

# Cal Law Trends and Developments

---

Volume 1970 | Issue 1

Article 12

---

January 1970

## Trusts and Estates

James D. Hill

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/callaw>

 Part of the [Estates and Trusts Commons](#)

---

### Recommended Citation

James D. Hill, *Trusts and Estates*, 1970 Cal Law (1970), <http://digitalcommons.law.ggu.edu/callaw/vol1970/iss1/12>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Cal Law Trends and Developments by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

# *Trusts and Estates*

by *James D. Hill\**

## **I. Introduction**

## **II. Statutory Developments**

### *A. Powers of Appointment*

1. Definition of General Power
2. Exclusive v. Nonexclusive Powers
3. Creditors' Rights
4. Exercise of Powers by the Residuary Clause of Donee's Will

### *B. Trusts*

### *C. Administration of Estates*

### *D. Guardians*

### *E. Time Periods*

\* B.A. 1957, University of Nevada; J.D. 1964, University of Denver. Lecturer, Trusts & Estates, Golden Gate College, School of Law. Member, Colorado, California State Bars.

**CAL LAW 1970**

The author extends his appreciation to Michael A. Gridley, student at Golden Gate College, School of Law, for his assistance in the preparation of this article.

**369**

### III. Judicial Developments

#### A. Trusts

#### B. Estates

1. Capacity to Establish Domicile
2. Estate-Related Torts
3. Will Contests
4. Interpretation of Wills
5. Instructions to Personal Representative
6. Guardians and Conservators

---

### I. Introduction

The most significant development in 1969 in the area of trusts and estates was the codification of the law regarding powers of appointment.<sup>1</sup> Other legislation subjects irrevocable inter vivos trusts to the jurisdiction of the Superior Court.<sup>2</sup> In the area of judicial developments, there were two cases of first impression. *Estate of Pernas*,<sup>3</sup> dealt with the allocation as to principal or income of gains distributed from mutual funds. The other, *Estate of Phillips*,<sup>4</sup> concerned the admission to probate of a will executed by a Californian who had been adjudicated an incompetent in Illinois prior to his coming to California.

### II. Statutory Developments

#### A. Powers of Appointment

The Powers of Appointment Act,<sup>5</sup> which becomes operative on July 1, 1970, is the result of recommendations by the California Law Revision Commission,<sup>6</sup> based on a study<sup>7</sup> by Professor Richard R.B. Powell.<sup>8</sup>

1. Stats. 1969, Chs. 155 and 468.

2. Stats. 1969, Ch. 1172.

3. 268 Cal. App.2d 275, 74 Cal. Rptr. 8 (1968).

4. 269 Cal. App. 2d 656, 75 Cal. Rptr. 301 (1969).

5. Civ. Code §§ 1380.1-1392.1.

6. The commission was directed by Resolution Chapter 130 of the Statutes of 1965 to make a study relating to powers of appointment.

7. *Research Study: Powers of Appointment in California*, 19 *Hast. L.J.* 1281 (1968).

8. Professor of Law, University of California, Hastings College of the Law.

Professor Powell proposed the application of the common law pursuant to *Estate of Sloan*,<sup>9</sup> but with statutory specification of some items. In his study, Professor Powell describes his position:

“There is no need to include in the statute a coverage of all the points possibly litigable concerning powers of appointment. The bar and the courts will be greatly helped, and the public interest will be served, by a statute which does spell out the “common law of California,” on the core points as to which litigation can fairly be anticipated. This will eliminate the need for expensive research into the decisions of England and of our sister states as to the content of the common law on powers. At present the *Restatement of Property* can be regarded as probably a fair presentation of the common law, but a careful lawyer will feel compelled to dig out the decisions and to weigh their conflicting ideas. So also will the careful judge. A declaratory statute will greatly minimize this wasteful process for both the bar and the bench.”<sup>10</sup>

As a result of the Powell study, and recommendations by the Law Revision Commission, the important portions of the common law on powers were codified in the California Civil Code.<sup>11</sup> California now becomes the fourth state<sup>12</sup> in the past six years to codify the common law on powers.

The new Civil Code sections include some departures from the common law, and existing California law, that warrant additional discussion. Four specific areas of departure, suggested by both Professor Powell and the Law Revision Commission, were adopted by the legislature.

9. 7 Cal. App.2d 319, 46 P.2d 1007 (1935). *Estate of Sloan* held the common law of powers of appointment to be in effect in California unless modified by statute. This included the earlier common-law preference for nonexclusive powers that was directly contrary to the “modern” common-law preference.

10. *Research Study: Powers of Appointment in California*, 19 *Hast. L.J.* 1281 at 1293 (1968).

11. Civ. Code §§ 1380.1–1392.1.

12. The three recent enactments were in New York (1964), Wisconsin (1965), and Michigan (1967).

## 1. Definition of General Power

The federal and state death tax statutes have long been guides to attorneys in defining the terms *general* and *special* powers. These definitions differ from the common law. In an effort to adopt a definition consistent with prevailing views, section 1381.2 departs from the common law and uses definitions set forth in the Internal Revenue Code of 1954,<sup>13</sup> and the California Revenue and Taxation Code.<sup>14</sup> A similar provision was adopted by New York, Wisconsin, and Michigan in their recent statute revisions.

## 2. Exclusive v. Nonexclusive Powers

The modern common-law preference for donees with special powers is to allow them to choose freely among the permissible appointees unless the donor states a contrary intent. This is known as an "exclusive" power in the donee. *Estate of Sloan*<sup>15</sup> held that California's preference is for a "nonexclusive" power in the donee of a special power. This meant that the donee had to give something to each permissible appointee, whether or not this was the intention of the donor.

Section 1387.3 adopts the modern preference of exclusive powers, but allows the donor to specify a minimum or maximum to one or more appointees. This reverses the holding of *Sloan*.<sup>16</sup>

## 3. Creditors' Rights

Under the common law, creditors of a donee of a general power had limited rights. It was presumed that the donee had no rights of ownership and that the appointee took directly from the donor.<sup>17</sup> Thus, it was difficult for a creditor to reach

13. I.R.C. 1954 § 2091(b)(1).

14. Rev. & Tax. Code § 13692 (1965).

15. 7 Cal. App.2d —, 46 P.2d 1007 (1935).

16. 7 Cal. App.2d —, 46 P.2d 1007 (1955). See also *Research Study: Pow-*

*ers of Appointment in California*, 19 Hast. L.J. 1281 at 1296 (1968).

17. *Research Study: Powers of Appointment in California*, 19 Hast. L.J. 1281 at 1294 (1968).

appointive assets. Today, a donee with a general power of appointment, whether exercised or not, has the equivalent of a fee simple over the appointive assets because of Section 2041 of the Internal Revenue Code.<sup>18</sup> It seems inequitable to allow such property to be free from the claims of creditors of the donee. To remedy this, a portion of the new statute<sup>19</sup> states that when the donee's other property is inadequate to satisfy the claims of creditors, property subject to a general power may be reached. This statute corresponds with ones recently enacted in New York (1964), Wisconsin (1965), and Michigan (1967).<sup>20</sup>

#### 4. Exercise of Powers by the Residuary Clause of Donee's Will

The rule of California Probate Code section 125<sup>1</sup> is the exact opposite of the common-law rule.<sup>2</sup> Professor Powell recommended that this section be revised or eliminated in an effort to abrogate the harsh results that occurred in *Estate of Carter*.<sup>3</sup> In *Carter*, the testator-donee of a general testamentary power did not exercise the power. There was very convincing evidence, *apart from the will*, that the donee did not intend to exercise the power. However, the Supreme Court of California interpreted Probate Code section 125 to mean that a residuary clause in a will exercises a general power unless there is language contained *within the will* to indicate a contrary intent, or the donor has required the donee to make specific reference to the power in the will.<sup>4</sup>

18. Section 2041(b)(1) defines a "general power of appointment" as meaning a power that is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate with certain stated exceptions.

19. Civ. Code § 1390.3.

20. *Research Study: Powers of Appointment in California*, 19 *Hast. L.J.* 1281 at 1295 (1968).

1. "A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms de-

noting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death, including property embraced in a power to devise." *Stats* 1931, Ch. 2 § 1, p. 594, § 125.

2. *Research Study: Powers of Appointment in California*, 19 *Hast. L.J.* 1281 at 1291 (1968).

3. 47 *Cal.2d* 200, 302 P.2d 301 (1956.)

4. 47 *Cal.2d* 200, 204-205, 302 P.2d 301, 304.

The exercise of a power by a residuary clause is now covered by Civil Code section 1386.2. This section will allow introduction of evidence apart from the will to prove the donee's intent. Amendments to Probate Code sections 125 and 126 now make these sections inoperative with respect to powers of appointment.<sup>5</sup>

### B. Trusts

A new act, relating to the administration of inter vivos trusts, will become operative on November 1, 1970.<sup>6</sup> The act will vest the Superior Court with jurisdiction over irrevocable inter vivos trusts if the trust instrument specifically so provides, or if the trustee petitions the Court to assume jurisdiction of all or part of the trust under the act. It must be noted, however, that a trust instrument may prohibit the application of the act to all or a part of the trust.

Two new code sections were added in 1969, relating to community property in trust.<sup>7</sup> Civil Code section 5113.5,<sup>8</sup> states that when a husband and wife transfer community property into certain revocable trusts, their respective interests shall remain community property, unless the trust expressly provides otherwise. However, when the trust instrument provides a means of distribution in the event of death, new Probate Code section 204 provides that the provisions of the trust must prevail, notwithstanding the spouses' rights under Probate Code sections 201, 202 and 203.

### C. Administration of Estates

The work of executors and administrators may be lessened due to the following code changes:

1. Where the decedent left an undivided interest in property, the executor or administrator of an estate is now allowed,

5. Probate Code §§ 125 and 126 were amended as part of the Powers of Appointment Act to specifically exempt them from applying to powers of appointment.

6. Probate Code §§ 1137-1137.14.

7. Civ. Code § 5113.5 and Probate Code § 204. For a further discussion, see Gouff, *Community Property and Family Law*.

8. Former Civ. Code § 164.8.

pursuant to Probate Code section 575, to maintain an action for *partition* without first obtaining court authority.

2. When it is shown to be in the best interest of an estate to exchange any property of the estate, the court may allow such an exchange after the requirements under section 1200 have been met. This procedure, under section 860 of the Probate Code, has been amended to allow the court to shorten the notice period or dispense with it completely when the exchange of stocks, bonds, or other securities, as defined in section 771, is for different stocks, bonds, or securities.

3. There are two instances under Probate Code section 842, when estate property may be leased for a period of more than ten years: a lease for the purpose of production of minerals, oil, gas, or other hydrocarbon substances, and a lease for the growing of asparagus. Section 842.1 was added in 1969, to allow the court to authorize the giving of a lease for over ten years on any estate property if it is agreeable with all persons interested in the estate; however, if any interested person objects, the court shall not make the order.

4. In 1969, section 760.5 was added to the Probate Code, to allow an executor or administrator to contract with an auctioneer to secure purchasers for any tangible personal property of an estate. Title to the property will pass upon receipt of the purchase price and delivery to the buyer, but the personal representative will be liable for the actual value until confirmation by the court.

#### D. *Guardians*

By amendment of section 1402 of the Probate Code,<sup>9</sup> it is now possible for *any* person, not just parents, to appoint *by will* a guardian for the estate that they are leaving to a minor. This will allow the testator to choose a guardian to handle the

<sup>9</sup> Stats. 1969, Ch. 563, p. 231. "A parent may appoint a guardian by will or by deed for the property of any child of such parent, living or likely to be born, which such child may take from such parent by will or succession, and

any person may in a will appoint a guardian for the property of any minor, living or likely to be born, which such minor may take from such person by such will."



particular property whom he feels will have the best interest of the minor in mind.

### E. *Time Periods*

A reduction in the time required to probate an estate appears the goal of the legislature, which has reduced many time-period requirements of the Probate Code.

1. A person eligible to contest a will after probate must do so within 4 months after such probate, rather than the 6 months previously allowed, according to revisions in Probate Code sections 380 and 384.

2. In keeping with last year's shortening of the time for creditors to file claims, in 1969 section 702 was similarly changed to reduce from 6 months to 4 months the time creditors have to file claims because of a delayed filing of affidavit of publication.

3. When 2 months have elapsed after the first publication of notice to creditors, it is now possible under section 1000, to petition for preliminary distribution, and, under section 1080, to file a petition to determine heirship. This is a change from 3 months and 4 months, respectively.

## III. **Judicial Developments**

### A. *Trusts*

Elvira Pernas, the testator in *Estate of Pernas*,<sup>10</sup> died in 1953, leaving a will that created a testamentary trust. The trust named William A. Evans as a life beneficiary, with the remainder to three charitable organizations, but made no indication of the testatrix's intent as to the allocation between principal and income. The principal assets of the trust were shares of corporations commonly known as mutual funds.

During a 12-year period, the trustee became entitled to receive either cash or additional shares as distribution of capital

<sup>10</sup> 268 Cal. App.2d 275, 74 Cal. Rptr. 8 (1968).

gains realized by the fund. In each instance, the trustee chose to receive shares rather than cash. These shares were always allocated to the principal of the trust.

On the filing of an accounting reflecting the trustee's allocation, the life beneficiary objected. The remaindermen appealed from the trial court's order that the capital gains distribution should have been allocated to income and disbursed to the life beneficiary.

The decision in the *Pernas* case rests on an interpretation of the Principal and Income Act prior to its modification by the legislature in 1967. The present statute provides:

"Distributions made from ordinary income by a regulated investment company or by a trust qualifying and electing to be taxed under federal law as a real estate investment trust are income. All other distributions made by the company or trust, including distributions from capital gains, depreciations, or depletion, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares, are principal."<sup>11</sup>

The Code also provides that in all other cases where the trustee has the option of receiving a dividend in either cash or shares, the dividend shall be considered as cash and deemed income, irrespective of the choice made by the trustee. Excepted are distributions from regulated-investment companies or real estate investment trusts. Prior to this 1967 change in the statute, the code provided:

"Where the trustee shall have the option of receiving a dividend either in cash or in the shares of the declaring corporation, it shall be considered as a cash dividend and deemed income, irrespective of the choice made by the trustee."<sup>12</sup>

The Court held that the 1967 amendment was expressly intended to change the law with respect to the allocation of distributions from mutual funds. Therefore, distributions of

11. Civ. Code § 730.06(c).

12. Civ. Code § 730.07(b)(1) prior to Amendment, Stats. 1967, Ch. 726.

capital gains, whether in cash or shares, prior to 1967 were deemed to be income, and the trial court's opinion was affirmed.

*Estate of Talbot*,<sup>13</sup> a subsequent case also involving allocation of principal and income, involved stock in General Motors and Du Pont, rather than in an investment company. In *Talbot*, the trust res included shares of stock in E.I. du Pont de Nemours, Inc. The du Pont Corporation owned a large block of shares in General Motors Corporation. As a result of antitrust litigation, the United States Government was able to compel du Pont to distribute all of its General Motors stock to its shareholders.

The trustee of the *Talbot* trust received 544 shares of General Motors stock by virtue of its ownership of du Pont shares. The trustee chose to treat the General Motors stock as principal rather than income available for a life tenant. In the absence of a clear expression of intent on the part of the testator creating the trust, the Court was required to determine whether the General Motors shares should be treated as principal or income.

Inasmuch as the trust had been created in 1931, and the principal and income statute<sup>14</sup> is applicable only to trusts established after 1941, the statute had no application to this case. The Court applied the Pennsylvania rule,<sup>15</sup> which was the law in California at the time of the creation of the *Talbot* trust. The Court also found persuasive authority in the Restatement<sup>16</sup> for the proposition that an involuntary corporate

13. 269 Cal. App.2d 526, 74 Cal. Rptr. 920 (1969).

14. Cal. Civ. Code § 730.02, was repealed by Cal. Stats. 1967, Ch. 1508 § 1, p. 3576, operative July 1, 1968. See § 730.15.

15. The Pennsylvania rule disregards the character of that received, such as cash dividend, stock dividend, or distribution of assets, and considers, rather, the period of time during which the dividend or distribution was earned by the corporation. That which is found

to be earned *only* before the commencement of a life estate is allocated to the corpus of the trust, while earnings wholly earned *after* a life estate commenced is allocated entirely to income. In the event that the earnings do not fall clearly into either category but are from both periods of time, a proper apportionment is made between principal and income.

16. "Where a corporation is directed by public authority to cease to hold shares of a subsidiary corporation, and

distribution is a distribution of principal rather than income, and noted that the California principal and income statute,<sup>17</sup> while inapplicable, provides that distribution made pursuant to a court decree belong to principal rather than income. Finally, the Court pointed out that the relative status of the life tenant and the remaindermen have remained unchanged inasmuch as the life tenant will continue to receive the income, although a portion of the dividends received in the trust will now flow from the General Motors Corporation rather than the Du Pont Corporation. Based on the foregoing, the Court held that the shares of General Motors Corporation that were distributed were a portion of the principal and were not allocable to income.

## B. Estates

### 1. Capacity to Establish Domicile

In *Estate of Phillips*,<sup>18</sup> the Court held that an adjudicated incompetent may change his legal domicile if he has sufficient mental capacity to select and adopt a new one. Declared incompetent in 1964 in Illinois, the decedent subsequently made two trips to California; the first a visit of one month, the latter for eleven months, terminated by his death. A few weeks prior to his death, he executed a will in which he stated, "I have now changed my domicile and residence to the State of California." That will was offered for probate by the named executor. Objections were filed by the Illinois appointed conservator of the person and estate of the decedent.

The basis for objection was the lack of capacity of an incompetent to change his place of residence. The Court noted that residence, as used in the appropriate Probate Code section,<sup>19</sup> is synonymous with domicile. The Court, in its opinion, uses the two terms interchangeably.

it distributes such shares among its share holders, such distribution may be held to be in the nature of a partial liquidation and allocable to principal." Restatement, Trusts, 2d, § 236 (E).

17. Cal. Civ. Code § 730.06(b)(3).

18. 269 Cal. App.2d 656, 75 Cal. Rptr. 301 (1969).

19. Probate Code § 301.

The acquisition of a new domicile, as defined by the Court, requires a physical change of residence, accompanied by an intent to make such change permanent or indefinite. In affirming the trial court decision to admit the will to probate, the Court of Appeal relied on the Restatement of Conflicts.<sup>20</sup> While this situation has not previously arisen in California, the majority view from other jurisdictions, as expressed in the Restatement, is as follows:

“A person who is mentally deficient or of unsound mind can acquire a domicile as if he had normal mental capacity if he is able to choose a home.”<sup>1</sup>

The Court also relied on the analogous law in California holding that the fact of adjudication of incompetency does not warrant a finding of lack of testamentary capacity without other evidence. The court held:

“. . . If an incompetent has the capacity to make a valid will under certain circumstances, he may also have the capacity to decide the place of his domicile if he is otherwise mentally alert and capable of choosing this home.”<sup>2</sup>

## 2. Estate-Related Torts

In *MacDonald v. Joslyn*,<sup>3</sup> the decedent left an estate in excess of \$10,000,000. His eldest son requested that the hearing on the petition for probate of the will be postponed for two months. On the arrival of the new date for the hearing, the son filed a contest of the will on the grounds of fraud and undue influence. Six months later, after having discharged two successive attorneys and obtaining *in propria persona* a postponement of the trial on the contest, a voluntary dismissal was filed. Subsequently, the executor named in the decedent's

20. Restatement, Conflict of Laws, § 40 (1934).

1. Restatement, Conflict of Laws, § 40 (1934).

2. 269 Cal. App.2d 656, 665, 75 Cal. Rptr. 301, 307.

3. 275 Cal. App.2d —, 79 Cal. Rptr. 707 (1969). For further discussion of this case, see York, REMEDIES, in this volume.

will filed an action for damages, based on malicious prosecution, for loss of executor's commissions, loss of trustee's fees, injury to his reputation, and mental anguish.

Generally, a cause of action based on malicious prosecution requires a plaintiff to have obtained favorable termination in a prior proceeding in which he was a defendant. The Court divided its comments on these prerequisites into two areas: being a defendant in a prior proceeding, and a favorable termination. The court said:

“When the will contest was filed, the petitioner became in one sense a ‘defendant’ for the purposes of the trial of the contest. He was a person who was aggrieved by the conduct of the contestant who had filed the contest for a spiteful purpose and without probable cause.”<sup>4</sup>

The Court went on to say that a favorable termination need not have been a final determination of the controversy, because voluntary dismissal is a favorable termination even though it is made “without prejudice.” The judgment of the trial court, awarding the decedent's intended executor the amount of commissions lost by the appointment of a public administrator during the pendency of the will contest was affirmed.

Another estate-related tort case in *Heyer v. Flaig*,<sup>5</sup> involving the negligence of an attorney in drafting a will. The sole question was the commencement of running of the statute of limitations against the claim of the testatrix's intended beneficiaries. She had consulted her attorney, Flaig, prior to her marriage, disclosing her nuptial plans and requesting that a will be prepared leaving her entire estate to her two daughters. Flaig, the defendant here, apparently did not advise the testatrix of the consequences of a posttestamentary marriage. Ten days after the execution of the will prepared for her by

4. 275 Cal. App.2d —, —, 79 Cal. Rptr. —, cites Probate Code § 371: “On the trial (of the will contest), the contestant is plaintiff and the petitioner is defendant. . . .”

5. 70 Cal.2d 223, 74 Cal. Rptr. 225, 449 P.2d 161 (1969). For further discussion of this case, see Moreau, TORTS, in this volume.

Flaig, testatrix married. Six months later, she died, and her recently acquired spouse claimed a portion of her estate.<sup>6</sup>

The two daughters, who were the intended beneficiaries, brought an action against Flaig more than 2 years after the drafting of the will, but within 2 years from the testatrix's death. The State Supreme Court held that the attorney drafting the will had a continuing duty to the testatrix to give effect to her testamentary wishes. The damage caused by his negligence was only potential until the testatrix's death, which prevented its correction. The Court said:

"Because defendant owed plaintiffs this continuing duty the cause of action did not accrue nor the statute of limitations commence to run until the defendant's negligence became irremediable."<sup>7</sup>

More important, perhaps, are the Court's comments on the rights of the intended beneficiaries to bring such an action. The right had been previously established in the earlier case of *Lucas v. Hamm*.<sup>8</sup> However, the Court appears to have enlarged the scope of liability to persons not in privity with one who, *ex delicto*, breaches a duty arising out of a contract. While the rule set forth in *Lucas* would have been a sufficient basis to uphold liability here, the Court further cites *Connor v. Great Western Sav. & Loan Assn.*,<sup>9</sup> for the proposition that "liability may flow from relationships which are not expressed by contract between the parties not in 'privity' with each other . . . ."<sup>10</sup> This thread of logic may be extended to other areas of the law in the future.

### 3. Will Contests

In addition to the contest-related tort action of *MacDonald v. Joslyn*, there were several other will-contest matters

6. His claim was based on Probate Code § 70.

7. 70 Cal.2d 225, 230, 74 Cal. Rptr. 225, 229, 449 P.2d 161, 165 (1969).

8. 56 Cal.2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961) cert. den. 368 U.S. 987, 7 L.Ed.2d 525, 82 S.Ct. 603.

9. 69 Cal.2d 850, 73 Cal. Rptr. 369, 447 P.2d 609 (1968).

10. 70 Cal. 2d 223, 228, 74 Cal. Rptr. 225, 228, 449 P.2d 161, 164 (1969).

that warrant comment. *Estate of Collins*<sup>11</sup> dealt with the assignment of one's interest in an estate solely for the purpose of contesting a will. Simply stated, the appellant in *Collins* sought out relatives of a testator and obtained assignments so he could commence will contests. While the right to contest a will may be assigned by an heir,<sup>12</sup> assignments made to heir hunters are against public policy and therefore void. Because the validity of an assignment that would enable one to commence a will contest depends on the facts of each individual case, it is difficult to set forth a universal rule of law. Here, the Court described that fact as follows:

“ . . . when a non-lawyer acts for prospective beneficiaries under arrangements providing for his payment of litigation expenses and the non-lawyer controls the litigation instituted on behalf of the beneficiaries, such procedure amounts to commercial exploitation of the legal profession.”<sup>13</sup>

Therefore, if a will contest is brought by an assignee, one of the first areas of inquiry on the part of the attorney representing the proponents of the will should be the facts surrounding the assignment. The *Collins* case holds that it is proper to determine the validity of the assignment prior to a determination on the merits of the contest.

To successfully contest a will on the ground of undue influence, it must be shown, in addition to the other requisite factors of confidential relationship and undue benefit, that the benefitting person actually participated in the preparation of the will. *Estate of Kerner*,<sup>14</sup> turned on such a point. There, the deceased had the advice of an attorney who prepared his will. The attorney's declaration in support of a motion for summary judgment averred that he was never contacted by the persons who were alleged to have exerted undue influence over the testator. The Court said:

**11.** 268 Cal. App.2d 86, 73 Cal. Rptr. 599 (1968).

**12.** 4 Witkin, *Summary of Cal. Law*, p. 3230 (1960).

**CAL LAW 1970**

**13.** 268 Cal. App.2d 86, 91, 73 Cal. Rptr. 599, 602 (1968).

**14.** 275 Cal. App.2d —, 80 Cal. Rptr. 289 (1969).



“Accordingly, if the person alleged to have exerted undue influence has not actively participated in the preparation or execution of the will, undue influence is not established, even though such person may have been in a confidential relationship with the testator and have unduly profited from the will.”<sup>15</sup>

No affidavits or declarations having been filed in opposition to the motion, summary judgment was granted and affirmed on appeal.

#### 4. Interpretation of Wills

*Estate of Becker*<sup>16</sup> involved a controversy between intestacy laws and the terms of a will. Subsequent to execution of her will, the testatrix had purchased nonrefundable annuities. A suit by the administratrix to recover the purchase price of the annuities based on the testatrix’s incompetency was settled for \$25,000. The question was whether these funds passed under the terms of the will to a charitable trust or by intestacy. The will had used the words “all income from my several bank accounts, also all income derived from all my stocks . . .” in making the bequest.

Clearly, the fund in controversy did not fall into either category specified in the will. Therefore, the Court considered whether the words “all income” were words of limitation or words of enlargement. The Court said:

“ . . . if the words derived from my several bank accounts, also all income derived from my stocks are construed as words of enlargement then the words merely indicate two sources from which income may be derived and do not exclude other sources of income.”<sup>17</sup>

The opinion quotes at length from *Page On Wills*<sup>18</sup> in pointing out when two inconsistent descriptions are contained within

**15.** 275 Cal. App.2d —, —, 80 Cal. Rptr. 289, 291.

**16.** 270 Cal. App.2d 31, 75 Cal. Rptr. 359 (1969).

**17.** 270 Cal. App.2d 31, 35, 75 Cal. Rptr. 359, 361.

**18.** *Page on Wills* (New Rev.) § 33.34.

a will, one general and the other more particular, the court must give effect to the testator's intent as ascertained from the entire will. From a latter portion of the will appointing an executor of "all above properties," the Court concluded that the testatrix intended to dispose of her entire estate, including those funds acquired after her death. Thus, the after-acquired assets passed under the terms of the will.

### 5. Instructions to Personal Representative

The right to petition the Court for instructions pursuant to the Probate Code<sup>19</sup> was before the Court in *Estate of Webb*.<sup>20</sup> The decedent's stepdaughter, a legatee named in the will, petitioned the Court for instructions to the administrator. The petition was denied on the basis that only the legal representative of the estate may petition the court for instructions. This type of relief is not available to one who is merely a legatee.

In *Estate of Pratt*,<sup>1</sup> a Court exceeded its jurisdiction in ordering the occupant of estate property to either vacate or post a bond for the rental value pending a determination of title to the property. A special administrator had been appointed pending a determination of multiple contests to several documents, each purporting to be the last will of a deceased who left no heirs. The ultimate decision of the contests was required to ascertain the distributee of certain real property that was an asset of the estate. One person, claiming a right to the property under one of the contested documents, occupied the property. After a petition for instructions by the special administrator, the Court ordered the occupant to either vacate the property or post a bond to secure the payment of the reasonable rental value in the event the occupant was found to have no right to the property.

The reviewing court<sup>2</sup> stated that between the special administrator and persons not related to the deceased by blood, the sole right to possession is in the administrator. The opinion goes on to say that since the Probate Court had no juris-

19. Probate Code § 88.

20. 269 Cal. App.2d 172, 74 Cal. Rptr. 710 (1969).

1. 274 Cal. App.2d —, 79 Cal. Rptr. 495 (1969).

2. Citing Probate Code § 581.

diction to determine title to the property between the administrator and the claimant, the Court's order exceeded its jurisdiction. A petition for instructions was the proper manner for the administrator to obtain directions from the Court as to whether the property should be rented, and if so, the terms of such rental. Thus armed with such instructions, the administrator could negotiate with the occupant for a suitable rental agreement. The Court states that failing there, the administrator's sole remedy would be a plenary action at law against the occupant, presumably for unlawful detainer.

## 6. Guardians and Conservators

Only a person interested in the well-being of a conservatee may object to the termination of a conservatorship, was the holding in *Conservatorship of the Estate of Stewart*.<sup>3</sup> The conservatee, upon recovery from a heart condition that caused his estate to be placed in a conservatorship, filed his petition for its termination. Objections were made by parties who claimed damages for breach of contract. The Court pointed out that in a conservatorship, title to the estate does not vest in the conservator. Rather, the conservator acts as an agent for the conservatee. Whatever rights objectors had against the estate during the conservatorship continue against the conservatee after his restoration to capacity. The Court's order discharging the conservator operates only between the two parties to the conservatorship, that is, the conservator and conservatee. Because the rights of the creditors or claimants are preserved, such persons do not have standing to object to the termination of the conservatorship.

*Estate of Ehle*<sup>4</sup> held that the attorney for the guardian may recover attorney's fees from the guardianship without filing a creditor's claim in the estate of the deceased when a ward dies leaving an estate to be probated. The attorney, having commenced a suit based on a denied claim in the estate of a deceased, subsequently requested fees in the petition and final accounting in the guardianship. The Court said:

3. 276 Cal. App.2d —, 80 Cal. Rptr. 738 (1969).

4. 267 Cal. App.2d 24, 72 Cal. Rptr. 474 (1968).

“Attorneys’ fees for services rendered to the guardian on behalf of the ward and the estate of the guardianship are proper expenses of the guardian to be paid out of the guardianship assets, and it is not necessary to file a claim therefore in the estate of a deceased ward in order to protect the right to enforce a claim for such services in the guardianship proceedings.”<sup>5</sup>

To further secure the payment of a proper expense of the guardianship, the Court will impose a lien on the estate in the event the assets have been transferred to an administrator or executor.

5. 267 Cal. App.2d 24, 29, 72 Cal. Rptr. 474, 477-478.

\*