock cooperative. A deed conveys title to real property, not the ownership of a share of stock. To avoid any confusion or legal problems that would result from the mismatch between the use of a deed and the form of ownership in a stock cooperative, the Commission recommends that stock cooperatives continue to be excluded from the definition of "real property" that is used in the RTODD statute. That approach would deny owners in stock cooperatives the benefits of using an RTODD. However, it is possible that a share of ownership in a stock cooperative could be transferred on death, outside of probate, under the existing Uniform TOD Security Registration Act. The Commission plans to conduct a separate study of that possibility, under its general authority to study the Probate Code.[9]

The Commission has since been conducting a study to develop a relatively simple method to make a nonprobate transfer on death of an interest in stock cooperative. This tentative recommendation is the product of that study.

While it may be that the existing Uniform TOD Security Registration Act could be used to transfer a share of ownership in a stock cooperative, the Commission does not recommend relying on that approach.

Instead, the Commission recommends the enactment of an entirely new statute that is designed specifically to provide a relatively simple way to make a nonprobate transfer on death of an interest in a stock cooperative. The proposed statute draws heavily on the RTODD statute and on the improvements to that

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7 2016 Cal. Stat. ch. 179.

8 See *Revocable Transfer on Death Deed: Follow-Up Study*, 46 Cal. L. Revision Comm'n Reports 135 (2019).

9 *Id.* at 157 (footnotes omitted).

statute that the Commission recommended in its 2019 follow-up study.[10] Some important adjustments were made to accommodate the special character of ownership of an interest in a stock cooperative."

See http://www.clrc.ca.gov/pub/Misc-Report/TR-L3032.5.pdf.

If you have questions or comments on this study, send an e-mail to Steve Cohen at scohen@clrc.ca.gov.

3. Study L-4100 – Nonprobate Transfers: Creditor Claims and Family Protections

The dominant trend in estate planning and administration over the past half century has been the rise of the nonprobate transfer. A nonprobate transfer is a transfer of property that occurs on the death of the decedent and that passes property to a beneficiary outside of regular probate channels. While the probate process provides well-developed procedures for the payment of a decedent's creditors and for support of a decedent's dependents, those procedures do not apply if the decedent's estate passes entirely outside of probate. The law governing nonprobate transfers does not comprehensively address those concerns.

The Commission's former executive secretary, Nathaniel Sterling, has prepared a comprehensive background study of the treatment of creditor claims and family protections, with respect to property passing outside of probate. The study discusses existing California law and the law of other jurisdictions. It concludes with recommendations for reform.

Per *CLRC Recommendation • May 31, 2019*:

"This recommendation addresses a significant ambiguity in Probate Code Sections 13550 and 13551. These sections concern liability of a surviving spouse to creditors of a deceased spouse.

To explain the proposed reform, it is first necessary to describe the existing statutory scheme and identify the ambiguity in question. The discussion then turns to a 2010 appellate decision on the point. [See *Kircher v. Kircher* (2010), 189 Cal.App.4th 1105.]

Next, the Law Revision Commission analyzes the situation. Based on the work it has done, the Commission recommends revising Section 13551 to make clear that its liability rule only applies to property that a surviving spouse receives pursuant to the part of the Probate Code containing that section (Part 2 of

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[10] Those recommendations are currently before the Legislature in Senate Bill 315 (Roth). The Legislature's decisions regarding those proposed reforms might prompt changes to the parallel provisions in this tentative recommendation.

Division 8, which authorizes distribution to a surviving spouse without administration under certain circumstances)." *Nonprobate Transfers: Liability of a Surviving Spouse Under Probate Code Sections 13550 and 13551*, 46 Cal. L. Revisions Comm'n Reports 11 (2019).

The Commission is conducting a study of the issues discussed in the background study. If you have questions or comments on this study, send an e-mail to Kristin Burford at kburford@clrc.ca.gov.

See http://clrc.ca.gov/pub/Printed-Reports/Pub241-L4100.pdf

4. Study L-4130.3 – Disposition of Estate Without Administration: Liability of Transferee

Per *CLRC* Pre-Print *Recommendation* • *December 3, 2020*:

SUMMARY OF RECOMMENDATION

The Probate Code includes procedures that allow a person to receive property from a decedent's estate without probate administration. This recommendation focuses on two of those procedures, which allow the decedent's devisee or heir to (1) take personal property from a small estate or (2) take real property of small value.

Under those procedures, the transferee is personally liable for the decedent's unsecured debts and is also liable if another person has a "superior right" to the property (i.e., the transferee was not actually the decedent's devisee or heir with respect to the property taken). In addition, if the decedent's estate is being administered, the personal representative can require that transferred property be returned to the estate for use in paying the decedent's obligations or for transfer to a person with a superior right. If the property was taken fraudulently, the transferee is liable for three times the value of the property taken.

This recommendation proposes improvements to those liability rules, including revisions to do the following:

- Eliminate the personal representative's authority to require the return of transferred property to pay the decedent's unsecured debts.

- Replace the property return rule with a provision that makes the transferee personally liable to the decedent's estate for a calculated share of the decedent's unsecured debts.

- Make clear that a transferee's liability for the decedent's unsecured debts includes the decedent's funeral expenses and expenses of last

illness, as well as any wage claims made against the decedent's estate.

- Expressly authorize a transferee to voluntarily return transferred property to the estate for administration. If the personal representative requires the return of transferred property because there is a person with a superior right, any treble damage award for fraud would go to the person with a superior right to the property, rather than to the estate generally. However, the award would first be used to reimburse the estate for the cost of the proceeding to recover the property.

- Existing rules provide for adjustments to the value of transferred property that is returned to the decedent's estate. Those rules would be standardized and generalized.

See http://clrc.ca.gov/pub/Printed-Reports/Pub242-L4130.3.pdf