

TAXATION



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2024 Estate and Gift Tax Conference

Panel 7: The Tip of the Iceberg: How Not to Muck Up An
Estate Plan

Thursday, March 21, 2024

2:25pm - 3:00pm

Speakers: Jenni Harmon

Conference Reference Materials

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The Tip of the Iceberg: How Not To Muck Up An Estate Plan

Jenni L. Harmon

Estate and Gift Tax Conference
Thursday, March 21, 2024
2:25 p.m. – 3:00 p.m.

The Tip of the Iceberg: How Not to Muck Up An Estate Plan

Important tips planners can use to better avoid the ugly “L”-itigation. Learn what to do and what not to do before it’s too late.





Funding Issues

Funding Issues

Cal. Prob. Code §850(a)(3)(B)

(a) The following persons may file a petition requesting that the court make an order under this part:

(3) The trustee or any interested person in any of the following cases:

(A) Where the trustee has a claim to real or personal property, title to or possession of which is held by another.

Funding Issues, continued

Estate of Heggstad

16 Cal.App.4th 943
(1993)

- Holding: it was not necessary for the trustor to transfer the asset into the trust by formal transfer documents where the declaration of trust by the owner was sufficient to create a trust.

Ukkestad v. RBS Asset Finance, Inc.

235 Cal.App.4th 156
(2015)

- Holding: it was not necessary for the trustor to transfer the assets into the trust by formal transfer documents where there was a general assignment by the trustor of all “right, title, and interest” to all of his “real and personal property”.

Kucker v. Kucker

192 Cal.App.4th 90
(2011)

- Holding: where a trustor’s estate plan consists of an inter-vivos trust agreement and a pour-over will, these documents were sufficient to show intent that a trustor’s real and personal property were trust assets.

Expect **MORE**.

Carne v. Worthington

246 Cal.App.4th 548
(2016)

- Holding: a probate court will consider the trust instrument signed by the trustor, as well as ancillary documents, such as general transfer of assets to the trust, when determining which assets are subject to administration by the trustee.

Funding Issues, continued

Estate Planning Tips

- When you meet with your clients, ensure they are providing you with all of their asset information.
- Make sure your client updates you if they obtain new assets that they want included in their trust.
- Prepare and record the deeds transferring real estate to the newly created trust for your clients.
- Provide detailed instructions for retitling assets, including bank and brokerage accounts.



Capacity Issues

Capacity Issues

Testamentary Capacity

- **California Probate Code § 6100.5**
 - A person is not competent to make a will if when the will was made, the individual did not:
 - Have sufficient mental capacity to understand the nature of the testamentary act, or
 - Understand and recollect the nature and situation of the individual's property; or
 - Remember and understand the individual's relations to their living descendants, spouse, and parents, and those whose interests are affected by the will.

Contractual Capacity

- **California Probate Code § 812**
 - A person is considered not to have capacity if he or she cannot effectively communicate regarding a decision.

Capacity Issues, continued

Estate Planning Tips

- Letters written by a doctor with a history of treating the settlor.
- Letters written by a geriatric psychiatrist, that has specialized knowledge in mental capacity evaluations.
- Consider temporal parameters.



Choice of Trustee

Choice of Trustee

Co-Trustees and Unanimous Consent

- In California, unlike most states, co-trustees must make administration decisions by unanimous consent.
- **California Probate Code §15620**
 - Unless otherwise provided in the trust instrument, a power vested in two or more trustees may only be exercised by their unanimous action.

Choice of Trustee, continued

Estate Planning Tips

- Make sure your clients are putting thought into who they are appointing as trustee.
- Think twice about naming more than one person to act.
- If your clients are naming co-trustees, remember the default rule of unanimous consent.
- Discuss the option of appointing a professional and whether it makes sense for your client.

Beneficiary Issues



Beneficiary Issues

Amendments and Special Needs Trusts

- **California Probate Code § 15403(a)**
 - If all beneficiaries of an irrevocable trust consent, they may compel modification of the trust upon petition to the court.
- **California Probate Code §15409(a)**
 - On petition by a trustee or beneficiary, the court may modify the administrative or dispositive provisions of the trust if owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust.

Beneficiary Issues, continued

Estate Planning Tips

- Include flexibility in the estate planning document itself to allow the trustee to establish a special needs trust for a beneficiary's share.

Beneficiary Issues, continued

Attorneys' Fees

- Trust Beneficiaries have to spend their own money to litigate.
- Trust Beneficiaries may not have the resources to fund litigation.
- The California probate code has very few options for attorneys' fee shifting and authority relating to "reasonable" trustee fees.

Beneficiary Issues, continued

Estate Planning Tips

- Discuss with your client the following when putting their plan together:
 - Adding attorneys' fees provisions
 - Adding the hourly rate for trustee's fees or setting forth a mechanism to determine how to calculate trustees' fees.



Tangible Personal Property

Tangible Personal Property

Typical Trust Provision

- On the death of the Surviving Trustor, the Trustee shall distribute the tangible personal property in accordance with the attached Personal Property Memorandum attached hereto as Exhibit B. The Trustee shall distribute the remaining tangible personal property, or all of the tangible personal property to the extent a Personal Property memorandum does not exist, equally to the children of the Trustors, free and discharged of any trust provisions.

Tangible Personal Property, continued

Estate Planning Tips

- Make sure your client keeps any separate writing regarding tangible personal property with the rest of their estate planning documents and sends you a copy to keep in their file.
- Discuss with your client options to include in the trust itself for distributing tangible personal property.
- Have the trust specify what to do if a dispute arises regarding tangible personal property.



Amendments & No Contest Clauses

Amendments & No Contest Clauses

There is a line of recent cases that discuss whether a trustee can use trust funds to defend contests of trusts and amendments or whether doing that violates the trustee's duty of impartiality among competing beneficiaries.

California Probate Code § 16003

- If a trust has two or more beneficiaries, the trustee has a duty to deal impartially with them and shall act impartially in investing and managing the trust property, taking into account any differing interests of the beneficiaries.

California Probate Code § 16247

- Allows Trustees to hire attorneys, accountants, and other agents to advise and assist the trustee in the performance of administrative duties.

Amendments & No Contest Clauses, continued

Whittlesey v. Aiello

104 Cal.App.4th
1221
(2002)

- Holding: to the extent the trustee represents the interests of one side of the contest over the other, the trustee must look to the parties who stand to gain from the litigation for reimbursement, not the trust.

Terry v. Conlon

131 Cal.App.4th
1445
(2005)

- Holding: Because the trustee had not participated as a neutral trustee to defend the trust and protect its assets, she must bear her own costs and fees.

Doolittle v. Exchange Bank

241 Cal.App.4th
529
(2015)

- Holding: a trustee should not defend a contested trust amendment unless the trust instrument expressly authorizes such defense, as such litigation is not considered of benefit and service to the trust.

Zanleuter v. Mueller

88 Cal.App.5th 1294
(2023)

- Holding: trusts may include language to allow the trustee to defend the validity of an amendment, but this trust lacked such authorization and explicitly did not authorize the trustee to defend any amendment.

Amendments & No Contest Clauses, continued

Estate Planning Tips

- When drafting amendments to a trust, ensure that the amendment explicitly authorizes the trustee to defend contests at the trust's expense.

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Jenni L. Harmon practices trust and estate litigation, probate and trust administration, estate planning, taxation, and business transactions. Her comprehensive estate planning services include skillfully crafting tailored plans that include drafting complex estate planning documents, including wills, trusts, special needs trusts, and other key documents to meet the unique needs and goals of her clients.

Jenni navigates the complexities of probating estates, administering trusts, and advising personal representatives, trustees, and beneficiaries to ensure a smooth and compliant process for her clients. Jenni's probate litigation practice involves representing fiduciaries and beneficiaries in all types of trust and estate matters, as well as conservatorships and guardianships. Her skill in this area, combined with her knowledge in taxation and business transactions, makes her a valuable asset to clients looking for well-rounded legal guidance in trusts and estates matters.

Education

Santa Clara University, B.S., Political Science with Pre-Law Emphasis and an Italian Minor
McGeorge School of Law, University of the Pacific, J.D. (with Distinction), Concentration in Tax Law

New York University, E-LL.M., Taxation

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A woman with blonde hair is sitting on a light-colored sofa in a modern office environment. She is wearing a dark blazer and has her hands clasped in her lap. The background shows large windows and office furniture. A large, thick orange circle is overlaid on the image, partially obscuring the woman and the sofa. The text "Thank you." is written in a bold, white, sans-serif font across the center of the image, with a small orange dot at the end of the period.

Thank you.