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Enough about Avoiding Probate ... , Let's Avoid Probate Litigation!

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Estate Planning Council of Diablo Valley
Enough about Avoiding Probate..., Let's Avoid Probate Litigation!
Hon. Marshall Whitley (Ret.)

February 15, 2017

Good Evening EPCDV and thank you Tim (Hyden) for that gracious introduction. And, thank you Amanda (Sinclair) for asking me to speak today. I would like to talk with you this evening about what many Americans have accepted as a prime directive, and that is that estate plans should be structured to avoid probate. As you may know this idea began to spread nationally in 1965 with Norman Dacey's best seller "How to Avoid Probate." Some may recall that this book outsold Master's & Johnson's book entitled "Human Sexual Response" which prompted one book critic to quip that How to Avoid Probate was more popular than sex.

Dacey's book argued that probate serves no purpose, takes too long, and permits lawyers and personal representatives to enrich themselves at the expense of decedents and their loved ones. What soon followed was a sea change shift by middle income Americans from using wills as the preferred method of testamentary dispositions to revocable living (inter vivos) trusts. As Prof David Horton of UC Davis Law School noted in his award winning article entitled "In Partial Defense of Probate: Evidence from Alameda County California."

"Everyone from seasoned practitioners to vendors of do-it-yourself estate planning kits to sketchy "trust mills" capitalized on our "near obsession with avoiding probate"

Now, over 50 years later has this movement of probate avoidance been successful? Has the probate court become unnecessary in the transfer of wealth from the dead to the living; and has that transfer process become more swift and efficient both in time and cost? My answer is an unqualified – Yes and No!

On the one hand, I believe the probate procedures for decedents' estates have become more user-friendly and efficient. Arguably the judicial council forms help streamline some of the filings; due execution will formalities have relaxed somewhat allowing some outlier documents to be

probated; technology has helped with notices and communications of all types; the Independent Administration of Estates Act gives personal representatives more freedom to carry out their duties without court involvement; the ability to make preliminary distributions addresses many delay concerns; and the required court status reports help keep these matters on the radar and bring them to a close. In fact Professor Horton's study revealed that almost two-thirds of the probate estates concluded in 10 months or less, with the shortest time a little over 5 months.

However, from the perspective of the Probate Courts, they long for the days where the straightforward estate administration was the prevailing state of things. Instead, as people have opted for living trusts over wills the number of wills filed for probate have decreased. In and of itself this is a good thing. With the thinning of these cases from the dockets of the Probate courts coupled with the streamlining of some of the procedures matters could move through more efficiently and with the need for fewer court resources. The problem though is with "the rest of the story."

The statistics for the past 20 years (which was as far back as I could get for this talk) show that the statewide total of Probate case filings each year have remained fairly constant at between 45 and 50 thousand. So, while there has been a reduction in the filing of estate administrations, this decrease in cases filed has been more than made up by the influx of trust filings. Many of which are emotionally charged and hotly contested litigated matters that have festered for months and years before being brought to Probate court for intervention. These types of cases bring to the Probate courts the complexities of civil litigation and the internecine warfare of family law disputes.

In the ten years from 2003 to 2013 that I handled probate matters in Alameda County the percentage of the probate calendar devoted to trust petitions, most of which were contested, doubled from approximately 20 percent to 40 percent. In other words, trust petitions went from 1 out of every 5 petitions filed in the probate department to 2 out of every 5. During that same time the percentage of the court's contested matters calendar that was trust litigation tripled from 25 percent to 75 percent. Not to be outdone, my colleagues in Los Angeles reported to me that

during this same period the percentage of their contested case calendars attributable to Trust litigation increased to 90%.

And, there is “double whammy” effect at play here in that all this has been happening during a time of fewer and fewer resources available to the California superior courts and the Probate Departments in particular since they are lower priority after criminal, civil, family, and juvie. Probate often has to vie with traffic for what is left over.

The bottom line is that the Probate departments of our superior courts have largely become the domain of protracted trust litigation, without sufficient resources to adequately manage and resolve these matters.

But what about the trust estates and the beneficiaries who find themselves embroiled in litigation at a time of grief and heightened emotions and sensitivities? For many they are the victims of a private wealth transfer process gone awry. For them the mantra to avoid probate has a hollow ring to it.

There is even a “triple whammy” that could come into play that these beneficiaries face when litigating certain types of trust disputes. Quite often the litigation seeks to invalidate all or a portion of the trust instrument due to lack of capacity, undue influence, financial elder abuse, or all three.

In my 20 years as a trial judge I handled all manner of civil and criminal cases and I can say without hesitation that these causes of action can be among the toughest to prove and to defend, particularly if the allegations relate to a decedent as opposed to a living person.

In most cases involving family members the transactions in question are not entirely clear and the truths about the decedent’s motivations are long dead and buried. What is left is a purely circumstantial case supported by much self serving “he said she said” testimony. In addition, given the murky burden of proof standards and the somewhat mysterious common law shifting

of the burden in undue influence cases, a reliable evaluation of the likelihood of success on either side of the issues is difficult and elusive.

And for the defendant the stakes are high. A loss could mean multiple damage awards and an order to pay substantial attorney fees. And, as many of you know the jousting over what constitutes reasonable and awardable attorney fees can take on a life of its own after the litigation has ended.

In sum, parties and lawyers involved in these types of disputes are in the highest of risk categories and should be highly motivated to resolve through means other than litigation.

How then can we tinker with these living trusts so that they best avoid probate **and** probate litigation?

First, what are some things to consider at the planning and drafting phase?

Broadly and simply speaking, the settlor wants three things:

1. To maintain control and use of assets during life;
2. Minimize or eliminate taxes at death; and
3. Pass property to beneficiaries pursuant to the trust terms via a smooth, economical, & efficient trust administration *that avoids Probate **AND PROBATE COURT (aka LITIGATION)***.

It is the third thing that generates the “bones of contention” that have been the subjects of much probate litigation. These litigated matters revealed that what was missing or not sufficiently developed during planning and drafting were the following:

- a. Insufficient pre-death disclosure to and discussion with beneficiaries/successor Trustee so as to achieve “buy-in” regarding unexpected/unequal dispositions or gifts to charities
- b. Selection of successor Trustees who are the “wrong” family members, or a non family member whose neutrality or fairness is questioned.
- c. Naming two or more co-trustees to serve together who have dysfunctional relationships.
- d. The above successor trustee issues and no 3rd party trust advisor or protector

- e. Failure to make it crystal clear to successor trustees the importance and procedures for providing the notification of PC 16061.7 thru .9
- f. Successor Trustees who neglect or violate their fiduciary duties and responsibilities and few, if any, “safeguards” in the trust instrument

It is probably true that most settlors want to get the estate planning, drafting, and execution of the documents over with as quickly, painlessly, and inexpensively as possible. However, many costly disputes can be prevented or more easily diffused with as much focus as is practicable on what is likely to happen during post death administration. A checklist could include:

- a. Persuading settlor to fully or at least partially disclose their estate plan to beneficiaries and even involve them in its development and creation. Of course all involved must understand who is the client being represented and who is not, who shares the attorney-client confidence and who does not, and to whom the attorney’s duties are owed.
 - These ethical issues must be made clear to beneficiaries that they are owed no duty of confidentiality, loyalty, competence, communication, or to avoid conflicts of interest. *Baker Manock & Jensen v Sup. Court* (2009) 175 CA4th 1414
 - However, the drafting attorney could be liable to a specific beneficiary for negligence or breach of contract as a 3rd party intended beneficiary of a contract between the settlor and the attorney to plan and draft competently. *Lucas v Hamm* (1961) 56 C2d 583
 - The logistics of the disclosure and involvement of beneficiaries is often a sensitive matter that must be discussed and determined. The inclusion of some and not others could cause bad feelings, retaliation, or unwanted confrontations.
- b. The number of disputes based on lack of mental capacity, fraud, forgery, and even disagreements over the meaning and intent of a given provision may be reduced by some of the following:
 - Utilizing certain execution formalities as with wills such as witnesses and notarizing settlor’s signature.
 - Video recording of discussion about disposition terms and execution of trust

- Providing written questions regarding disposition terms to the settlor who writes his/her answers which are placed in the attorney file
 - If relevant having settlor complete a written test/exam of mental capacity such as the Folstein Mini-Mental State Exam (MMSE)
 - Drafting clear statements in the trust of settlor's intent including the settlor's reasoning regarding non pro rata dispositions and other potentially controversial provisions
- c. Are you sure you want "Uncle Louie" or "dead beat son" to be the successor trustee, or Cain and Able to serve as successor co-trustees? Instead, help settlor understand how it may be more efficient and cost effective to appoint a Professional Trustee as successor after settlor.
- If settlor is adamant that no stranger is allowed to be the successor trustee, then maybe its time for the trust instrument to include one of more of the safeguards set forth in Rules of Court 7.903. The Judicial Council has determined that these are good enough for Testamentary, Special Needs, and other court funded Trusts pursuant to PC 2580 substituted judgment and PC 3100 proceedings for a particular transaction, so I believe they merit serious consideration, particularly with non professional successor trustees
 - Court confirmed accountings
 - Bond/blocked account
 - Court confirmed compensation
 - Limiting investments such as government bonds, securities listed on established US stock exchanges, money market mutual funds, etc (see PC 2574)
 - Court approval of changes in trustee
 - Limiting Trustee's exercise of authority

Moreover, failure of the trustee to "get off on the right foot" has given beneficiaries cause to file petitions to remove and surcharge. I believe many of these contested matters could have been prevented or been more easily remedied by requiring in the trust instrument one or more of the following safeguards that are statutorily applicable to estates in probate:

- A duty to provide to beneficiaries an Inventory & Appraisal (DE-160) submitted within a specified time frame (perhaps using probate referees for property appraisals)

- A duty to give mailed notice to known or reasonably ascertainable creditors of the decedent
 - A requirement to use the Notice of Proposed Action (DE-165) procedure for specified transactions or exercise of discretion
 - A requirement to provide to the beneficiaries a status report no later than 12 or 18 months from becoming successor trustee containing the information set forth in PC 12200 et seq.
- d. Even with all the safeguards in the world disputes will invariably arise! Those too can be managed short of litigation by:
- Including a clause in the trust requiring the beneficiary/Trustee to engage in good faith mediation of disputes before litigation with, among other incentives, that the trust will pay the reasonable expenses of the mediation. Mediation works to fully resolve mostly all of these types of disputes. It's not a matter of whether a settlement will be reached it's just a matter of how long will it take to get there? In any event it beats with hands down the expense, trauma, and vagaries of litigation. And, while voluntariness of all the participants is a best case scenario for mediations, I believe that is more important in civil disputes involving strangers than in Trust disputes involving testamentary dispositions and family members. With these types of cases, as with family law matters, litigation has too many sharp and adversarial edges to provide the types of resolutions that are needed. Usually it does not take long for even the most skeptical and reluctant participant to become a believer as they participate in the mediation process.
 - Yes, these clauses can be written to be enforceable! As a condition to accepting the benefits and duties under the trust beneficiaries and trustees could be required to agree to all the terms of the trust including the requirement to mediate. Or, in addition to a bequest to the beneficiary a specific cash gift could be provided on the condition that the beneficiary executes an agreement to the required mediation clause. As for the trustee, it could be made an express condition that acceptance of the mediation clause is required to assume the position or that the failure to comply with it is grounds for removal. Of course, these binding contractual provisions would be effective only after the running of the 120 day period provide in PC 16061.7 et seq.

See California Trusts and Estates Quarterly Volume 20, Issue 2 2014, *Bringing Beneficiaries to the Mediation Table: Drafting Enforceable Trust Provisions Requiring Mediation of Disputes During Post-Death Trust Administration* by Christopher D Carico, Esq. and Golnaz Yazdchi, Esq.

- Including a clause in the trust requiring the beneficiary/Trustee to engage in binding arbitration of disputes in lieu of litigation. It is a creative and flexible process compared to litigation. It is the equivalent of a private (not public) court trial. Rules of evidence are generally applicable but not necessarily doggedly adhered to if participants want. The parties control when the arbitration trial takes place and so not subject to the courts availability. Arbitration trials can be completed in much less time as they can proceed all day for as many days as the parties wish. While there is generally no automatic appellate review, there have been instances where parties have stipulated to a process of recording the trial and for a 3 panel arbitration award review.
 - Yes these clauses may be able to be written to be enforceable! The trust instrument can condition becoming a beneficiary and a successor trustee to written acceptance of the terms of the trust as a way of creating the contractual relationship required for the enforceability of binding arbitration. Perhaps this is enough. See *Diaz v Bukey* (2011) 195 Cal.App4th 315; *Pinnacle Museum Tower Assoc v Pinnacle Market Development* (2012) 55 Cal4th 223; *McArthur v McArthur* (2014) 224 Cal.App.4th 651; and *Rachal v Reitz* (2013) 403 S.W.3d 840 (Texas Supreme Court held that arbitration clause in the Trust was enforceable because the instrument was clear that the settlor intended it, that the beneficiary's assent to this was proven by the beneficiary's acceptance of the benefits of the trust, and arbitration act requires enforcement of written agreements to arbitrate)
 - Moreover the Federal Arbitration Act could be applicable if there is an interstate aspect to the trust administration. In that event, the federal act interprets the type of agreements that permit arbitration more broadly than state arbitration acts. The FAA is said to require some type of underlying consensual relationship – even if it is not a full fledged contract. This could apply to the beneficiaries and trustees acceptance of the benefits of the trust. See “*Donative Trusts and the United States Federal*

Arbitration Act” 2016 by Professor David Horton UC Davis School of Law. Also, see *Rachal v Reitz* supra

- e. Last but certainly not least, whatever happened to our old friend the “Will?” It is a tried and true testamentary instrument and all the safeguards come “standard.” True, it requires a probate administration BUT I submit that that process is much kinder and gentler than during Dayce’s time! If a trust is needed, let’s resurrect (drum role please) THE TESTAMENTARY TRUST. Yes it lacks the intervivos feature but nothing is lost and much is gained during the trust administration phase.

Next, what are some things to consider at the post death trust administration phase?

- a. Trustee transparency and more transparency
- b. W/n 60 days after Settlor’s death (or info re new noticee), or change in Trustee of irrevocable trust, Trustee must send to beneficiaries (settlor’s heirs) specific notice re SOL to contest validity of trust and right to request a copy of trust (16061.7).
 - S.O.L. bars challenge to trust more than 120 days from notice or, if later, 60 days from service of trust terms.
 - Failure to send = Trustee liable for beneficiary’s damages, attorney fees, costs caused by the failure.
 - Duty cannot be waived
- c. If trust is irrevocable and beneficiary requests, Trustee must provide copy of trust instrument and a report on the administration of the trust relevant to beneficiary’s interest. 16060.7, 16061. Trust instrument cannot waive this requirement (16068)
- d. When trust becomes irrevocable due to Settlor’s death or upon change of Trustee of an irrevocable trust and beneficiary requests, Trustee must provide a copy of the trust instrument. 16061.5. Trust instrument cannot waive this requirement (16068)
- e. Absent waiver in the trust or an effective written waiver by beneficiary, after either incapacity of Settlor without a conservatorship (15800 & *Johnson v Kotyck*), or Settlor’s death, Trustee must account to beneficiary entitled to current distributions:

- Annually; and
 - Upon change of Trustee; and
 - At termination of trust
 - (16062, 16063, 16064, 16069)
- f. Use Notice of Proposed action form (DE-165) and procedure as frequently as practicable to give forewarning and opportunity to air disagreements before action taken.
- g. All parties should understand that litigation should be last resort after all other dispute resolution fails because:
- Airs family’s “dirty linen in public”
 - Long drawn out process (a year or two and is likely to be longer in future)
 - Costly process
 - The so called *American Rule* (CCP 1021, 1033.5(10)) applies to trust report and accounting disputes. Therefore, generally speaking a party’s attorney fee is the responsibility of that party unless otherwise provided by statute, contract, or common law. However, “[t]he Probate Code is studded with provisions authorizing the Trustee to hire and pay (or seek reimbursement for having paid) attorneys to assist in trust administration. For example, section 16247... Section 16243... And section 15684...” *Kasperbauer v Fairfield* (2009) 171 CalApp4th 229. This includes reasonable attorney fees for the preparation of accountings and responding to objections to the accountings. *Estate of Beach*, (1975) 15 Cal3d 623; *Estate of Cassity*, (1980) 106 CalApp3d 569. However, since the Trustee must administer the trust “solely in the interest of the beneficiaries” (16002), the Trustee must subjectively believe the expense was necessary or appropriate to carry out the trust purposes, and such belief must be objectively reasonable. *Donahue v Donahue*, (2010) 182 CalApp4d 259.
 - In some limited circumstances that are beyond the scope of this paper a prevailing beneficiary may be entitled to have their attorney fee paid by the trust depending upon the applicability of either the “common fund theory” (see for examples: *Estate of Reade* (1948) 31 Cal2d 669; *Estate of Lundell* (1951) 107 CalApp2d 463; *Estate of McDonald* (1954) 128 CalApp2d 719), or the “substantial benefit theory” (first implicitly adopted in a probate conservatorship matter in *Estate of Moore* (1968) 258

CalApp2d 458 and now codified in PC 2640.1). The latter theory being less developed in the probate context.

- Further, 17211(a) says a beneficiary who contests w/o reasonable cause and in bad faith the Trustee's account may be charged with the Trustee's attorney fee and costs of litigation. "Reasonable cause" in this context is synonymous with "probable cause." "Probable cause" means an objectively reasonable belief that the action is legally tenable. Probable cause is a low threshold designed to protect a litigant's right to assert arguable legal claims even if the claims are extremely unlikely to succeed. See *Uzyel v Kadisha* (2010) 188 CalApp4th 866.
 - And, 17211(b) says a Trustee who opposes w/o reasonable cause and in bad faith a contest of his/her account may be charged with the beneficiary's attorney fee and costs of litigation. Reasonable cause to oppose a contest of an account requires an objectively reasonable belief, based on the facts then known to the Trustee, either that the claims are legally or factually unfounded or that the petitioner is not entitled to the requested remedies." *Uzyel v Kadisha*, supra.
 - See *Leader v Cords* (2010) 182 CalApp4th 1588 interpreting 17211 liberally as a remedial statute and applying it where the beneficiary's action followed receipt of an accounting, but was not a challenge to any specific item set forth in the accounting. Instead, the action was to force a distribution that the accounting revealed should be made. On the other hand see, *Soria v Soria* (2010) 185 CalApp4th 780, where the court drew the line on the liberal application of 17211 to include only actions brought pursuant to 17200 and 17201 regarding the internal affairs of the trust rather than civil causes of action that in essence disputed the existence of a trust.
- Magnifies and exacerbates disagreements
 - Divides and polarizes parties (families)
 - Winner take all – zero sum game
- h. Increased emphasis on use of alternative dispute resolution processes
- Court mediation, if available
 - Early private mediation (may include collaborative agreements)
 - Early evaluative mediation
 - Arbitration in lieu of court trials

A Few Important Trustee Accounting Rules and Cases To Note

Trustee's duty to inform (report & account)

- a. See 16060. Generally “to keep the beneficiaries reasonably informed concerning the trust and its administration by providing complete and accurate information with regard to the administration of the trust.” *Wells Fargo Bank v Superior Court* (2000) 22 Cal4th 201, 216-217. Also see, Cal. Law Revision Com. 54A West's Ann. Prob. Code (1991) ed.
- b. Unless trust states otherwise, Trustee has no duty to report or account to a beneficiary while trust is revocable and the Settlor with power to revoke is competent. (15800, 16064(c), 16069).
- c. Even where a Settlor is a conservatee a Trustee still has no duty to report or account to a beneficiary because the Settlor is deemed to have the power to revoke by means of the conservator & the court. *Johnson v. Kotyck* (1999) 76 CalApp4th 83

Court will compel the Trustee to account

- a. Per PC 17200 (b)(7) where a beneficiary with standing (15800 & *Johnson v Kotyck*):
 - Makes a written request Trustee; and
 - Trustee has failed to submit an account within 60 days after the request; and
 - There has been no accounting within the 6 month preceding the written request
- b. Notwithstanding a waiver of accountings in the instrument or by a beneficiary, pursuant to PC 16064 a court may compel an accounting where a beneficiary with standing shows “that it is reasonably likely that a material breach of trust has occurred.”
 - “Reasonably likely” means more than merely possible but less than “more probable than not”. See *Alvarez v Superior Ct* 154 CalApp4th 642,653
- c. “Where an accounting is necessary to determine the status of trust assets, the court may order one sua sponte.” *Christie v Kimball* (2012) 202 CalApp4th 1407 citing to *Schwartz v Labow* (2008) 164 CalApp4th 417, 427

Allocation of burden of proof:

- a. On party submitting the account regarding the accuracy of items in the account. *Estate of Miller*(1968) 259 CalApp2d 536, 549-550

- b. On party objecting to the account regarding new matters not in the account that are “affirmative allegations or attempted surcharges”. *Estate of Kirkpatrick (1952) 109 CalApp2d 709, 713* citing to *Estate of Vance, 141 Cal 624*

SOL is 3 years on breach of trust claims against Trustee for acts disclosed in account/report (PC 16460)

- a. Expires 3 years after receipt
- b. If no account/report, 3 year period begins on date beneficiary discovered or should have discovered subject of the claim. Therefore “delayed discovery rule” applies. See *Baker v Beech Aircraft (1997) 96 CalApp3d 321*
- c. Generally, a contingent beneficiary has no standing re claims based on Trustee’s conduct during Settlor’s lifetime while was trust revocable. 15800, 16069. See *Babbitt v Superior Court (2016) 247 Cal.App.4th 1135* confirming where settlor was trustee during his life, absent allegations of lack of capacity or undue influence, after his death there is no duty to account to beneficiaries for any transactions occurring during the period in which the trust was revocable. Except see *Estate of Giralдин (2012) 55 Cal.4th 1058* holding that beneficiaries after the settlor’s death had standing to assert a breach of the duty the non settlor Trustee owed to the settlor during settlor’s life to the extent that the breach harmed the beneficiaries. Also see, *Evangelho v Presoto (1998) 67 Cal.App.4th 615* which held that after settlor’s death beneficiaries had standing to obtain an accounting for periods before settlor’s death upon a showing of fraud or bad faith for improper acts which had been hidden from the ultimate beneficiaries.
- d. Obtaining court an order, after a noticed hearing, which approves the accounting and the acts of Trustee, has the effect of shortening the 3 year SOL. However, Petitioner must be aware of the court’s power pursuant to PC 17202 to dismiss a petition if it appears that the proceeding is not reasonable necessary for the protection of the interests of the trustee or beneficiary. This unilateral authority granted to the court is based upon PC17209 which provides that “[t]he administration of trusts is intended to proceed expeditiously and free of judicial intervention...” Absent extrinsic fraud, the Trustee has no liability for the period covered by the order once it becomes final (60 day rule to appeal per CRC 8.104).

- e. Trust instrument may reduce 3 year SOL, but a reduction below 180 days will not be effective and Trustee's exposure will be 180 days from the accounting disclosing the item or from a specific notice given by the Trustee that the beneficiary has 180 days to object to the Trustee's action

The ever expanding landscape of trust funding with real property

- a. *Estate of Heggstad* (1993) 16 Cal.App.4th 943 – settlor and trustee the same then listing on Schedule A is sufficient
- b. *Ukkestad v RBS Asset* (2015) 235 Cal.App.4th 156 – Trust that merely describes the real property as “all my real property” could be sufficient if when challenged there is extrinsic evidence that clarifies the specific real property that was intended to be placed in trust.
- c. *Carne v Worthington* (2016) 246 Cal.App.4th 548 – Trust instrument, like a deed, is effective to transfer the property pursuant to PC 15200(b). Property held in name of settlor as trustee of revocable trust could transfer it to the 3rd party trustee of settlor's irrevocable trust by listing it on the Schedule A of the irrevocable trust.