

Beverly Hills Bar Association – Trusts & Estates' Section

Case Summaries for May and June of 2018

Case Updates

Sveen v. Melin (Decided June 11, 2018) United States Supreme Court Case No. 16-1432 (Certiorari to the US Court of Appeal for the Eighth Circuit) (Upholding the Minnesota statute, Minn. Stat Section 524-804(1), revoking beneficiary designation in favor of a former spouse when insurance policy was acquired by the decedent before the statute's enactment.)

Mark Sveen and Kaye Melin were married to each other in 1997. In 1998, Sveen purchased a policy of life insurance and named Melin as primary beneficiary and his two children from a prior marriage as the contingent beneficiaries. Sveen and Melin were divorced in 2007. Sveen died in 2011, without having updated his beneficiary designation. Under Minn. Stat Section 524-804(1), Sveen's beneficiary designation as to his now ex-wife, Melin, was revoked and his children from his prior marriage were to receive the insurance proceeds.

In contesting the Minnesota law, which was enacted in 2002 and is modeled on a similar provision in the Uniform Probate Code, Melin argued that the statute violated the US Constitution's Contract Clause. Melin asserted that the Contracts Clause was violated because the statute was not in existence when Sveen purchased the policy and its operation substantially impaired the contractual bargain Sveen made with the insurer by interfering with Sveen's reasonable expectations as to whom would receive the policy proceeds at his death. Although the District Court rejected this argument, the Court of Appeal for the Eighth Circuit reversed, finding that a revocation upon divorce statute like Minnesota's violates the Contract Clause if applied retroactively. The Supreme Court granted certiorari to resolve the split of authority.

In an 8 to 1 decision, the Supreme Court reversed the Appellate Court and upheld the retroactive application of a revocation on divorce law to a pre-existing agreement's beneficiary designation. The Supreme Court found that no Contracts Clause violation was caused by that retroactive application because the statute: (1) is designed to reflect the policy owner's intent; (2) is consistent with the power a divorce court could exercise, and (3) the policy owner may sign a new beneficiary designation confirming the former spouse as beneficiary.

Thomas E. Morgan, as Trustee, etc. v. Superior Court of Orange County (Nancy Morgan Shurtleff, real party in interest) (Filed 05/29/2018) Case Number G055377, Fourth Appellate District, Division Three (Trust provision protecting prior Trustee's entire communications with the Trust's lawyers violates public policy and is unenforceable.)

In 2013, Beverly Morgan created a revocable living trust that included provisions that limit the Trustee's liability and reduced the Trustee's duty of loyalty and duty to avoid conflicts of interest, as well as including indemnifications. However the Trust did not extend these limitations to the Trustee's gross negligence, willful misconduct or bad faith. In addition, the Trust included a provision stating the Trustee shall be absolutely protected and free from any duty or right of disclosure to any successor Trustee or any beneficiary and any duty to account.

Ms. Morgan died in 2014, survived by her three children, Thomas Morgan, Nancy Shurtleff and John Morgan, and two grandchildren, Kathleen Shurtleff and Jessica Shurtleff. Upon Ms. Morgan's death, Thomas became successor Trustee and litigation with his siblings and nieces began almost immediately. In 2016, Nancy, John and Nancy's daughters filed a motion to suspend Thomas as Trustee based on Thomas's alleged use of Trust funds for payment of his personal lawyers, among other acts of self-dealing. The Court ordered Thomas to file an accounting. After that accounting was filed, the Court on its own motion found the accounting to be so inadequate its sole purposes appears to have been to pay lip service to the Court's Order. Subsequently, the Court suspended Thomas as Trustee and appointed Bruce Hitchman and Lee Ann Hitchman as interim Co-Trustees. The Court further ordered Thomas to give the interim Co-Trustees all communications between Thomas and any person or entity acting for the Trust.

In June 2017, the Court clarified its Order to specifically include invoices, billing statements and fee agreements, as well as copies of checks and wire transfers used to pay Thomas' counsel. Subsequently, the interim Co-Trustees submitted a proposed formal Order, which mirrored the Court's June 2017 Minute Order. Thomas filed objections asserting that disclosure of attorney-client privileged material was contrary to established case law, citing to *Wells Fargo Bank v. Superior Court* (2000) 22 Cal. 4th 201 ("Wells Fargo") and *Fiduciary Trust International of California v. Klein* (2017) 9 Cal. App. 5th 1184. The Court entered its formal Order, impliedly overruling Thomas's objections and in relevant part ordered Thomas to give the interim Co-Trustees (but not Thomas's siblings or his nieces or the lawyers for any of them) all original, un-redacted attorney invoices, billing statements, fee agreements and check/wire transfers by which payment was made for all attorney's fees and cost incurred or paid by Thomas. Thomas filed a writ of mandate and/or protection with the appellate court on the grounds that the Orders required him to turn over documents protected by the attorney-client privileged.

The appellate court stated that when a Trustee seeks legal advice on behalf of the Trust, the Trustee is the client and the right to assert attorney client privilege vests in the office of the Trustee. Accordingly, that right to assert privilege transfers from a Trustee to his or her successor Trustee. Further, the appellate court noted that the Trust, consistent with the Probate Code and the Restatement of Trusts, includes provisions that demonstrated Ms. Morgan's intent not to absolve Thomas of liability for intentional misconduct, gross negligence, or acts undertaken in bad faith or with reckless disregard for the beneficiaries' interest. Accordingly, the appellate court found that the portions of the Trust that provided a Trustee is free from any duty or right of disclosure to any

successor Trustee violates public policy, as expressed by statute, and is void because its enforcement would prevent a successor Trustee from obtaining documents that might establish the prior Trustee's malfeasance, bad faith or intentional misconduct.

The appellate court also considered Thomas's claim under Wells Fargo and its progeny. Under Wells Fargo, the former Trustee is exempt from turning over all privileged communication if he or she can demonstrate that counsel was retained in a personal capacity and affirmative steps were taken to distinguish personal advice from fiduciary advice. Finding that there was no contention that Thomas retained separate counsel for his separate interests and that the Order required disclosure only to the interim Co-Trustees and not Thomas' siblings, nieces or their lawyers, the appellate court denied the writ.

Estate of Norman Casserley, Dec'd, Hawkins, as administrator, v. Joya (Filed 04/27/2018) Case Number D072298, Fourth Appellate District, Division One (Creditor Claim Based on Criminal Restitution Not Entitled to Priority)

The Decedent and Blazeovich were once neighbors. Due to a conflict between them, the Decedent was convicted of a crime that entitled Blazeovich to restitution pursuant to a 1971 Order of \$17,796, plus 10% interest from the date of sentencing. In 2007, Blazeovich obtained an order of restitution and abstract of judgment, which he recorded. Subsequently, Blazeovich obtained an amended abstract for restitution in the amount of \$44,796, but did not immediately record it. In 2008, Blazeovich recorded an assignment of judgment in favor of his wife, Joya. On July 3, 2015, the Decedent died intestate without a surviving spouse, descendants, parents or grandparents. The San Diego County Public Administrator and the California Department of Health Care Services each filed claims, as an unsecured creditor. Joya filed a creditor's claim for \$178,000 on June 10, 2016 and on June 22, 2016 recorded the amended abstract of judgment. The sole asset of the estate, the Decedent's home, was sold and Joya received roughly \$53,000 from the sale. After which Joya filed an amended claim alleging that a balance was still owed to her.

The Administrator determined that the probate estate was insolvent and proposed to treat all of Joya, San Diego County Public Administrator and the California Department of Health Care Services as unsecured creditors. Joya objected and argued that the recording of the lien in 2016 created a lien on the probate estate. The Probate Court found that Joya was an unsecured creditor and not entitled to priority over the County and State's claims. Joya appealed.

In affirming the trial court, the appellate court first noted that Code of Civil Procedure Section 686.020 provides that the enforcement of a judgment against the deceased judgment debtor's estate is governed by the Probate Code. Citing to the California Law Revision Commission's comments to CCP Section 686.020, the appellate court stated that the filing of an abstract of judgment after the death of the judgment debtor does not create a lien on estate property.

Alexander v Scripps Memorial Hospital (Filed 04/16/2018) Super. Ct No. 37-2014-00016257-CU-MM-CTL, Fourth Appellate District, Division One (Elder Abuse Claim Requires More than Medical Malpractice)

Elizabeth Alexander was suffering from end stage pancreatic cancer and had an advance health care directive under which she authorized one of her sons, Christopher Alexander, to take all measures to prolong her life. In January of 2013, Mrs. Alexander was admitted to a skilled nursing facility as she could no longer care for herself. On February 18, 2013, Mrs. Alexander was admitted to Scripps Hospital for evaluation for additional treatment. The Scripps medical team determined that Mrs. Alexander should not be aggressively resuscitated due to her frail condition, the extensive metastasis of the cancer and such resuscitation would cause further harm and suffering. Although Christopher acknowledged that Mrs. Alexander's death was imminent, he wanted Mrs. Alexander to receive all measures to prolong her life. The medical team indicated it could not provide ineffective medical care. Mrs. Alexander died on February 21, 2013. CPR was not performed.

The family sued for violations of the Health Care Decisions Law and elder abuse, among other causes of action. After extensive discovery, the trial court sustained a demur to all causes of action without leave to amend.

The appellate court upheld the trial court's demurs regarding the elder abuse claims and stated that disagreements between doctors and the patient or the patient's agent under a health care power about the type of care being provided does not by itself give rise to an elder abuse cause of action. Further, disputes as to the accuracy of medical invoices by themselves are insufficient to state a claim for financial elder abuse. In addition, the appellate court held that there was no violation of the Health Care Decisions Law because a doctor may decline to comply with a patient's health care instruction that requires medically ineffective health care, which is defined as treatment that would not offer the patient any significant benefit.

Statutory Changes

Probate Code Section 851(c) has been amended to require that, in the Notice of Hearing for a petition pursuant under Section 850, there shall be a description of the property subject to the petition that is adequate to give notice to a person interested in that property. If the petition is filed pursuant to Probate Code Section 859, the Notice of Hearing for the petition must include a description of the relief sought sufficient to provide notice to a person against whom the relief is requested. Finally, the Notice of Hearing must include a statement advising a person interested in the property or the relief sought that he or she may file a response to the petition.

Probate Code Section 6300 has been amended to allow the testator's pour-over will to reference terms in a written trust instrument that is executed within 60 days after the will's execution.

Probate Code Section 15403(b) has been revised to allow the Court, with the consent of all the beneficiaries and the Court's determination of good cause, to terminate a Trust with a spendthrift clause. Further, Probate Code Section 15403(c) has been modified so that the Court may limit the class of beneficiaries from whom consent is necessary.

Probate Code Section 15404(a) has been revised to allow a trust to be modified or terminated by the settlor and all the beneficiaries without Court involvement.

Ethics Updates

New Code of Professional Responsibility approved by the Supreme Court and will become effective on November 1, 2018

Los Angeles County Bar Association Professional Responsibility & Ethics Committee released Opinion Number 530 on May 23, 2018 in which it opined that, unlike a general partnership, it is not misleading to the public and thus is not a violation of Rule of Professional Responsibility Rule 1-400 for a law corporation or limited liability partnership to use a firm name that includes the name of a lawyer who is no longer a shareholder or partner but who remains employed by the firm.