

Beverly Hills Bar Association – Trusts & Estate Section  
October and November 2017 Case Updates

**Urick, III vs Urick, as Trustee**

Appeal from the Superior Court of Los Angeles County

Decision Dated October 5, 2017

Facts:

On March 8, 2013, Allyne Urick signed her revocable living trust.

On January 3, 2014, Mrs. Urick signed a holographic amendment to her Trust, which “deleted” her son, Willis, from the assets of her living Trust.

On August 6, 2014, Mrs. Urick restated her living Trust and included the standard provision that the restated Trust’s provisions would control over all earlier statements of the Trust’s provisions. Her son, Willis, was included as a beneficiary in the Restatement, as well as a no-contest clause.

Mrs. Urick died on August 18, 2015, and her daughter, Dana, became successor Trustee.

Procedural History:

On February 16, 2016, Dana brought a petition to reform that Trust, alleging that its terms were misrepresented by the drafting lawyer, that Mrs. Urick had mistakenly signed the restatement not realizing her intent was not properly reflected by its terms and that the restated Trust did not include the distribution plan Mrs. Urick had requested.

On May 31, 2016, Willis brought a petition for instructions as to whether Dana’s petition violated the no-contest clause of the Trust.

On August 4, 2016, Dana filed an anti-SLAPP motion in her capacity as Trustee asserting that: (a) she had filed the reformation petition in her capacity as Trustee; (b) the motion was not a direct contest because she had sought reformation on the grounds of mistake; and (c) she had probable cause for filing her petition for reformation.

Obviously, Willis opposed his sister’s Anti-SLAPP motion, arguing that the anti-SLAPP statute should not apply to the no-contest provisions of the Probate Code and even if it did, he had a reasonable probability of prevailing on the merits.

The trial court issued a minute order granting the Anti-SLAPP motion, finding that the disinheritance petition arose from protected litigation and that Willis failed to show a probability of prevailing because Dana’s petition for reformation had been brought in her capacity as Trustee. Willis appealed.

Appellate Decision:

The Appellate Court disagreed. The Appellate Court held that although the Anti-SLAPP motion could be brought in the no contest action, Willis had carried his burden of proof and had demonstrated a reasonable probability of prevailing on the merits. The Appellate Court ordered the Probate Court to enter a new and different order denying the motion to strike.

**Estate of Betty Lou O'Connor, Deceased**

**Parille v. O'Connor**

Appeal from the Superior Court of Los Angeles County

Decision Dated October 13, 2017

Facts:

On August 1, 2006, Betty Lou O'Connor created her living Trust. Her two children, Tom and Kelli, as well as the two children of a predeceased son, were equal remainder beneficiaries.

Mrs. O'Connor had established two joint accounts with Kelli in 2008.

Mrs. O'Connor died in 2012.

After Mrs. O'Connor's death, Tom contended that the two joint accounts were assets of the living Trust, and Kelli contended that they were not. Kelli asserted that the accounts were joint accounts while Mrs. O'Connor was living and now belonged entirely to Kelli as the joint owner with right of survivorship.

Under California law, sums remaining on deposit at the death of a party to a joint account belong to the surviving party as against the decedent's estate unless there is clear and convincing evidence of a different intent.

Procedural History:

The Probate Court held that because there was no clear and convincing evidence of a contrary intent, the accounts passed as a matter of law to Kelli. Tom appealed.

Decision of Appellate Court:

The Appellate Court ruled that there was substantial evidence supporting that the Probate Court's determination presumption of survivorship rights had not been overcome. In upholding the Probate Court, the Appellate Court noted that this evidence included that:

Mrs. O'Connor opened the accounts while Kelli was assisting Mrs. O'Connor with various business affairs;

Mrs. O'Connor indicated to Kelli that the money in the two accounts was for Kelli's use; Kelli had complete access to the accounts;

Both Mrs. O'Connor and Kelli had signed the account opening documents, which documents were sufficient to invoke application of Probate Code Section 5302 (Ownership of Joint, POD and Trust Accounts After Death of Party); and

The Bank (Wells Fargo) had confirmed that both had withdrawal rights over the accounts.

**Stewart v. Superior Court of San Bernardino County (St. Joseph Health, et al Real Parties in Interest)**

Appeal from the Superior Court of San Bernardino County

Decision Dated October 12, 2017

**Facts:**

On February 1, 2012, Anthony Carter, age 78, was admitted to St. Mary Medical Center (a part of the St. Joseph Health System). Maxine Stewart, a registered nurse with an active license, was Mr. Carter's agent under his durable power of attorney for health care decisions. Mr. Carter was confused, was having difficulty eating and was unable to participate in making health care decisions. Disputes developed between Mr. Carter's doctors at St. Mary and Ms. Stewart concerning the appropriate course of treatment. The doctors met with the St. Mary ethics committee, without including or providing notice of that meeting to Ms. Stewart. The ethics committee determined that a pacemaker was necessary to prevent Mr. Carter's death and Ms. Stewart, as Mr. Carter's agent, was not acting in accordance with her powers by refusing to authorize the necessary surgery. Over Ms. Stewart's objections and with the approval of the ethics committee, the doctors implanted a pacemaker in Mr. Carter on February 22, 2017. After Mr. Carter had a heart attack in the hours following the surgery, the pacemaker was removed and was not re-implanted. Mr. Carter suffered brain damage as a result of the heart attack and died on April 15, 2013.

**Procedural History:**

As the representative for deceased Mr. Carter, Ms. Stewart filed a complaint alleging among many claims, a claim for elder abuse under the Elder Abuse and Dependent Adult Civil Protection Act ("the Act") against St. Mary and its doctors. As part of the elder abuse claim, Ms. Stewart alleged that St. Mary prevented Mr. Carter from exercising his right to refuse unnecessary surgery. The Trial Court granted St. Mary's motion for summary judgment as to the elder abuse claim, ruling that the interpretation of the power of attorney for health care by the ethics committee was not withholding care and was not made within a custodial capacity, as required by the Act. Ms. Stewart appealed by filing a writ of mandate.

### Decision of Appellate Court:

The Appellate Court found that the facts alleged by Ms. Stewart were sufficient to establish negligence under the Act, that the evidence presented created triable issue of fact and that a reasonable jury could find that St. Mary committed neglect of an elder under the Act. The Appellate Court ordered the issuance of a peremptory writ of mandate, by which the Superior Court was directed to vacate its order granting St. Mary summary judgment motion and to substitute an order denying that motion.

### **The People ex rel Harris and Becerra, as Attorneys General, etc. v. Shine**

Appeal from the Superior Court of Marin County

Decision Dated October 23, 2017

#### Facts:

In 1995, Robert and Eva Lindskog established a revocable trust. As amended, the Trust provided that at Eva's death, all but \$1 million of her share of the Trust assets would be held as the Livewire Lindskog Foundation and used for charitable purposes. Originally, Robert and Eva served as Co-Trustees. Robert resigned as a Trustee in 2001 and Eva died in 2004. As a result of Eva's death, William Shine became successor Trustee.

The Trust included a provision indemnifying the Trustees which stated in relevant part: "Except for the Trustee's willful misconduct or gross negligence . . . , the Trustee shall be indemnified and held harmless . . . by the trust estate . . . from and against any and all liens, claims, liabilities and expenses, including reasonable attorneys' fees, for the Trustee may be liable or subjected, arising out of, emanating from or made with respect to the trust or any assets or liabilities thereof . . . :

In 2005, Robert's conservator objected to Shine's accounting. In 2008, by a Probate Court approved settlement, Shine was required to form the Foundation and distribute the remaining Trust assets to it. Although Shine filed articles of incorporation in 2009, he failed to appoint officers, directors, apply for tax exempt status or transfer assets from the Trust to the Foundation. In 2011, the Attorney General began an audit, at which point Shine appointed two long-time friends, Marty Mancebo and Thomas Harrington, as Co-Trustees.

In December 2013, the Attorney General petitioned to have Trustees removed, appointment of a receiver and an accounting. At a hearing in February 2014, the Trustees agreed to relinquish control of the Trust and the Court appointed a Temporary Trustee. The Temporary Trustee provided an initial report to the Court in May 2014, in which he reported inaccurate records, mismanagement of assets and unaccounted for assets.

#### Procedural History:

In March of 2016, the former Trustees petitioned the Court to instruct the Temporary Trustee to reimburse past defense costs (which had been paid personally by Shine) and to pay the former Trustees' future attorney fees and costs, as it appeared the Attorney General's petition to surcharge the former Trustees would proceed to trial. The former Trustees argued that the only potential liability might arise from their administration of the Trust (but not the Foundation) and legal authority for those payments exists in the Trust, the Probate Code and in case law. The Attorney General opposed the petition and asserted that the former Trustees were not entitled to fees because the defense of their administration was not for the benefit of the Trust. Further, the Attorney General described in its opposition to the petition numerous instances of wrongdoing by Shine, which it supported by citations to evidence. The former Trustees did not present any evidence that disputed the Attorney General's allegations. Although the Probate Court found that the Attorney General had a strong case, it held that because the allegations of misconduct were unproved and the alleged misconduct appeared to be within the scope of the Trust's indemnification provisions, the former Trustees were entitled to fees under those provisions. The Attorney General appealed.

#### Decision of Appellate Court:

The Appellate Court held that the Probate Court did not apply the correct legal standard for an award of pendent lite fees (i.e., fees for ongoing litigation not yet resolved on the merits). The Appellate Court held that when the Trust is silent on interim fees, the Court must first assess the probability that the Trustee will ultimately be entitled to reimbursement and second must balance the relative harms to all interests involved in the litigation, including the interests of the Trust beneficiaries. The Court's balancing of harms requires at least some inquiry into the ability of the ability of the Trustee or the former Trustee to repay the attorney fees, if it is ultimately determined they are not entitled to the costs of defense. The Appellate Court stated that an award of interim fees would seldom be justified where, as in this case, the Trust is silent on interim fees and the Trustee's misconduct is at issue. The Appellate Court ordered the Probate Court's fee order reversed and on remand instructed the Probate Court to consider the fee petition using the legal standard articulated by the Appellate Court.

#### **Aviles v. Swearingen**

Appeal from the Superior Court of Ventura County

Decision Dated October 23, 2017

#### Facts:

In 2010, Margaret Chappell created the Margaret B. Chappell Living Trust, which she amended three times before her death on January 12, 2016. In the original Trust instrument, Jose Francisco Aviles received all of the Trust assets at Mrs. Chappell's death. In the First Amendment, Mr. Aviles received the Trust real estate and the balance was divided between Mrs. Chappell's brother and the children of Mrs. Chappell's nieces and nephews. In the Second Amendment, Mr. Aviles received the

Trust real estate and the balance was divided between Mrs. Chappell's brother and Mrs. Chappell's godchildren. The Second Amendment included a no contest clause which stated that "a protected instrument" shall include any and all amendments to the Trust. In the Third Amendment, Tracy Swearingen was named as the sole beneficiary and successor Trustee. In addition, the Third Amendment incorporated the unchanged provisions of the Second Amendment.

Procedural History:

After Mrs. Chappell died, Mr. Aviles filed a petition to invalidate the Third Amendment on the grounds that it was the product of undue influence and financial abuse. Ms. Swearingen opposed the petition and filed a counter petition asserting that Mr. Aviles violated the no-contest clause in the Second and Third Amendments. The Probate Court held that the Third Amendment was not a protected instrument as defined by Probate Code Section 21310 because it did not contain a no-contest clause or did not expressly refer to the no-contest clause in the Second Amendment.

Decision of Appellate Court:

The Appellate Court affirmed the Probate Court's Order denying the petition to disinherit Mr. Aviles finding that the Third Amendment did not specifically refer to the no-contest clause in the Second Amendment as required by Probate Code Section 21310 and that Mrs. Chappell did not unequivocally express her intent to include within the scope of the no contest clause those petitions contesting trust amendments as products of fraud or undue influence.

**Estate of Victor Reed**

**Reed v. Reed and Ocaña**

Appeal from the Superior Court of Sonoma County

Decision Dated November 8, 2017

Facts:

Victor Reed was survived by his children, William Reed and Daniel Reed. William was appointed as the personal representative for Victor's estate in 2010.

Procedural History:

In 2014, Daniel filed a petition alleging misconduct by William, as personal representative, and, among other things, seeking William's removal as personal representative. The trial on the petition was held in March of 2015, and at the conclusion of the trial in April of 2015, the Probate Court orally announced its decision to remove William and appoint Shelley Ocaña in his place, and referred to a forthcoming written decision that would set forth the basis for the removal order. The Probate

Court's Statement of Decision was issued in April of 2016. William appeals from the Statement of Decision.

Decision of Appellate Court:

The Appellate Court found that when a Statement of Decision is requested and the Order removing the personal representative includes a reference to the forthcoming Statement of Decision, that statement is an effective reserve of jurisdiction by the Probate Court over the matter and makes the Statement of Decision the final, appealable Order.