

San Bernardino County Bar – Probate Division

Crossover Issues – Conservatorship and Trusts

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Overview of Issues and Information

- Framing the Issue – History and Demographics, Why now?
- Crossover Issues and Hypotheticals Situations
- Attorney and Fiduciary Fees – Conservatorship and Trust
- Conflicts of Interest – When Your Client Wears Many Hats
- Attorney-Client Confidentiality – When Your Client Wears Many Hats
- Amending and Accounting for Revocable Trusts
- Selling Assets – When Your Client Wears Many Hats
- Ancillary Conservatorships and Accountings
- Trust/POA Operating Accounts

Questions?

Framing the Issue – Why is the coming up now?

- Demographics – Aging population, longer life span
- Corresponding rise of Dementia and elder medical issues
- General rise in estate values of the Baby Boomer Generation
- General move in the 1990's and 2000's towards trusts
- Incapacity and Death of Settlers – Disputes between siblings
- In cases involving challenges to trust administration

Questions:

Any other reasons you can think of for the rise in these kinds of cases and issues before the courts?

Crossover issues and Hypotheticals

- Trust Administration – Generally private and out of court
- Conservatorships – Public and court-supervised
- Trust disputes generally relate to formation and accountings
- Conservatorship disputes generally relate to appointment
- Separate fiduciary duties for a Conservators v. Trustees
- Links between parties and assets
- Use of professionals to assist the fiduciary

Questions:

Can one person be both the conservator and the trustee of the conservatee's trust? Does this situation raise any difficulties for the fiduciary?

Issue 1 – Attorney and Fiduciary Fees (Our Favorite Issue)

- Attorney and Trustee Fees for Trust generally ok and private
See terms of the Trust and PC 15680 et seq., *Evans v. Superior Court* (1939)
Reasonable fees and must be for the benefit of the Trust as a whole, not just the trustee, See PC 16000 et seq., *Estate of Reade* (1948).
- Preference of the court for hourly fees and proof of time spent vs. % of Trust or Estate.
- Use of trust funds to defend the trust ok See *Estate of Duffill* (1922) but not if the litigation is *solely* for the benefit of the trustee, See *Terry v. Conlan* (2005) but maybe ok if specifically authorized by the trust. See *Doolittle v. Exchange Bank* (2015)

Hypothetical:

X is trustee and a remainder beneficiary. He is being sued for breach of duty. Can he use the trust funds for his own defense?

Issue 1 – Attorney and Fiduciary Fees (Our Favorite Issue Again!)

- Attorney and Conservator Fees are subject to prior court approval
See PC 2625-2627 and Rules of Court 7.756
Must be for the benefit of the estate and reasonable, similar to the terms of payment under a trust.
- No payment of conservator and attorney fees with conservatee's funds without prior court approval. Does this include trust funds?

Hypothetical:

Conservatee is the life beneficiary of a revocable trust. Child 1 is the trustee and conservator of the person and estate. Most of the assets of the conservatee are in a revocable trust for their benefit. Can Child 1 pay the attorney fees without prior court approval from trust funds?

Conflicts of Interest – When a client wears multiple hats

- Fiduciary Duties – Custom to the tasks and situations
- Sources of duties, Trust Document, Probate Code Trusts and Conservator, and the Common Law
- Beneficiaries vs. Family Members and other “Interested Parties”
- Duty to Segregate - Assets and Expenses
- Trustee Separate Duties to the Trust as a whole, all beneficiaries
- Attorney Separate Duty of Loyalty to client in multiple roles
- Does the conservator owe any duties to the family members of the conservatee? Does the trustee owe any duties to contingent beneficiaries?

Hypothetical:

Remainder beneficiaries of the conservatee’s trust want the conservatee to receive proper care but at the lowest cost in order to preserve assets for distribution. Does the trustee/conservator have a duty to lower the costs of care of the conservatee for those purposes?

Attorney-Client Confidentiality – When the client wears multiple hats

- Communications between attorney and client are privileged – Evidence Code Sec. 950 et seq.
- Sources of duties, Trust Document, Probate Code Sec. 1600 et. Seq, and the Common Law
- Conservator-Attorney – who holds the privilege?
- Trustee-Attorney who holds the privilege? See *Borissoff v. Taylor & Faust* (2004) 33 Cal. 4th 523 and *Morgan v. Superior Court* (2018) 23 Cal. App. 5th 1026.
- What if the trustee pays for their own separate counsel?
- What happens if the attorney and the trustee/conservator communicate on multiple issues in the same correspondences?

Hypothetical:

Trustee/Conservator resigns as trustee. New trustee requests a complete copy of the former trustee's file from their attorney. There is information of mismanagement of the conservatee's funds in the attorney's trust file. Does the attorney have to hand over a complete copy of the trust file?

Amending and Accounting for Revocable Trusts (w/ a cship)

- Generally revocable trusts are revocable/amendable See PC 15401
- Generally revocable trust with a life beneficiary do not require accountings until the trust is irrevocable – See PC 16060 et seq.
- Conservatorship can be terminated – not permanent
- Creating or amending a trust for a conservatee requires a petition for substituted judgment – See PC2580 et seq.
- Are the beneficiaries of the trust due an accounting if the settlor is under a conservatorship?
- Does the trustee have a duty to seek to amend the trust according to the wishes of the settlor/conservatee?

Hypothetical:

Conservatee's trust gives a large gift to a child that committed financial elder abuse. The abuse is long past the statute of limitations. The other children of the conservatee are pressuring the trustee/conservator to amend the trust to disinherit the bad child. What if the conservatee has now reconciled with the bad child?

Selling Assets – When you have a trust and a conservatorship

- Generally trustee has authority to sell asset, supervised by the court or not. See terms of trust and powers under the PC 16226 et seq.
- Generally a conservator may sell assets without court permission (exception annuities – See PC 4457) can continue to pay but not liquidated.
- Conservator must seek court approval to sell the residence or former residence of the conservatee – See PC 2591.5.
- Purpose is to preserve the home of the conservatee for them to live in if at all possible. They could recover and want to return.
- Similar “Residence” provisions in revocable trusts.
- Does the conservator/trustee have to hold onto the home of the conservatee/settlor indefinitely just in case?

Hypothetical:

Conservatee/settlor has been moved into a dementia facility. Home of the conservatee is in their revocable trust. It is not economical to rent the home but it does not have to be sold yet to provide for the care of the conservatee. Does the trustee/conservator have to get court approval to sell the home?

Ancillary Conservatorships and Accountings

- Conservatorship and/or trust in one state and assets in another.
- Are the orders and letters in state A sufficient to sell real property in State B held in the name of the conservatee?
- Title and Escrow will often require orders and letters in the state in which the real property exists in order to sell it.
- Conservator in state A has a bond and must complete accountings
- Do we have to have a full conservatorship of the person and estate in state B to sell the conservatee's former residence?
- Can counsel for the conservatee in state A consent to the sale and conservatorship?

Hypothetical:

Conservatee in Florida living with child conservator. Conservatee's former residence in CA. The only thing to be done in CA is to sell the home. Is a conservatorship of the person and estate necessary to sell the home? Should the court require an inventory and accounting of the estate in CA?

Trust/POA Accounts

- Trust assets are Trust assets and should be controlled by the trustee
- What can a trustee do about assets outside the trust when the settlor is incapacitated?
- Banks generally do not like co-trustees or co-conservators. Hard to manage and verify signatures on checks, etc.
- Can an agent under a DPOA manage an account that is a trust asset?
- First look to the terms of the trust and DPOA
- Growing problem in banks creating hybrid Trust/POA accounts so that they only have to deal with one signer on the account.

Hypothetical:

Settlor signs DPOA at request of Co-Trustee in order to create an operating account from which to pay personal bills of the settlor from trust assets. Does this account go on the trust accounting? Is the co-trustee also liable?

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