2024 Update and a View of 2025:

Are You Ready for the Misinformation and Lies?

STANISLAUS COUNTY ESTATE PLANNING COUNCIL

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SUMMARIES

Estate Litigation Summary [SPB]: Standing to sue continues to be liberalized. What may constitute a trust contest or an amended pleading is also liberalized. Financial elder abuse, which remains a frequent claim related to trust and estate matter, continues to receive treatment by the courts of appeal. The anti-SLAPP motion has not gone away. Timing for summary judgments motions will change. Most importantly, the Court of Appeal confirmed that an order suspending a trustee's powers is not appealable.

Estate Administration Summary [EAN]:

2024 was an active year for the California Supreme Court in areas relevant to trusts and estates law. The most important Supreme court ruling in our area was the *Haggerty v. Thornton* decision, resolving the interpretation of Probate Code section 15402 and accordingly how to construe whether a trust amendment clause is the exclusive and only way to modify a trust.

A second Supreme Court decision, *Harrod v. Country Oaks Partners, LLC*, held that agents under health care powers of attorney do not have authority to enter into arbitration agreements. Two appellate cases which followed shortly thereafter clarified what is needed for fiduciaries holding financial authority to bind the principal to arbitration.

Last, the Supreme Court resolved any prior ambiguity as to whether voting and nonvoting stock are distinguishable for purposes of claiming an exception to reassessment for property tax purposes based on the transfer of real property from a corporation being a proportional ownership interest transfer to the transferee.

Technology will continue to influence administrations, as demonstrated by a decision discussing the validity of electronically signed trusts, and a case where genealogy connected an unknown child to her siblings, which child proceeded to promptly allege she was an omitted beneficiary under her deceased father's trust.

Estate Planning Summary [JWP]:

Surprise, as we go to print we have no way of knowing whether gift, estate and generation-skipping transfer tax exemptions will fall in 2026. Current law says they will, but a legislative maelstrom is on the horizon. In the tax arena for 2024, we see two cases addressing IRC § 2519 on termination of a QTIP Trust with mixed results for taxpayers. Final regulations on basis consistency reporting were issued in 2024. Further, we see another FLP case, this time with the added spice of penalties in the context of tax savings that are "to good to be true." Issues relating to specific accounts, such as IRAs and foreign accounts,

also reared their head. Lower court tax decisions in Bolles and Connolly were affirmed. Finally, on the California side, we have a case discussing who owns money in a client trust account and a case affirming when a drafting attorney can be liable to non-clients.

A. Revenue Procedure 2024-40 – 2025 Inflation Adjustments [JWP]

i. Applicable Exclusion Amount: $13,990,000 (+$380,000), $27,980,000 (+$760,000) for a married couple

ii. Annual Exclusion Amount: $19,000 (+1,000)

iii. Gifts to Non-US Citizen Spouse: $190,000

iv. Section 2032A Special Use: $1,420,000

v. Section 6166 2-Percent Portion: $1,900,000

vi. Section 6039F (Form 3520) Gifts from Foreign Persons Exceed: $20,116

vii. Trusts and Estates Highest Income Tax Bracket: $15,650

B. RECENT CALIFORNIA CASE LAW DEVELOPMENTS (PLANNING, ADMINISTRATION, PROPERTY TAX, AND CONSERVATORSHIPS), LEGISLATION, & "TAX" AUTHORITIES

Selected authorities and cases of interest to trust and estate attorneys published between October 13, 2023 and November 12, 2024.

1. The Supreme Court Has Ruled: For Trust Specified Method Of Modification To Be Exclusive, The Trust Must Express It To Be So [EAN]

HAGGERTY V. THORNTON (2024) 15 Cal.5th 729 [February 8, 2024]

Short Summary: In 2015, Aunt Jeane created a trust. It included the following reservation of rights: "The right by an acknowledged instrument in writing to revoke or amend this Agreement or any trust hereunder."

In 2016, Aunt Jeane herself wrote a first amendment, which was acknowledged before a notary public, and which named her niece as successor trustee and as a beneficiary.

In 2017, Aunt Jeane wrote, but did not sign, a beneficiary list, which did not include her niece.

In 2018, Aunt Jeane herself again wrote an amendment, the beneficiaries under which also did not include her niece. Above her signature, Aunt Jeane wrote, “I herewith instruct Patricia Galligan to place this document with her copy of the Trust. She can verify my handwriting.” Galligan was her former estate attorney.

After Aunt Jeane died, Thornton, a private professional fiduciary, filed a petition to confirm herself as trustee, alleging (for unclear reasons) that the 2016 amendment had been revoked, and confirming the 2017 and 2018 amendments as valid.

The niece objected, and sought to confirm herself as trustee, based on her position that the 2016 amendment had been validly acknowledged, but the 2017 beneficiary list and 2018 amendment had not, and therefore each did not comply with the trust clause requiring an “acknowledged instrument.”

The niece’s argument relied primarily on *King v. Lynch* (2012) 204 Cal.App.4th 1186. She alleged this case reasoned that the trust agreement provided for a method of amendment, so that method must be followed in order to validly amend the agreement. The trial court ruled against the niece, who appealed.

The appellate court affirmed the trial court decision. When the trust instrument explicitly makes the method of revocation provided in the trust instrument the *exclusive* method of revocation, the method in the trust instrument must be used. (*See Masry v. Masry* (2008) 166 Cal.App.4th 738.) However, if it is not made exclusive, the procedures under Probate Code section 15401 may be used.

The California Supreme Court granted review. On February 8, 2024, the Supreme Court affirmed the appellate court decision. It said the plain meaning of the term otherwise means if it is to the contrary. A modification clause would be to the contrary if it were to preclude the use of any of the revocation procedures under Probate Code section 15401.

The Supreme Court went on to say that if a trust were to provide it may only be modified by the method in the trust, then the trust would preclude modification via any other method, including the statutory method of revocation under Section 15401, and it wouldn’t matter whether the trust distinguished between revocation or modification. Also, providing otherwise can also occur if the trust specified the method of modification as exclusive. None of that occurred in this case, so the disputed amendments were valid.

Comment: For those of you placing bets on *Haggerty* or *Balistreri v. Balistreri* (2022) 75 Cal.App.5th 511, *Haggerty* wins. More is needed than the mere inclusion of an amendment clause. This ruling favors settlor intent in construing a trust modification, unless the trust amendment provision is expressly stated to be exclusive. Drafters take note of what it takes if you wish your clause to be the only method available to modify a trust.

2. Standing Under Probate Code Section 17200 Expands [SPB]

HAMLIN V. JENDAYI (2024) 105 Cal.App.5th 1064 (October 17, 2024)

Short Summary: Dr. Laura Dean Head died in 2013, survived by her sisters, respondents Della Hamlin and Helaine Head. Two months before her death, Dr. Head went into hospice care at the home of a former student and friend, appellant Zakiya Jendayi, and during that time, Dr. Head executed a trust instrument naming Jendayi as the trustee and sole beneficiary of the trust. In 2020, respondents petitioned the probate court to invalidate the trust on the grounds of undue influence, lack of capacity, and forgery. After a 17-day bench trial, the Alameda Superior Court (the Hon. Sandra Bean, presiding) granted the petition, finding Jendayi exerted undue influence over Dr. Head to execute the trust instrument.

In the published portion of this opinion, the First District Court of Appeal concluded that respondents, as intestate heirs of Dr. Head disinherited by the trust, had standing to contest the instrument in the probate court and that their petition was not barred under Probate Code section 17200. In reaching its decision, the Court of Appeal relied on *Barefoot v. Jennings* (2020) 8 Cal.5th 822, 257 Cal.Rptr.3d 629 (*Barefoot*), which held that standing to petition the probate court under section 17200 extends not only to current trust beneficiaries but also to individuals formerly named as beneficiaries. The Court of Appeal reasoned, however, that *Barefoot* expressly left open the question whether "an heir who was never a trust beneficiary has standing under the Probate Code to challenge that trust. The Court of Appeal further reasoned that its conclusion comports with *Barefoot's* admonition to read Probate Code sections "consistent with the statutory scheme as a whole," its recognition of the broad jurisdiction and discretionary powers of the probate court, including the power to confer standing under section 17206 as necessary or proper to dispose of matters presented by a petition, and its consideration of judicial economy and the public interest in preventing the administration of a trust that has been procured through fraud or undue influence.

3. QTIP Trusts – Early Termination of QTIP Trusts Result in Gift By Remainder Beneficiaries – Are QTIP Trusts the Ultimate Tax Quagmire or Does Logic Prevail? [JWP]

ESTATE OF ANENBERG V. COMMISSIONER [2024] 162 T.C. No. 9 (5/21/24)

Short Summary: This Tax Court case, with the opinion drafted by Judge Toro, comes on cross motions for partial summary judgment. The case involved QTIP trusts established on Husband's death for the benefit of his surviving Wife. The California Probate Court issued an order terminating the QTIP Trusts and directed that all assets be distributed to Wife. The cross motions addressed the issue of whether there was a gift under IRC § 2519 on termination of QTIP trusts.

First some background. The trustee of the QTIP trusts petitioned the Superior Court of California for the Central District of the County of Los Angeles to terminate the QTIP trusts pursuant to California Probate Code § 15403 (consent of all beneficiaries) and direct the trustee to distribute all trust assets to Wife. In March 2012, the Superior Court issued an order terminating the QTIP Trusts and directing all assets distributed to Wife. At that time, the QTIP trusts held $25,450,000 of assets (Wife's income interest was valued at $2,599,463). Wife received all assets from the QTIP trusts, and among those assets were 199 voting shares and 19,701 nonvoting shares in the family' closely held corporation that owned and operated gas stations.

In August 2012, Wife gifted some of the shares she received from the QTIP trusts to various trusts for the benefit of descendants. In September 2012, Wife sold virtually all of her remaining shares (shares from the QTIP trusts and shares from her other trusts) various trusts for the benefit of descendants. In return for the sales, Wife received nine-year promissory notes in amounts equal to the value of the shares and bearing annual interest at the applicable federal rate. These promissory notes were secured by shares and were partially guaranteed.

Wife timely filed a Form 709 reporting the gifts of shares and took the position that the sales of the shares did not result in taxable gifts. IRS examined Wife's 2012 gift tax return and (after Wife's death in 2016) issued a Notice of Deficiency to Wife's estate. IRS determined that Wife's estate was liable for a gift tax deficiency of more than $9 million and an accuracy-related penalty of over $1.8 million.

Wife's estate timely filed a Tax Court Petition. IRS answered the Petition and amended the answer twice. In the second amendment, IRS alleged for the first time that the termination of the QTIP trusts was a disposition of Wife's

qualifying income interest for life in the QTIP and that she is liable for gift tax as a result of that disposition under IRC § 2519.

IRC § 2519 generally provides that if a surviving spouse disposes of any portion of his or her income interest for life in a QTIP trust, then that surviving spouse makes a gift of the entire remainder value of the QTIP trust. Kite (T.C. Memo 2013-43) and IRS arguments made during exam has brought a lot of attention and concern with early termination of QTIP trusts (and even significant distributions from QTIP trust to the surviving spouse during his or her over life).

The Estate in Anenberg argued that: (i) the transactions were merely a permissible conversion of Wife's qualifying income interest for life into an interest in other property (a permissible exception to application of IRC § 2519); and (ii) even if there was a disposition of Wife's qualifying income interest for life, Wife did not make a gift (Wife received all assets and full and adequate consideration).

IRS' principal argument was that Wife triggered IRC § 2519 and owes gift tax because when the QTIP trusts terminated she disposed of her lifetime income interest in the QTIP trusts. How could Wife make a gift if she received all assets? The Tax Court focused on this very question, stating that, "In sum, when looking for a gratuitous transfer in the circumstances here, one comes up short. Simply put, [Wife] made no gift. So, while (we assume) there was a transfer, there was no transfer of property by gift, a predicate for the Code's imposition of gift tax."

Importantly, the Tax Court differentiated this case from Kite which did apply IRC § 2519 to termination of a QTIP Trust. The Anenberg opinion specifically differentiates Kite, stating: (i) IRS did not argue the substance over form doctrine; and (ii) Kite "involved an apparent attempt to prevent estate or gift tax from ever being imposed on the residual value of the QTIP for which a marital deduction had been taken."

BRUCE E. MCDOUGALL V. COMMISSIONER [2024] 163 T.C. No. 5 (9/17/24) - See also **CCA 202118008**

Short Summary: This Tax Court case, with the opinion also authored by Judge Toro, comes on cross-motions for summary judgment. After Wife's death, a QTIP trust was created for the lifetime benefit of Wife's surviving Husband. In McDougall, the QTIP trust was terminated by nonjudicial agreement. Like in Anenberg, all assets of the QTIP trust were transferred to Husband. Husband promptly thereafter sold some of the assets received from the QTIP trust to trusts for the benefit of descendants in exchange for promissory notes. Husband and his children each filed gift tax returns reporting offsetting reciprocal gifts and no gift tax.

IRS examined the gift tax returns and issued a notice of deficiency to each of Husband and his two children. The notices determined that: (i) termination of the QTIP trust resulted in gifts from Husband to each of his children IRC § 2519; and (ii) the nonjudicial agreement to terminate the QTIP trust resulted in gifts from children to Husband of the remainder interests in the QTIP trust under IRC § 2511.

The Tax Court made the following holdings with respect to the cross motions: (i) the transactions are governed by the principles in Anenberg; (ii) assuming there was a transfer of property under IRC § 2519 when the QTIP trust was terminated, Husband is not liable for gift tax under IRC § 2501 because Husband made no gratuitous transfers, as required by that section; (iii) termination of the QTIP trust and transfer of QTIP trust property in exchange for promissory notes did not result in gifts from Husband to either of his children; and (iv) the agreement to terminate the QTIP trust resulted in gifts to Husband from each of his two children under IRC § 2511.

4. An Agency Document Allowing The Agent To Make The Principal's Health Care Decisions Does Not Infer The Authority To Sign An Arbitration Agreement. More Is Required [EAN]

HARROD V. COUNTRY OAKS PARTNERS, LLC (2024) 15 Cal.5th 939 [March 28, 2024; petition for certiorari denied October 7, 2024]

Short Summary: This is a California Supreme Court decision clarifying the scope of authority an agent holds under a health care power of attorney document.

A competent adult desiring a power of attorney for health care may, but need not, use the advance health care directive statutory form found in Probate Code section 4701. Regardless of whether the adult executes the statutory form directive or any other health care power of attorney, the provisions of the Health Care Decisions Law govern the effect of the writing. Probate Code section 4700.

Charles Logan executed a power of attorney for health care. He did not use the statutory form. Instead, he signed a California Medical Association form patterned on, and specifically citing to, the Health Care Decisions Law. Logan appointed his nephew, Mark Harrod, as his “health care agent” to make “health care decisions”

The power of attorney did not specifically address the authority to execute an arbitration agreement on Logan's behalf. The closest to such authority was

arguably under section B, which said: "***Choose*** or reject my physician, other health care professionals or ***health care facilities***."

After Logan was admitted to a skilled nursing facility, the nephew signed an arbitration agreement. The sole issue on appeal was whether he was authorized to do so. Disagreeing with the reasoning in the 2005 case of *Garrison v. Superior Court*, the court of appeal held he did not. (*Garrison v. Superior Court* (2005) 132 Cal.App.4th 253)

The California Supreme Court granted review, and on March 28, 2024 affirmed the judgment of the Court of Appeal and remanded the case for further proceedings.

The court concluded that a health care decision excludes an optional, separate arbitration agreement that does not accomplish health care objectives. Comparing the Health Care Decisions Law to the financial Uniform Statutory Form Power of Attorney Act, the court noted specific references in the financial Uniform Statutory Form Power of Attorney Act to an agent's power to settle claims or submit claims to arbitration. Such references are absent from the Health Care Decisions Law, which weighs heavily against implying similar or related powers in the context of a health care decision defined under the Health Care Decisions Law.

Resolving a conflict in Court of Appeal case law, the court also held Civil Code section 2319, which embodies the notion of implied authority - that an agent expressly granted a specific power should have sufficient authority to effectuate it – does not infer authority to sign an arbitration agreement as there is nothing necessary or proper and usual about signing an optional arbitration agreement so as to place the principal into a skilled nursing facility.

<u>Comment</u>. This case resolves any questions as to whether an agency document allowing the agent to make the principal's health care decisions infers the authority to sign an arbitration agreement. More is required.
The decision distinguishes the statutory form health care directive from the statutory form financial power of attorney. The language in the statutory form financial power of attorney per Probate Code section 4401 empowers the agent to submit to arbitration. *See* Probate Code section 4450(d). If you use this latter form in your practice, should you modify it? Or, should you draft your own financial power of attorney with the following provision?

My attorney in fact is specifically authorized to sign all forms and agreements and other necessary documents, with the exception of optional arbitration clauses or agreements for the purpose of my admittance, residence and/or treatment in a hospital, skilled nursing care facility, facility organized for the treatment of persons either wholly or partially disabled, retirement residence, or assisted living facility.

Finally, California and federal law require that all contracts of admission that contain an arbitration clause clearly indicate that agreement to arbitration is not a precondition for medical treatment or for admission to the facility. So, why would one agree to arbitration?

5. An Order Suspending The Powers Of A Trustee Is Confirmed As Non-Appealable. [SPB]

YOUNG V. HARTFORD (2024) --- Cal.Rptr.3d --- 2024 WL 4750759 (November 12, 2024)

Short Summary: Defendant Stanley Hartford is the trust protector and defendant Debbie Fleshman is the trustee of the Carolyn Patricia Young Family Trust. Plaintiff Christa Ann Young is a current beneficiary of the trust. Plaintiff alleges defendants are conspiring to improperly withhold trust funds from plaintiff and from certain charities that the trust instrument dictates should receive a portion of the net income of the trust annually. The alleged purpose of the conspiracy is to preserve assets for the benefit of defendant Debbie Fleshman, who (in addition to being trustee) is a residuary beneficiary of the Trust, and will inherit half of its residue upon plaintiff's death. Plaintiff filed an *ex parte* application seeking the suspension of defendants' powers arising from their respective roles as trust protector and trustee of the trust and appointment of a private professional fiduciary as "interim" trustee. The Orange County Superior Court granted the ex parte application and issued a minute order suspending the powers of the defendants. Both defendants (i.e., the trust protector and trustee) appealed.

Plaintiff filed a motion to dismiss the appeal before completion of the record. The Fourth District Court of Appeal granted the motion, confirming that the order appealed from was non-appealable. The Court of Appeal reasoned that nothing in Probate Code section 1300 or 1304, the relevant statutes, rendered the order appealable.

Note: The Court of Appeal analyzed Probate Code section 15642, which only deals with trustees. It, therefore, seems the California courts continue to treat trust protectors as fiduciaries and apply law applicable to trustees.

6. IRS Asserts Consenting to Trust Modification Can Result in a Gift by Trust Beneficiaries [JWP]

ILM 202352018 [2023] (1/3/24)

Short Summary: This internal legal memorandum from Chief Counsel's office addresses the following situation: the trustee of an irrevocable trust treated as a grantor trust for income tax purposes (thus an intentionally defective grantor trust, or IDGT) wanted to modify the IDGT to add a discretionary tax reimbursement clause. Said another way, the trustee wanted the discretion to reimburse the grantor for income taxes paid by the grantor on income generated by assets of the IDGT. The trust document did not originally include such a reimbursement clause. The trustee proposed to make this modification with the consent of the trust beneficiaries. The ILM holds that addition of the reimbursement clause will result in a taxable gift by the trust beneficiaries. The ILM further holds that the result would be the same if the modification instead pursuant to a state statute requiring notice and a right to object (and thus did not require consent). Why is either of these a gift? It is because the trust beneficiaries are relinquishing a portion of the beneficiaries' interest in the IDGT to the grantor. The ILM goes on to state that the gift should be "valued in accordance with the general rule for valuing interests in property for gift tax purposes in accordance with the regulations under § 2512 and any other relevant valuation principles under subtitle B of the Code."

7. In Case You Have Any Question On Why Facilities Fight So Hard To Avoid Juries…Resident Dies After Drinking An Industrial-Strength Cleaner That Had Been Poured Into A Juice Pitcher By Residency Employee [EAN]

MAXWELL V. ATRIA MANAGEMENT CO., LLC (2024) 105 Cal.App.5th 230 [September 19, 2024; petition for review filed on October 29, 2024]

Short Summary: Trudy Maxwell was a 93-year-old resident of Atria Park of San Mateo. She became a resident after being diagnosed with dementia. When she was admitted, James III, her son, executed a separate arbitration agreement with Atria as Trudy's "POA." He was the appropriately acting agent under her financial power of attorney, if it was valid (whether it was valid was at issue as his appointment was predicated upon having attached the death certificate of the prior named attorney-in-fact, which he had not done). But, in any event, he was not her agent under her health care power of attorney.

Trudy died after she drank an industrial strength cleaner that had been poured into a beverage pitcher by an Atria employee and served to her and several other residents.

All eight of her children sued Atria for negligence and elder abuse. Atria sought to compel arbitration.

The trial court, based on Trudy being admitted due to dementia and thus for health care reasons, concluded that James III did not have the authority to execute the arbitration agreement because he did not have the authority to make health care decisions for the decedent.

Atria appealed, arguing that, as her financial attorney-in-fact, James III did have authority to sign the arbitration agreement.

The court of appeal, noting the Supreme Court's recent decision in *Harrod v. Country Oaks Partners, LLC*, remanded the decision. *See Harrod v. Country Oaks Partners, LLC* (2024) 15 Cal.5th 939.

The Supreme Court in *Harrod* ruled unanimously that agreeing to arbitration is beyond the scope of health care decisions to be made by an agent under a health care power of attorney.

The *Harrod* court based its reasoning in part on the need for a rule that conforms to commonsense expectations about the distinction between decisions regarding health care and those generally affecting a person's legal rights. (*Id*. at pp. 950, 957–958.) The court considered it relevant that a health care decision maker may be, first, a patient-selected surrogate, second, a patient's agent pursuant to an advance health care directive or a power of attorney for health care, third, a conservator, and, fourth, a close family member or friend designated by a health care provider or facility. Should important legal rights such as agreeing to arbitration be decided by a surrogate the principal chooses in an emergency situation, or worse, as selected by a health care provider?

Upon remand, the trial court is directed to reconsider disposition of the motion to compel arbitration in light of *Harrod*. The trial court must first consider whether the financial power of attorney was valid (due to the prior agent's death certificate not being affixed and other reasons). If determined valid, the trial court must next determine whether the arbitration agreement is otherwise enforceable, then the trial court must determine whether the health care power agent, rather than James III, held the authority to admit Trudy to Atria, and, if so, whether James III nevertheless held the authority to agree to arbitration. In other words, as there existed both a health care and financial power of attorney, held by different persons, does this affect application of the holding in *Harrod*?

<u>Comment</u>: The nuance of different acting agents under a financial and health care power of attorney matter seems in my opinion to not affect the Supreme

Court's ruling. Most likely, the California Supreme Court's decision has effectively thrown out arbitration agreements for a significant number of residents signed by agents under a durable power of attorney for health care, and not by a financial attorney-in-fact.
Conflicts regarding the roles of agents under health care and financial powers of attorney should be at the forefront of the admission process, as California law views arbitration as a financial decision rather than one related to health care.

So, maybe we don't need to worry about arbitration language in our health care directive forms, but we should definitely be concerned about such language in our financial powers of attorney.

8. Financial Elder Abuse: Court May Award A Penalty of Twice the Value of Misappropriated Property Directly to Trust Beneficiary, Individually. [SPB]

ASARO V. MANISCALCO (2024) 103 Cal.App.5th 717 (July 12, 2024).

Short Summary: This matter arises out of the family trust of decedents Nicola and Antoinette Giacalone. The parties to the lawsuit are various beneficiaries and/or former trustees of the family trust. Anthony Asaro, a trust beneficiary, prevailed on his petition in San Diego Superior Court, which petition alleged wrongdoing by two sets of successive cotrustees.

Jon Maniscalco, a former trustee and beneficiary, appeals the resolution of Asaro's claims against him for breach of fiduciary duties and financial elder abuse of Antoinette. He argues: (1) Asaro lacked standing to assert his claims; (2) Asaro's claims were time-barred; (3) Asaro's claims were released pursuant to a settlement agreement between Jon and the then-trustees, including Nicola; (4) Asaro's elder abuse claims were not supported by substantial evidence; and (5) the court improperly calculated damages under Probate Code section 859 and improperly awarded those damages to Asaro individually.

The Fourth District Court of Appeal affirmed. With respect to the imposition of a penalty of "twice the value," under Probate Code section 859, the Court of Appeal reasoned that that section provides that where the court finds property has been wrongfully taken from a trust (among other things), the defendant is "liable for twice the value of the property recovered by [the] action." Jon claimed the statute only permits the award of double damages—the value of the property doubled—rather than the value of the property plus a penalty measured by twice the property's value. He also contended the trial court improperly awarded section 859 penalties to Asaro instead of the Trust. The Court of Appeal analyzed the split in the law between *Conservatorship of Ribal* (2019) 31 Cal.App.5th 519, (*Ribal*), which Jon relied upon, and *Estate of*

Ashlock (2020) 45 Cal.App.5th 1066 (*Ashlock*). The Court of Appeal agreed with *Ashlock* and held that return of the misappropriated property is required under Probate Code section 856, and liability for "twice the value" misappropriated falls under Probate Code section 859. Interestingly, the Court of Appeal also held that the misappropriated property was properly ordered to be paid to the trust under section 856, whereas the penalty under section 859 was properly payable to the plaintiff because otherwise, the defendant would partially benefit given his interest in the trust.

9. Treasury Issues Final Basis Consistency Regulations [JWP]

T.D. 9991 [2024] (9/17/2024)

Short Summary: On September 17, 2024, Treasury published final regulations for basis consistency reporting (and they are effective as of that date). The focus of these regulations is to make sure that when a beneficiary of inherited property reports his or her income tax basis, it is consistent with that reported on the estate tax return. Main takeaways: (1) we must continue submitting and filing Form 8971; (2) Treasury removed the rule that if an asset was not reported on the estate tax return, the beneficiary's income tax basis would be zero; and (3) beneficiaries (except trustees) are not required to report further transfers of inherited property. These final regs are promulgated under IRC Code §§ 1014, 6035, 6662, 6721, and 6722.

10. Fiduciary's Express Power To Arbitrate Required To Bind Principal To Arbitration [EAN]

ENMARK V. KF COMMUNITY CARE, LLC (2024) 105 Cal.App.5th 463 [September 25, 2024]

Short Summary: Lisa was under an LPS conservatorship. Her father was the LPS conservator of Lisa's person.

The LPS conservatorship order empowered the conservator to place Lisa in "the least restrictive setting" for her "care and needs." The order also imposed "disabilities" including but not limited to prohibiting her from "enter[ing] into any contract…"

During the conservatorship Lisa moved into the Community Care Center, a skilled nursing facility. Her father signed two optional arbitration agreements with the facility as Lisa's representative. After Lisa died, her parents sued the facility's owners and operators, who petitioned to compel arbitration. The trial court denied the petition, finding no evidence of the father's authority to bind Lisa to arbitration.

The owners and operators appealed, contending the claims were subject to arbitration because the LPS conservatorship order empowered the conservator to contract for Lisa's placement, which necessarily encompassed his authority to make agreements connected to her placement. Additionally, the order prohibited Lisa from entering into contracts and left the conservator's power to contract unrestricted.

However, after the trial court ruling, but before the parties filed their briefs on appeal, the Supreme Court published its decision in *Harrod v. Country Oaks Partners, LLC* (2024) 15 Cal.5th 939.

Harrod concerned the enforceability of a separate and optional arbitration agreement between a skilled nursing facility and one of its residents. When the resident was admitted, a relative signed the agreement but not the resident. The relative had a health care power of attorney, authorizing the agent to make "health care decisions".

The Supreme Court first determined a "health care decision" "directly pertains to who provides health care and what may be done to a principal's body in health, sickness, or death." (*Id.* at p. 952.) A health care decision "excludes an optional, separate agreement that does not accomplish health care objectives." (*Id.* at p. 966.)

The Supreme Court next considered whether the health care power of attorney gave the agent implied power to execute the arbitration agreement on the resident's behalf. The Supreme Court found that for a power of attorney to be viewed as binding on the principal "it must appear that the act done by the agent was in the exercise of the power delegated, and within its limits." (*Id.* at p. 961.)

Based on *Harrod*, the appellate court concluded the conservator's execution of the arbitration agreements was not a health care decision binding Lisa to arbitration. Further, the appellate court concluded the Supreme Court's reasoning concerning the scope of a power of attorney applies equally to the conservator's ostensible authority under the conservatorship order. It did not authorize agreeing to arbitration.

<u>Comment</u>: The appellate court in *Enmark* had no concerns with reading *Harrod* as requiring express authorization of the power to arbitrate in the LPS conservatorship order as a condition to binding Lisa to arbitration. So, where does that leave us in general conservatorships? In *Holley v. Silverado Living Management, Inc.* (2020) 53 Cal.App.5th 197, the temporary conservator for a resident signed an arbitration agreement on their behalf. The appellate court confirmed the trial court's denial of the facility's petition to arbitrate based on, among other things, the temporary conservator's lack of authority by statute. A conservator of the estate lacks the power to bind the patient to an agreement

giving up substantial rights, such as the right to use the courts for redress of grievances, without the conservatee's consent or a prior adjudication of the conservatee's lack of capacity.

Further, even with a finding of lack of capacity, it seems more is needed under the Probate Code for a conservator of the estate to bind the conservatee to arbitration.

California Probate Code section 2406 provides that if there is a dispute relating to the estate, the conservator may enter into an agreement in writing with the third person to submit the dispute to arbitration. However, the agreement is not effective unless it has first been approved by the court and a copy of the approved agreement is filed with the court.

Second, although the power to arbitrate any dispute is expressed in Probate Code section 2591(p), Probate Code section 2590 requires the court to grant a conservator a power specified in Probate Code section 2591 before it may be exercised independently.

What solution would have worked to create a binding arbitration agreement in this case? Perhaps Lisa could have signed the arbitration agreement, but as she suffered from mental disability, did she have the capacity to do so? The facility could have required all Lisa's potential successors in interest to sign in their personal capacities…an unrealistic administrative procedure to perhaps employ, but technically feasible.

Absent a grant of statutory authority in a conservatorship or express power to do so in a financial power of attorney, good luck to facilities seeking to compel an arbitration agreement signed on behalf of a resident. Facilities take note: "You don't need a weatherman to know which way the wind blows…" Bob Dylan, "Subterranean Homesick Blues".

11. A Civil Complaint Can Constitute A Trust Contest. [SPB]

HAMILTON V. GREEN (2023) 98 Cal.App.5th 417 (December 28, 2023)

Short Summary: Lena Grace Hamilton (Lena) was the settlor of the Lena Grace Hamilton Trust, dated March 11, 1991. Lena had two children, defendant LaDonna Green (LaDonna) and Eric Duane Hamilton (Eric Sr.). Eric Sr. also had two children, plaintiffs Dominic Hamilton (Dominic) and Eric Hamilton (Eric Jr.). The Trust instrument named LaDonna as the "initial trustee," and upon Lena's death, the trust estate was to be distributed to LaDonna and Eric Sr. The Trust instrument also stated that at the time of Lena's death, if either LaDonna or Eric Sr. was "not living, or [was] later deceased, distribution shall be made to that person's descendants, if then living." A handwritten

amendment changed that provision to read, "if one beneficiary is alive all [Lena's] properties shall [pass] to the survivor."

Eric Sr. died in 2004, predeceasing Lena. Lena died in 2019. After Lena's death, LaDonna informed Dominic and Eric Jr. that she was the sole beneficiary of the Trust, as Eric Sr. had predeceased Lena. LaDonna provided Dominic and Eric Jr. with excerpts of the Trust instrument to substantiate her argument that she was the sole beneficiary. Dominic and Eric Jr. asked LaDonna for a copy of the trust instrument; LaDonna refused the request.

Dominic and Eric Jr. filed a probate petition seeking LaDonna's removal as trustee. Approximately 3 months later, LaDonna served a Probate Code section 16061.7 notice on Dominic and Eric Jr. More than a year later, Dominic and Eric Jr. filed a civil complaint against LaDonna, alleging causes of action for: (1) interference with inheritance rights; (2) interference with prospective economic advantage; (3) interference with contract; (4) conversion; (5) quiet title; (6) breach of fiduciary duty; and (7) an accounting. LaDonna demurred to the complaint, alleging each cause of action was time-barred under Probate Code section 16061.8. The Los Angeles Superior Court sustained the demurrer, without leave to amend. Dominic and Eric. Jr. appealed.

Treating the order sustaining the demurrer as a judgment of dismissal, the Second District Court of Appeal affirmed. In reaching its decision, the Court of Appeal applies the "practical effects" test under *Estate of Stoker* (2011) 193 Cal.App.4th 236, 240–241, reasoning that the practical effect of Dominic and Eric Jr.'s complaint was to challenge the validity of the Trust amendment.

12. Who Owns Money in the Client Trust Account? Rules of Professional Conduct to the Rescue! [JWP]

DICKSON V. MANN [2024] 103 Cal. App. 5th 935 (11/19/2024)

Short Summary: Law firm and a trustee entered into a flat fee agreement for law firm to provide future legal services related to a post-death trust administration. The agreement provided that law firm would charge a flat fee of $585,000.

The trustee paid the flat fee and the funds were held in law firm's trust account in trust for trustee. Two days later, a judgment was entered against trustee, individually and in his capacity as trustee stemming from a suit against him for misconduct related to the trust administration.

Two weeks later, the judgment creditor served law firm with a notice of levy for any money law firm was holding in trust for the trustee. Law firm filed a third-party claim disputing the judgment creditor's right to the funds The Trial Court

ordered law firm to turn over the funds to the judgment creditor. Law firm appealed.

The Appeals Court affirmed the Trial Court, holding that: (i) one cannot conclude that the funds belonged to trustee "merely because they were located in the client trust account. That fact alone is not dispositive;" (ii) even though the flat fee agreement states that the flat fee is deemed earned when received, Rule 1.5(d) of the Rules of Professional Conduct state that a flat fee is not earned until services are provided; and (iii) law firm did not provide any legal services under the flat fee agreement prior to the date it received the notice of levy, and thus the funds were owned by trustee as of that date.

It is noted that law firm had an earlier fee agreement with trustee, but law firm did not raise the earlier fee agreement while litigating the claim. The Trial Court denied a motion for reconsideration that would have considered that prior agreement into account. The Appeals Court affirmed the Trial Court's denial of that motion for reconsideration.

13. Email With Your Name/Signature At End Is Not A Trust Amendment [EAN]

TROTTER V. VAN DYCK (2024) 103 Cal.App.5th 126 [June 27, 2024]

Short Summary: Mary emailed son Timothy stating:

"My mind is quite clear now as [to] how to move forward on the house and will.

I will write it out and then we need to see that the lawyer gets a copy asap and start redoing the will and trust.
1. The house will go to you
2. My cash assets will be divided among my five children; nothing to Wendy …
The rest of selected items will be assigned to different children/grandchildren and I'm working on that list.
Thanks, mom".

Around the same date Mary sent her estate planning attorney a scanned copy of his questionnaire, which she completed by hand. Her cover email said that the "estate planning questionnaire" was attached and "[t]his is something you can review before we talk … . Thanks, Mary[.]" The questionnaire, under "Dispository Plan," where the instructions say to "describe in detail" who should inherit her assets when she dies, was not completed by Mary and left blank. On the following page, in the section for listing "CHILDREN AND GRANDCHILDREN," Mary listed her children's names from present and prior marriages, including Wendy. Mary drew an asterisk next to Wendy's name and

drew another asterisk at the bottom of the page with the words, “NO CONTACT—WOULD PREFER TO DROP FROM WILL—IF POSSIBLE[.]”

Mary died before being able to complete an amendment with her attorney. Son Timothy, successor trustee of the Trotter Family Revocable Trust, petitioned the probate court seeking guidance about whether the emails constituted a valid amendment to the Trust. The court found that Mary's writings were insufficient to amend the Trust. The court held the Uniform Electronics Transaction Act (UETA) does not apply because a unilateral trust amendment does not constitute a “transaction” within the meaning of the statute (Civil Code section1633.2, subdivision (o); and (2)). Mary's writings did not adequately express an intent to amend the trust by the writings themselves.

Timothy appealed, arguing that the probate court erred because: (1) the “trust” exclusion under the UETA is narrowly defined by reference to a “testamentary trust”; (2) amending a trust constitutes a “transaction,” bringing it within the UETA's purview; (3) the questionnaire and Mary's June 25, 2020 email were both “signed” under the UETA; and (4) Mary's writings were explicit enough to convey her intent to amend the Trust.
The appellate court affirmed the decision. The execution of a will, trust, or a health care power of attorney or similar health care designation does not involve another person and is a unilateral act, and is not covered by the Act. Specifically, the Comments to Uniform Electronics Transaction Act section 2, pages 10-11, archived at https://perma.cc/U9W9-NVU4, state that “[a] transaction must include interaction between two or more persons. The same person in different fiduciary capacities is not another person.”

Second, even if the trustee were someone other than Mary, delivery of a unilateral amendment to the trustee would not constitute a transaction “occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.” (Civil Code section 1633.2, subdivision (o))

Finally, when viewed as a whole, Mary's writings appear to be nothing more than correspondence between a client and her attorney about potential changes to the Trust, with the expectation that her attorney would later formalize an amendment.

<u>Comment</u>: Shouldn’t the Civil Code be amended to allow estate planning documents to be covered by the Act? I personally think so, with restrictions. However, in the 2019-2020 legislative session, during the time of social distancing, a legislative proposal to allow for the electronic creation and execution of wills did not make it out of the Legislature.

What if, instead of a unilateral amendment, it was a two-settlor trust, or an amendment which was required, by the terms of the trust, to be signed by a

trustee who is not the settlor? A trust is a fiduciary relationship whereby a settlor places assets under the control of a trustee for the benefit of a beneficiary. It is personal in purpose. In a litigious situation the opponent would certainly argue it should not be considered a transaction. The definitional requirement of a "transaction" under the UETA is one relating to business, commercial or governmental affairs between two or more persons. Further, although the subject matter was a single-settlor trust amendment in *Trotter,* the court noted that the UETA, by its own terms, does not apply to testamentary trusts, which the court construed to include revocable living trusts.

What about those attorneys that used the UETA during the COVID pandemic for document execution? Now that the *Trotter* decision is known by the legal community, best practices would be to follow up with those clients, and to recommend their documents be physically re-signed.

14. Motions for Summary Judgment: Filing Deadlines. [SPB]

AB 2049 (Pacheco; July 15, 2024)

Short Summary: This bill modifies Code of Civil Procedure section 437c. Previously, a motion for summary judgment or summary adjudication in a civil action or proceeding was required to be served and filed at least 75 days before the hearing on the motion. Previously, any opposition to the motion was to be served and filed at least 14 days before the hearing and a reply to the opposition to be served and filed at least 5 days before the hearing.

This bill changes the deadline for a party to file a motion for summary judgment or summary adjudication to at least 81 days before the hearing on the motion. The bill also changes the deadlines for filing an opposition to at least 20 days before the hearing and for filing a reply to at least 11 days before the hearing. The bill prohibits a party from filing more than one motion for summary judgment against an adverse party without leave of court. The bill also prohibits the introduction of new facts in a reply to an opposition to a motion for summary judgment.

15. Alternative IRA Investments Turn Taxable – Paying the Price for Flexibility [JWP]

ESTATE OF CAAN V. COMMISSIONER [2023] 161 T.C. No. 6 (10/18/2023, Corrected 11/4/2023)

Short Summary: This Tax Court case, with the opinion drafted by Judge Copeland, involves the estate of James Caan (the actor who played Sonny Corleone in the Godfather movies). Mr. Caan's IRA with UBS held an interest in a hedge fund. The custodial agreement with UBS provided that Mr. Caan had the responsibility to provide UBS with the yearend fair market value of the hedge fund every year.

Mr. Cann failed to provide the value for tax year 2015. UBS thereafter notified Mr. Caan and distributed the hedge fund interest to Mr. Caan pursuant to the terms of the custodial agreement. UBS also issued a Form 1099-R to Mr. Caan reporting a distribution valuing the distributed hedge fund interest at over $1.9m (based on the 2013 value and last value known to UBS).

More than a year after the notification from UBS, Mr. Caan liquidated the hedge fund interest and contributed the cash proceeds to Mr. Caan's IRA at Merrill Lynch. Mr. Caan reported the 2015 IRA distribution on his income tax return; however, he claimed it was nontaxable as a rollover contribution.

IRS disagreed with Mr. Caan's filing position and issued a notice of deficiency, taking the position that there was a taxable distribution. Mr. Caan requested a private letter ruling waiving the 60-day period for rollover contributions and filed a Tax Court Petition for redetermination of his 2015 income tax deficiency. IRS declined to issue the private letter ruling on the basis that the 60-day period could not be waived because Mr. Caan was required to contribute the hedge fund interest, and not cash, to the IRA at Merrill Lynch for the distribution to be nontaxable as a rollover contribution.

The Tax Court held as follows: (i) the hedge fund interest was distributed to Mr. Caan in tax year 2015; (ii) the hedge fund interest was not contributed to the IRA at Merrill Lynch in a qualifying rollover contribution; (iii) an amount equal to the fair market value of the hedge fund interest at time of distribution (Tax Court determined $1,548,010) is taxable to Mr. Cann in 2015; (iv) the Tax Court has jurisdiction to review IRS' denial of Mr. Caan's request for a waiver of the 60-day period for rollover contributions; (v) the standard of review of a denial of a request for a waiver is abuse of discretion; and (vi) IRS did not abuse its discretion in denying Mr. Caan a waiver.

16. Revenue And Taxation Code Section 62(a)(2) - Proportional Interest Transferors; “Stock” Means “All Stock” [EAN]

PRANG V. L.A. COUNTY ASSESSMENT APPEALS BD. (2024) 15 Cal.5th 1152 [May 30, 2024]

Short Summary: The general rule is a transfer of real property either to or from a legal entity triggers a reassessment for property tax purposes. Of utmost importance to practitioners is the exception to this rule when the proportional ownership interests in real property of the transferor and transferee - “whether represented by stock” or another measure – remain the same after the transfer. Revenue and Taxation Code section 62(a)(2).

Here, Super A Foods, Inc. had two classes of stock - voting and non-voting. The voting stock was held by the Amen Trust, and the nonvoting stock was held by the Amen Trust and several other individuals, including a company employee. Super A transferred real estate held by the corporation to the beneficiaries of the Amen Trust only.

After the Assessor reassessed the property based on the non-voting stockholders not receiving their proportionate interest, the Trustees of the Trust were successful in persuading the Assessment Appeal’s Board to reverse the assessment. The Trustees’ position was that no change in ownership occurred because the Trust held all the corporation’s voting stock. According to the Trustees, the term “stock” in section 62, subdivision (a)(2) must be interpreted to mean voting stock. In advancing this argument, the Trustees pointed to Revenue and Taxation Code section 64(c)(1) concerning transfers of ownership interests in legal entities, which expressly refers to “voting stock”, and argued that sections 62 and 64 must be read together. After the Superior Court vacated the reversal, the Trustees appealed.

The Appellate Court did not find the Trustees’ position at all persuasive. Although “voting stock” appears in other statutes, the court held that this does not lead to ambiguity, and the fact that “stock” is used in section 62(a)(2) means “stock” is what is to be considered.

The California Supreme Court granted review. On May 30, 2024, the Supreme Court approved the appellate court decision. To the extent section 64(c)(1) refers to “voting stock,” it is used as a measure of corporate control, not of beneficial ownership interests in corporate real property.

<u>Comment</u>: Do you think the taxpayer here was totally off base? Section 401 of the Assessors’ Handbook, a 2010 publication that discusses a variety of issues raised by sections 60 through 69.5.6, states “[f]or change in ownership purposes, ownership in a corporation is determined by the percentage of

ownership or control of a corporation's voting stock." The Board of Equalization filed an amicus brief arguing "stock" as per section 62(a)(2) is ambiguous. And, Justice Baker's dissent pointed out that BOE regulations interpreting related statutes (*see* Revenue and Taxation Code section 64(d); California Code of Regulations title 18, section 462.180) and its guidance issued to county assessors discussing Revenue and Taxation Code section 62(a)(2), interpreted the term "stock" to mean voting stock. So, the Amen Trust had support for its position. We now know the aforementioned are not to relied on.

This ruling resolves the prior ambiguity for estate, tax, and financial planning professionals handling property transfers within trusts and corporations. All classes of stock in ownership transfers, not just voting stock, must be considered.

Assessors have become much more proactive in analyzing entity records when citing 62(a)(2) as the basis for reassessment exclusion. Consider an amendment to the partnership or operating agreement, or minutes, to confirm the current ownership for clarity purpose, a separate declaration of the proportionate interest transfer, and an affidavit of ownership, all in support of the transfer being proportionate prior to recording the underlying deed. Complete this due diligence before recording the deed to ensure all records support proportional ownership are in place.

17. Extortion May Lead To Rescission. [SPB]

TRAN V. NGUYEN (2023) 97 Cal.App.5th 523 (November 28, 2023).

Short Summary: The complaint alleges that Bruce Tran and his wife were married in 2003 and have two children. Between 2010 and 2011, the Trans separated. During their separation, Tran began a romantic relationship with Que Phung Thi Nguyen. A few weeks into the relationship, Nguyen informed Tran she was pregnant with his child. Shortly thereafter, in June 2011, Tran ended the relationship. In February 2012, Nguyen gave birth to a child and gave the child the last name of Tran. She maintains Tran is the child's father. Although Tran did not tell his wife about the child, he voluntarily played a role in the child's life; he was present for the child's birth and attended the child's first birthday party.

According to the First Amended Complaint (FAC), Nguyen later "began to blackmail" Tran by demanding that he pay her thousands of dollars, or she would disclose their relationship and the child's existence to his wife. Tran pleaded with Nguyen not to tell his wife. He told her that learning of their relationship and the child's existence "could cause Mrs. Tran to commit suicide." Nguyen, nonetheless, persisted in her threats. Tran claimed he was afraid he might lose his family. He therefore paid Nguyen approximately

$500,000 and purchased a BMW vehicle for her. The FAC alleges Nguyen is liable for civil extortion because she "obtained property or other consideration from [him], with [his] consent, induced by a wrongful use of force or fear" and that the fear was "induced by a threat to expose, or impute to, [him] disgrace or to expose a secret affecting [him]."

Nguyen demurred, arguing California law does not recognize a cause of action for civil extortion under these circumstances. The Orange County Superior Court agreed with Nguyen, citing *Fuhrman v. California Satellite* Systems (1986) 179 Cal.App.3d 408, (*Fuhrman*), disapproved on other grounds in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 212, for the proposition that a claim in the nature of civil extortion, however labeled, is limited to a claim for the recovery of money obtained by the wrongful threat of criminal or civil prosecution, and then only if the threat is made with knowledge that the threatened claim is false.

The Fourth District Court of Appeal reversed, concluding that a cause of action for rescission based on menace is the civil statutory counterpart to a criminal extortion claim. And although the categories of threats that could qualify as "menace"—i.e., threats of confinement, of physical violence or of harm to character—are relatively narrow, this case satisfies the statutory requirement because the threat of exposure alleged (that Tran had fathered a child with Nguyen while married to his wife), constitutes threatened harm to his character.

18. Alleged Estate Tax Savings from FLP Right Before Death are "Too Good to be True" – With Penalties for Emphasis [JWP]

ESTATE OF FIELDS V. COMMISSIONER [2024] T.C. Memo. 2024-90 (9/29/2024)

Short Summary: This Tax Court Memorandum opinion authored by Judge Copeland found that assets transferred to an FLP were includable in Decedent's estate for estate tax purpose pursuant to IRC § 2036. The Tax Court further found that Decedent's estate was liable for a negligence penalty.

Decedent had educated her great-nephew, mentored him, designated him as her agent under a durable power of attorney, as the successor to most of her wealth and executor of her estate. A month before her death (and after having been diagnosed with Alzheimer's dementia more than five years prior), Decedent's great-nephew, as agent under Decedent's durable power of attorney, transferred $17 million of Decedent's assets to an FLP. The transfers left Decedent with only $2.15 million of assets (other than her FLP interest), with bequests of $1.45 million and substantial estate tax due at her death. Decedent's great-nephew signed all of the documents and he controlled the

FLP. Decedent's great-nephew, as executor, claimed discounts of 15% for lack of control and a 25% for lack of marketability (reducing the value to about $10.8 million, an estate tax savings of about $2.5 million based on a 40% tax rate).

IRS audited the estate tax return and issued a statutory notice of deficiency. The Court found that Decedent retained enjoyment of, the right to income from, and the right to designate who would possess or enjoy her assets transferred to the FLP. The Court further found that transfer of Decedent's assets were not bona fide within the meaning of IRC § 2036 (and thus did not meet the exception to applicable of that section). In light of the transfer timing, allegations by taxpayer that the transfers were made to avoid elder abuse (there were two such prior instances), to allow for management consolidation and succession, and to address the durable power of attorney not being respected was not enough to establish the transfers to the FLP were bona fide. The Court found the transfers to the FLP were made to avoid estate tax.

IRS and the Court did not stop there. IRS further asserted that Decedent's great-nephew should have known IRC § 2036 would negate any discounts the FLP purported to offer. As such, the estate should be subject to a negligence penalty. The Court agreed, finding that Decedent's great-nephew did not adequately research or understand IRC § 2036. He should have realized the circumstances in this case. What were those circumstances? According to the Court, interposing an FLP shortly before death to substantially reduce estate tax is too good to be true – there was no reasonable cause or reliance on counsel.

19. Distinguishing Before-Born And After-Born Omitted Children, And What About Those General Disinheritance Clauses? [EAN]

ESTATE OF WILLIAMS (2024) 104 Cal.App.5th 374 [August 21, 2024]

Short Summary: In total, Benjamin fathered seven children. He was aware of the existence of all but Carla, who was born before he moved to California.

After moving to California, Benjamin's last two children were born. After their births, he executed a trust specifically naming only two of his children as beneficiaries. The trust did not include a general disinheritance clause.

After a DNA match, Carla's daughter contacted one of Benjamin's other children on a genealogy website. A "family get together" occurred in September 2019, where Carla met several half-siblings and learned of Benjamin's recent passing.

Shortly thereafter, Carla received a Probate Code section 16061.7 notice from

the trustee. In response, Carla petitioned to receive a share of the estate under Probate Code section 21622.

The court found that Benjamin was Carla's father, and that Benjamin was unaware of her birth at the time he executed the trust. However, the court held that Carla failed to show Benjamin did not provide for her "solely because he was unaware of her birth" and denied her petition.

Carla appealed.

The analysis of the status of an omitted child differs if they were born after the trust was signed, as opposed to having been born before the trust was signed.

An *after-born* child omitted from a testamentary instrument is presumed to have been omitted inadvertently and to be entitled to a share of the estate under Probate Code section 21620. That presumption is only overcome if (1) an intent to omit the child is apparent in the testamentary instrument (a general disinheritance of all after-born children…), (2) the testator devised substantially all the estate to the omitted child's other parent, or (3) evidence establishes the testator made a gift to the child outside the estate in lieu of a testamentary devise. (Probate Code section 21621.)

In contrast, current law presumes a child born *before* execution of the relevant testamentary instrument was intentionally omitted. (Probate Code section 21622.)

Rallo v. O'Brian (2020) 52 Cal.App.5th 997, however, provided a path to inheritance for a before-born child, conditioning the preexisting child's recovery upon the child showing (1) the testator's unawareness of the child's birth, and (2) that the child was not provided for solely because of that lack of awareness. To recover under Probate Code section 21622, the omitted child must show the decedent would have provided for the child but for the fact that the decedent was unaware of the child's existence.

Thus, even assuming it is "substantially likely" Benjamin would have provided for Carla if known to him, "substantially likely" is not the relevant standard. The fact that Benjamin did not provide for four other known children, and his stated intent to provide specifically for two children, supported the trial court's ruling that Carla failed to show Benjamin did not provide for her "solely because he was unaware of her birth."

The appellate court affirmed the trial court's ruling.

<u>Comment</u>: We have all heard the saying, "there is nothing like family." Here, a DNA match led to the uniting of unknown siblings, followed by a 16061.7 notice, and finally litigation.

What should planners do? Should you include a trust recital identifying the

testator's children, as well as a general disinheritance clause as to any children born *before* execution of the trust and not identified in the recital? With genealogy a popular hobby, and the availability of DNA testing as easily as via a *23andMe* subscription, the prospects of finding a before-born child have never been higher.

But be much more cautious with after-born children disinheritance clauses. The two clauses should be distinguished from each other.
Finally, are either or both forms of disinheritance clauses, and whether to include them, something more to discuss with our clients? How long will our document review meetings be?

20. A Creditor's Claim May Qualify As An Amended Pleading. [SPB]

SPEARS V. SPEARS (2023) 97 Cal.App.5th 1294 (December 19, 2023).

Short Summary: Brian Spears filed a petition seeking to be named as a creditor of his deceased father's trust; to remove his step-mother, Therese Spears, from her position as trustee; and for an accounting. The Humboldt Superior Court sustained Therese's demurrer, with leave to amend. A couple months later, Brian filed a document titled "Creditor's Claim," using the same case number that was assigned to his original petition, instead of filing an amended petition. The trial court then dismissed Brian's petition on the basis that he did not file an amended pleading after the court sustained Therese's demurrer to the petition with leave to amend. Brian appealed, contending he did file an amended pleading, reasserting only his claim to be named as a creditor of the trust (through his creditor's claim).

The First District Court of Appeal reversed. The Court of Appeal reasoned that Brian's creditor's claim provided additional specificity regarding the oral agreements on which he based his claim to be a creditor of the trust, plainly aimed at remedying the defects the trial court found in his original claim. The Court of Appeal further reasoned that Brian filed these documents under the same case number as his original complaint. Giving these documents a reasonable interpretation, the Court of Appeal held that the creditor's claim was intended to be Brian's amended pleading, given that Brian was abandoning his claims for an accounting and removal of Therese as trustee and proceeding solely on his creditor's claim.

Note: The Court of Appeal also held that the comment in *Arluk v. Dobler* (2004) 116 Cal.App.4th 1324, 1333 about what happens when there is no proceeding to administer an estate is *dicta*.

21. Penalties for Failure to File FBARs Survive Death [JWP]

UNITED STATES V. HENDLER [2024] 23 Civ. 3280 (DEH) (S.D.N.Y. Sep. 17, 2024) (9/17/2024)

Short Summary: In this District Court case, the U.S. Government sued the surviving spouse and daughter of a decedent who died in 2021 (Defendants). Defendants were distributees of decedent's estate and the surviving spouse was administrator of decedent's estate. The Government was seeking unpaid tax assessments. This opinion comes in response to cross-motions for summary judgment.

Decedent was a US citizen and had a financial interest or signature authority over nine bank accounts in Israel. The accounts had combined balances of at least $10,000 in U.S. dollars. Decedent failed to timely file FBARs as required. In 2015, decedent filed untimely FBARs, noting his ownership of the accounts and their combined balances of more than $10,000 from 2004 to 2010. Before decedent died on January 6, 2021, IRS was examining decedent's FBAR filings. After decedent's death, IRS assessed FBAR penalties totaling $250,000 against decedent. Following <u>Bittner v. United States</u> (which held as a matter of statutory interpretation that $10,000 penalties for non-willful failure to file FBARs accrue on a per-report, not a per account, basis), IRS reduced the penalties against decedent to $70,000, that is $10,000 for each of the seven years of unreported FBARs (plus additional statutory penalties and interest). As of October 3, 2023, decedent's estate owed a total of $81,934.53, including additional penalties and interest.

Defendants made two arguments as follows: (i) the FBAR penalties accrued at the time they were assessed in 2021, and this was after decedent passed away and FBAR penalties cannot be assessed against a decedent; and (ii) to the extent that the Government had any claim against decedent prior to the April 2021 FBAR assessments, that claim was extinguished by decedent's death.

The District Court granted the Government's motion and denied Defendants' motion. As to Defendants' first argument, the Court held that the Government's right to levy an assessment regarding decedent's failure to file FBARs for the final year in question accrued on June 30, 2011 (well before decedent's death), and the Government may pursue the claims against his estate. As to Defendants' second argument, the Court held that FBAR related penalties are not extinguished upon the death of the taxpayer (note that neither the parties nor the Court found binding case law on this point). The Court further held that the Government issued the assessments timely, as they were issued prior to expiry of the statute of limitations (as extended by decedent by agreement).

22. Family Code 2640 Right of Reimbursement Is For A Contribution, Not A Sale, And On Close Calls The Courts Will Interpret To Protect the Community [EAN]

IN RE MARRIAGE OF MOTISKA & FORD (2023) 96 Cal.App.5th 1291 [November 8, 2023, as modified on denial of rehearing November 29, 2023; review denied February 21, 2024]

Short Summary: Per a mediated agreement in his prior marriage, Dale Motiska ("Motiska") was awarded a nursery business as his separate property, as a sole proprietorship. Then, in his next marriage, in an attempt to incorporate the nursery, he sold the nursery to Buxup, Inc. for $1.00.

Dale did not dispute Buxup itself as being a community property asset. The dispute here was the value of his separate property contribution to the acquisition of Buxup, a community asset, within the meaning of Family Code section 2640, triggering a right to reimbursement.

The trial ruled that as this was a sale transaction as opposed to a contribution, Motiska was not entitled to any reimbursement. Motiska appealed.

Motiska's first error was not challenging the factual finding during litigation at the trial court level that Motiska sold his nursery to Buxup for $1.00. Accordingly, the court of appeal concluded it must imply all necessary adverse findings that will support a determination against Motiska as to issues he failed to raise, like the consideration being $1.00.

Second, the appellate court held a spouse's sale of property to the community (or, as here, to a business that is a community asset) differs from a freely given contribution that is subject to reimbursement under section 2640.

Finally, as to Motiska's argument that $1.00 was merely nominal consideration and "akin to a gift" as opposed to a sale, the Court of Appeal noted that the sale, even at a low price, constituted valid consideration. This view was further supported by the fact that Motiska chose the sale price to avoid business transfer taxes, among other potential reasons.

<u>Comment</u>: The Court of Appeal referred to the California's Supreme Court's opinion in *In re Marriage of Walrath* (1998) 17 Cal.4th 907, 919, which highlighted the policy consideration of encouraging contributions to benefit the community and protecting the expectations of reimbursement that arise from those contributions.

Second, even if Motiska had challenged the sale itself at the trial court as akin to a gift, he would still have had material facts to overcome. Maybe, as this was

at least his second marriage, what he should have done was enter into a premarital agreement to define and protect his separate property.

Last, estate planners need to remain vigilant of these cases to understand the nuances of community property. And, if uncertain as to the effect of transactions between spouses, refer your clients to family law counsel for an opinion. Finally, remember, community property rules themselves from state to state are very different (e.g., in Texas, income from separate property is community property).

23. The Anti-SLAPP Motion Continues To Proliferate Probate Proceedings. [SPB]

GREEN TREE HEADLANDS, LLC V. CRAWFORD (2023) 97 Cal.App.5th 1242 (December 19, 2023).

Short Summary: Alan Patterson once owned a group of residential lots in a subdivided area of Sausalito known as Wolfback Ridge Estates. Patterson's residence sat on Lot 3, adjacent to undeveloped Lot 4. During the time he lived there, a 15-foot easement across Lot 4 allowed access to his garage on Lot 3 (the Driveway Easement). Patterson sold Lot 3 to Steven McArthur, and McArthur took title in the name of a limited liability company, Green Tree Headlands LLC. To effectuate the sale, Patterson and McArthur signed a Purchase Agreement, which included two addenda. The Second Addendum contained, among other things, the following provision: "The existing driveway easements over Lot #5, and Lot #4 to access Lot #3 will remain in existence."

No group sale of the lots in Wolfback Ridge Estates took place, and McArthur had no occasion to exercise his Right of First Refusal for Lot 4. Patterson moved out of the residence on Lot 3 in 2011, and never undertook any construction on Lot 4. After McArthur's purchase of Lot 3, McArthur claims Patterson knew for years that McArthur and his wife continued to use the Driveway Easement, and never objected. Patterson died in 2017, and his three adult children are the beneficiaries under his estate plan. Following Patterson's death, Crawford, the trustee of a trust holding his assets (the Trust or the Patterson Trust), took over the management of Lot 4. (Crawford had been Patterson's accountant.) Crawford, as Trustee of the Patterson Trust, brought suit alleging various claims for breach of contract, declaratory relief, quiet title, etc. However, the defendants prevailed on demurrer and a motion to strike under Code of Civil Procedure section 128.7 (due to Crawford's discovery abuse). (<u>Note:</u> Crawford had ignored a Rider attached to the Purchase Agreement, among other things.) McArthur then sued Crawford for malicious prosecution, and in response, Crawford filed an "anti-SLAPP" special motion to strike under Code of Civil Procedure section 425.16. The Marin County

Superior Court denied the “anti-SLAPP” motion, finding that Crawford met his burden to show a probability of success on the merits.

The First District Court of Appeal reversed. It reasoned that sufficient evidence did exist for Crawford to overcome McArthur’s arguments under Prong II. The Court further reasoned that: Litigants should always be mindful that, under the *Bertero-Crowley* rule, a partially well-founded lawsuit will not ward off malicious prosecution exposure if they bring a case that overreaches, even in part. But despite the strictures of that rule, “ ‘Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win....”

Note: A malicious prosecution claim lies if probable cause is lacking for any “ground” or “theory” of liability. (See *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 57; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 679, 683, 686–687, 691.

24. Federal Lien Defeats Claim that a QPRT Owned the Real Estate [JWP]

CAROLYNE Y. SOHN ET AL. V. UNITED STATES [2024] No. 5:22-cv-00385 (3/21/2024)

Short Summary: This case comes from the United States District Court, Northern District of California, and is in response to cross motions for summary judgment. The taxpayers transferred the Saratoga residence into a Qualified Personal Residence Trust (QPRT) in 1996. Title to the property was subsequently transferred back to the taxpayers on various occasions. After one of the taxpayers incurred a substantial tax debt, the federal government placed a lien on the residential property at a time when nominal title to the property was held by the taxpayers rather than the QPRT.

Validity of that lien depended upon whether the property was owned by the taxpayers or by the QPRT. If owned by the taxpayers, then the lien would be valid. If owned by the QPRT, then the lien would not be valid. The District Court granted the Government’s motion for summary judgment, holding: (i) the trust is no longer a QPRT because it failed to meet the requirements of Treas. Reg. § 25.2702-5(c)(9) and was not timely reformed pursuant to Treas. Reg. § 25.2702-5(a)(2); (ii) taxpayers could not overcome the presumption under California law that when legal title to the property was subsequently transferred from the QPRT to the taxpayers, that transfer validly transferred full beneficial title in the property to the taxpayers as their community property.

25. Service of Summons On Conservatee Is Made To Conservator [EAN]

IN RE N.J. (2024) 104 Cal.App.5th 96 [August 12, 2024]

Short Summary: The case involves the removal of a newborn child from her mother due to the mother's substance abuse and mental health issues.

A key fact was the mother's aunt was acting as the mother's conservator during the matter.

The mother had requested the child be placed with the aunt. The juvenile court denied her request to place her child with her aunt and terminated her parental rights.

The mother appealed, raising two issues. Her first argument was that the juvenile court failed to provide proper notice of proceedings to aunt, as her conservator. Mother also contended she did not receive proper notice of the necessity to seek writ review to preserve a challenge to the juvenile court's order terminating reunification services.

The appellate court held the juvenile court erred in both respects. The trial court's orders were reversed, and the matter was remanded for further proceedings.

<u>Comment</u>: The aspect of this case relative to trusts and estates attorneys is the failure to provide proper notice of proceedings to aunt, as conservator. Given aunt's status as conservator, she was required to be served with notices of all dependency proceedings. The appellate court referred to *In re Daniel S.* (2004) 115 Cal.App.4th 903, 911, where that court looked to Code of Civil Procedure section 416.70, which provides that service of a summons on a conservatee may be made by delivering a copy to the conservator. Keep in mind that a conservator has a much broader scope and role than the commonly thought Probate Code person and estate duties.

26. Free Room and Board In Exchange for Care Services Constitutions "Remuneration" for Purposes of Becoming A Care Custodian. [SPB]

ROBINSON V. GUTIERREZ (2023) 98 Cal.App.5th 278 (December 26, 2023)

Short Summary: Under the statutory presumption of Probate Code section 21380, a provision of a dependent adult's estate plan that makes a donative transfer to the adult's "care custodian" is presumed to be the product of fraud

or undue influence if the adult executed the instrument during the period when the care custodian provided services to the adult or within 90 days before or after that period. (Prob. Code § 21380(a)(3).) A “care custodian” is a person who provides health or social services to a dependent adult. (Prob. Code §21362(a).) For purposes of section 21380’s presumption, however, a “care custodian” does not include a person “who provided services without remuneration if the person had a personal relationship with the dependent adult” as established by criteria in the statute. (Prob. Code § 21362(a).)

In this matter brought by a decedent’s intestate heirs at law, the trial court (San Joaquin Superior)(determined that defendant Elvira Gutierrez was not a care custodian for purposes of section 21380’s presumption. Gutierrez was residing with the decedent receiving free room and board in exchange for providing care services when the decedent executed instruments transferring her entire estate to Gutierrez. Specifically, the decedent executed a joint tenancy deed naming Gutierrez as a joint tenant on the title to her residence. Also, while a patient in a hospital, the decedent directed an attorney to prepare her estate plan. She wanted her entire estate to pass to Gutierrez and to have Gutierrez become the trustee of her trust. The attorney prepared a trust instrument, a will, and an individual grant deed. In the revocable inter vivos trust agreement, the decedent named Gutierrez as the trustee of the trust, and she transferred her property into the trust. The decedent also transferred her residence by grant deed to Gutierrez as trustee of the trust. The trust instrument and the will declared that upon the decedent’s death, all of decedent's property passed to Gutierrez free of trust. The decedent died 10 days after executing her estate plan.

Plaintiffs are the surviving children of the decedent's brother, who predeceased her. They brought this action in by petition in the probate court to determine the validity of the trust and the will. Following a three-day court trial, the trial court denied plaintiffs’ petition and entered judgment in favor of Gutierrez because Gutierrez was not a care custodian because room and board did not constitute remuneration for her services and she had a prior personal relationship with the decedent that met the other criteria set forth in section 21362(a).

Plaintiffs appealed, contending that the trial court erred by determining Gutierrez was not a care custodian. They argued that Gutierrez’s receipt of free room and board in exchange for her services for decedent constituted remuneration. They also asserted that the record does not support the court’s finding that Gutierrez and the decedent had a prior personal relationship. Ultimately, the Third District Court of Appeal reversed. It reasoned that free room and board, in exchange for care services, are, indeed, remuneration for purposes of section 21362.

27. Continued Struggles with IRC § 2703 – Motion for Summary Judgment Denied Due to Genuine Disputes of Material Facts Affecting Exceptions [JWP]

ESTATE OF ANDERSON V. COMMISSIONER [2024] Tax Court Docket No. 37600-21 (6/14/2024)

Short Summary: This Tax Court case, with the opinion drafted by Judge Copeland, comes on taxpayer's motion for summary judgment. IRS issued the Estate a notice of deficiency determining an estate tax deficiency of $4,124,391. The Estate filed a petition for redetermination in Tax Court and a motion for summary judgment. The Tax Court denied the Estate's motion for summary judgment.

Decedent was a shareholder in an S corporation with subsidiaries involved with renting, distributing, and servicing equipment for construction, forestry, and mining. The shareholders entered into a shareholders agreement providing that when a shareholder receives an offer to purchase some or all of his shares in the company, then the company generally has the right to purchase all (but not less than all) of the shares subject to the offer. The shareholders agreement further provided the company with the right to purchase all (but not less than all) shares owned by a shareholder upon certain "triggering events" affecting the shareholder, including death, divorce, and bankruptcy.

The shareholders agreement contained a provision stating how to determine the value of the shares the company has a right to purchase. The shareholders agreement provided that the value of each share shall be determined by an independent appraiser selected by the company's board of directors based on the fair market value of a minority interest in the company. The appraisal is to be either: (i) as of a date not more than 24 months preceding the event determined by an independent appraiser selected by the company's board; or (ii) if no such appraisal was obtained, the company will obtain an appraisal as of the end of the calendar year preceding the event. The appraiser must value a minority interest in the company.

Decedent made gifts of shares in the company during his lifetime, and at his death he owned 6,278 shares of nonvoting stock. Decent and his descendants owned less than 50% of the company, the rest of the company being owned by Decedent's brother, his brother's daughters, and a spouse of one of the brother's daughters.

After Decedent's death on December 12, 2017, the company elected to purchase Decedent's shares and the shares held by Decedent's descendants. Pursuant to an appraisal dated December 2, 2016, the appraiser concluded that, "as of September 30, 2016, the fair market value of [the company] on a

lack of control basis is . . . $13,809,000.00, or $562.00 per share [with 25,900 shares outstanding].” The company used this per share value as the purchase price for the subject shares.

Also after Decedent’s death, the same appraiser issued an appraisal report dated February 20, 2019, which concluded that “as of October 31, 2018, the fair market value of [the company] on a lack of control, non-marketable basis is $23.7 million, or $1,317 per share [with 18,010 shares outstanding].”

On September 21, 2021, IRS issued the notice of deficiency to the Estate determining a $4,124,391 estate tax deficiency. IRS took the position that each share had a fair market value of $2,154 in 2017 and that fair market value should be used for estate tax purposes. Note this fair market value was based on an “Internal Revenue Service Valuation Memorandum.”

On February 1, 2022, in reaction to the notice of deficiency, the Estate and Decedent’s lineal descendants filed suit against the company in the U.S. District Court asserting, among other things, that the company breached the shareholders agreement by failing to provide accurate information to the appraiser, ensuring the appraisal reflected fair market value, failing to pay what was owed under the shareholders agreement, and failing to assist or undertake the defense of the notice of deficiency. The District Court litigation settled out of court and neither IRS nor the Tax Court were informed of its terms.

The issue for the Tax Court was valuation of the shares in the company includible in Decedent’s estate (and the shares Decedent gifted during life). The Estate argued that the price determined under the shareholders agreement was binding on IRS. Specifically, the Estate argued it met the exceptions to IRC § 2703 and the common law that generally ignore value provisions in a shareholders/buy sell agreement for gift and estate tax purposes.

Bone Fide Business Arrangement - Given the litigation that ensued as to this issue, there is a genuine dispute as to this material fact.

Device to Transfer Property for Less than Full and Adequate Consideration - Again, given the lawsuit and the lack of evidence in the record as to the settlement terms of the same, there is a genuine dispute of material fact that is better suited for a trial on the merits.

Comparable to Arm's-Length Transaction – IRS questioned whether unrelated parties would agree to a provision that valued their shares as of a date up to two years before the date of purchase – court found that further evidence – likely including expert testimony – is needed.

Therefore, the motion for summary judgment was denied.

28. Be Aware Of Mootness Issues When Requesting Extensions of Time [EAN]

CONSERVATORSHIP OF K.Y. (2024) 100 Cal.App.5th 985 [March 20, 2024]

Short Summary: On December 9, 2022, a jury found K.Y. to be gravely disabled within the meaning of then-Probate Code section 5008(h)(1)(A) and the trial court appointed the Public Guardian as conservator of K.Y.'s person. K.Y. timely filed a notice of appeal on December 13, 2022 and the record on appeal was filed on March 9, 2023. K.Y. sought and received three extensions of time for a total of 94 days, before filing her opening brief on Sept. 7, 2023. The Public Guardian sought and received two extensions of time for a total of 28 days, before filing its Respondent's Brief, which brief was filed less than two weeks before the conservatorship order expired. K.Y. filed her reply brief on January 19. 2024 after receiving an additional 30-day extension, over a month after the conservatorship order had expired on December 9, 2023.

The Public Guardian requested that the Court of Appeal dismiss the appeal as moot. The Public Guardian also advised the Court of Appeal that it had filed a petition to renew the conservatorship in November 2023 and that K.Y. had accepted the reappointment for six months.

The Court of Appeal dismissed the appeal as moot, as the conservatorship order appealed from expired before briefing was complete and there was no exception to mootness under the facts of the case. The bases of the Court's ruling were that K.Y. accepted reappointment of the conservatorship so K.Y. was very unlikely to suffer from collateral consequences of the appeal being dismissed; the trial court record was filed and counsel was appointed in a timely manner; and counsel for both sides requested numerous extensions for filing their briefs.

29. Elder Abuse Restraining Order Did Not Authorize Declaration That Deed Was Void *Ab Initio.* [SPB]

NEWMAN V. CASEY (2024) 99 Cal.App.5th 359 (January 30, 2024).

Short Summary: In February 2022, in the San Mateo Superior Court, Gracia Bovis filed a "Request for Elder or Dependent Adult Abuse Restraining Orders" on Judicial Council form EA-100.2. She described the alleged abuse as follows: "[She] was misled by her daughter that she needed to protect her home from rising property taxes. Marina Casey, her daughter, told her mother to sign some documents the [year before] or else her property taxes would skyrocket. Bovis later learned that the documents did not protect her from

rising property taxes, but instead transferred the property into her daughter's name."

An evidentiary hearing before the Honorable Lisa Novak commenced remotely, with only Bovis and her attorney present. Bovis proceeded to testify as follows: She had lived in her house for over 50 years. Her daughter, Casey, "tricked [her] into signing papers" so she "would not get higher taxes" under Proposition 19. When Casey presented the documents to Bovis to sign, she did not tell her the home would no longer be in her name. Bovis admittedly did not read the documents. When the trial Court asked Bovis why she had not read the documents, Bovis stated, "There was so much confusion going on in this matter discussing this, and I just trusted her." Just as Bovis finished testifying, Casey and her counsel were connected to the hearing and explained that they were in a different department. The trial Court then continued the hearing for a week. The trial Court ultimately found that Bovis had met her burden of clear and convincing evidence, that she has not understood what she had done by signing the deed, so an elder abuse restraining order was issued. The trial Court then denied Casey's motion for reconsideration, finding that "Casey's possession of title is ongoing elder financial abuse that must be enjoined." The trial Court ordered the transfer deed void *ab initio*.

Casey appealed, challenging the restraining order(s) as not supported by the evidence and the order declaring the deed void on the additional ground the trial court exceeded its authority under Welfare & Institutions Code section 15657.03. The First District Court of Appeal affirmed the issuance of the restraining order(s), but it reversed the subsequent order declaring the deed void. The Court of Appeal reasoned that section 15657.03 establishes a summary and initially provisional remedy to secure the immediate protection of elders from further abuse. The Court of Appeal further reasoned that the statute expressly enumerates the kinds of restraining orders the court may issue, and in some situations, a restraining order, alone, may provide an elder a sufficient remedy. In other situations, it may not, and, in such situations, the summary restraining order process serves as an important adjunct to a civil or probate action for elder abuse under the Elder Abuse and Dependent Adult Civil Protection Act (§ 15600 *et seq.*).

30. Step Transaction Inapplicable to Cause Estate Inclusion of Life Insurance Proceeds Through Lack of Insurable Interest Argument [JWP]

ESTATE OF BECKER V. COMMISSIONER [2024] T.C. Memo. 2024-89 (9/24/2024)

Short Summary: This Tax Court Memorandum opinion, authored by Judge Nega, found that death benefit proceeds from life insurance policies acquired

and held by irrevocable trust are not includable in Decedent's gross estate for estate tax purposes.

Decedent created an irrevocable trust with his son and daughter as trustees. Decedent's wife, children and grandchildren were the trust's beneficiaries. Decedent did not possess any retained interests in the trust that would cause inclusion in his gross estate for estate tax purposes.

The trust acquired two life insurance policies insuring Decedent's life issued in Maryland, with death benefits of $11,470,000 and $8,000,000. Decedent borrowed money, and loaned that money to the trust so the trust could pay the initial premiums of $999,693 and $697,257. Subsequent borrowing occurred to pay premiums as they became due. The borrowing had a chain. The Trust borrowed from Decedent, who borrowed from Mr. S, who borrowed the funds from Dr. W. The borrowings were documented with loans, and ownership of the loans subsequently transferred. The holders of the loans did not have a direct relationship with Decedent.

After Decedent's death, the policies paid out $11,489,797.22 and $8,013,808. Disputes arose between the trustees and the then owners of the loans as to who should receive the death benefit proceeds. The trust ultimately paid $9 million to one of the then loan holders. Decedent's estate also filed an estate tax return that did not include the death benefits from the trust owned policies.

IRS examined the estate tax return, and issued a statutory notice of deficiency that: (i) included the death benefits paid on the two trust-owned policies: (ii) allowed a $9 million deduction for the amount paid to the then loan holder; and (iii) increased taxable gifts by $7,734. Decedent's estate filed a petition for redetermination with the Tax Court.

Maryland law requires the owner of life insurance to have an insurable interest. This is because in the absence of an insurable interest, entering into a contract for insurance on the life of another is "a mere gambling contract and is against public policy." Maryland law further provides for a cause of action that allows the estate of an insured to recover the death benefits from those who receive death benefit proceeds not having an insurable interest in the decedent's life.

IRS argued that step transaction doctrine applied to acquisition of the life insurance, the trust and the lending that took place to acquire and maintain the life insurance. Said another way, if one collapses the transactions, then the proceeds were not primarily for the benefit of the trust beneficiaries. Rather, the policies were for the benefit of the lenders who had no insurable interest. Therefore, the insurance contracts violated Maryland's insurable interest statute and Decedent's estate had a cause of action allowing recovery of the

death benefits from the lenders. The Court analyzed this argument, holding "applying the step transaction doctrine is inappropriate."

The Court also analyzed whether the proceeds are includable in Decedent's gross estate for estate tax purposes under other theories. The Court concluded that they were not because without such a claim, there were no incidents of ownership under IRC § 2042 and no property ownership under IRC § 2033.

31. LPS Conservatorships – Failure Of Trial To Begin Within Ten Days Of Demand Is Not Mandatory Grounds For Dismissal [EAN]

CONSERVATORSHIP OF T.B. (2024) 99 Cal.App.5th 1361 [February 27, 2024; review denied June 12, 2024]

Short Summary: The issue in this matter was the proper interpretation of Welfare and Institutions Code section 5350(d)(2), which, effective January 1, 2023, the Legislature amended to add that the "[f]ailure to commence the trial within [10 days of a demand for trial] is grounds for dismissal.

The trial court in Contra Costa County made a finding of grave disability and appointed a conservator in a proceeding under the Lanterman-Petris-Short Act (Welfare and Institutions Code section 5000 et seq.) after granting continuances and denying motions for dismissal based on a delay in commencing the conservatorship trial.

The Court of Appeal affirmed, holding the time limit for commencing a conservatorship trial (Welfare and Institutions Code section 5350, subdivision (d)(2)) is directory and not mandatory because there is no self-executing consequence for a delay, the amended text indicates the Legislature has not rejected a prior judicial construction as directory, and such construction preserves judicial discretion as to dismissal and avoids impinging on the courts' inherent authority to control dockets and decide cases.
The appellate court also found that the trial court abused its discretion by focusing only on the availability of counsel and the court in granting continuances for 171 days after the demand for trial, rather than all the circumstances listed in California Rules of Court, rule 3.1332(d). However, the error was harmless because the duration of the temporary conservatorship was not excessive (Welfare and Institutions Code section 5352.1, subdivision (c)) and no fair trial or due process violation was apparent.

32. No Limitation On Scope Of Forfeiture (Violation of "No Contest Clause") Imposed Following Beneficiary's Direct Contest Of The Trust Without Probable Cause. [SPB]

KEY V. TYLER (2024) 102 Cal.App.5th 365 (May 28, 2024)

Short Summary: This opinion follows *Key v. Tyler* II (2019) 34 Cal.App.5th 505. *Key v. Tyler* II involved a trust beneficiary filing petition to enforce the trust's no-contest clause against a co-beneficiary, alleging that the co-beneficiary's defense of an invalid trust amendment procured through undue influence was a direct contest of the trust and therefore implicated the no contest clause. The Los Angeles Superior Court struck the petition based on the co-beneficiary's anti-SLAPP motion and denied the beneficiary's motion for attorney fees. The beneficiary appealed. The Second District Court of Appeal, reversed, concluding that the beneficiary's defense of an amendment in court constituted a direct contest of the original trust.

This opinion concerns what occurred after the Court of Appeal remanded. On remand, the co-beneficiary moved to bifurcate trial on the beneficiary's no-contest petition. The co-beneficiary argued that there was a preliminary, and potentially dispositive, issue arising from the absence of a no contest provision in the 2003 Amendment. The co-beneficiary also claimed that the absence of such a provision meant that the subject amendment is not a protected instrument under Probate Code section 21310(e), and that the beneficiary's share of the assets from the Residual Trust specified by the amendment is, therefore, not subject to forfeiture. The Los Angeles Superior Court agreed, and on its own motion, denied the beneficiary's no contest petition. The beneficiary appealed.

On appeal, the dispositive issue was the consequence of the beneficiary's direct contest. The beneficiary claimed that the forfeiture resulting from her direct contest could include only her share of the assets that is directly controlled by the original Trust instrument. The beneficiary argued that those assets are limited to her share of the personal property identified in Article Four of the original Trust instrument, which the amendment changed. The beneficiary claimed that she cannot be precluded from receiving distribution of her designated portion of the assets through the Residual Trust because those assets are "controlled by" a different Amendment, which is not a protected instrument. The Second District Court of Appeal ultimately reversed, rejected the argument that the other amendment was not a protected instrument. It also remanded for the trial court to find whether probable cause was lacking.

33. IRA Distributions Are Taxable – Even if Distribution Results from Forfeiture to Government [JWP]

LONNIE WAYNE HUBBARD V. COMMISSIONER [2023] T.C. Memo. 2024-16 (2/7/2024)

Short Summary: This Tax Court case, with the opinion drafted by Judge Marshall, comes in response to IRS' motion of summary judgment to sustain most of IRS' proposed deficiency (and failure to file and failure to pay penalties) for taxpayer's 2017 tax year. The issues posed were whether: (i) taxpayer was liable for tax on a $427,518 distribution from an IRA in 2017 paid to the United States government and not the taxpayer; and (ii) taxpayer is liable for failure to timely file and failure to timely pay penalties. The Tax Court granted IRS's motion because taxpayer constructively received the distribution and there was no genuine dispute of material fact.

What happened? Taxpayer was indicted for various crimes related to the distribution of controlled substances and chemicals. Before his conviction, taxpayer was a pharmacist. Taxpayer was found guilty on most of the counts and taxpayer's IRA (and other property) was condemned and forfeited to the United States government. Taxpayer was incarcerated in 2017 and remained incarcerated during all relevant times. The IRA custodian issued taxpayer a Form 1099-R, Distributions from Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., for the 2017 tax year. Taxpayer had made no payments with respect to his 2017 Federal income tax liability.

34. AB 2867 (Gabriel) Recovery of artwork and personal property lost due to persecution. [EAN]

Status 9/16/24 Chaptered – Secretary of State – Chapter 257 Statutes of 2024

Per Legislative Counsel's Digest:

Existing law provides that in the case of a theft of any article of historical, interpretive, scientific, cultural, or artistic significance, a cause of action is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, the aggrieved party's agent, or a law enforcement agency. Existing law requires a civil action against a museum, gallery, auctioneer, or dealer for the recovery of works of fine art that were unlawfully taken or stolen, including a taking or theft by means of fraud or duress, to be commenced within 6 years of the actual discovery by the claimant or their agent of the identity and whereabouts of the work of fine art and information or facts that are sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art. Existing federal law, the Holocaust Expropriated Art

Recovery Act of 2016, establishes a statute of limitation for claims to recover artwork and other property, as defined, stolen or misappropriated by the Nazis between 1933 and 1945.

This bill would provide that California substantive law shall apply in actions to recover fine art or an item of historical, interpretive, scientific, or artistic significance, including those covered by the Holocaust Expropriated Art Recovery Act of 2016, brought by a California resident or their heirs, as specified.

This bill would also permit a California resident or a representative of the estate of a California resident, as specified, to bring an action for damages or to recover artwork or personal property, as defined, that was stolen or otherwise lost as the result of political persecution. The bill would permit such actions to be brought within six years of the discovery of relevant facts, as provided. This bill would also permit those who discovered relevant facts prior to the effective date of this bill, to bring such actions within 6 years of the discovery of the relevant facts or within 2 years of the effective date of this bill, whichever is later. The bill would permit a cause of action previously dismissed on specified grounds to be brought again under these provisions within 2 years of either the effective date of the bill or the entry of final judgment and the termination of all appeals, whichever is later.

This bill would declare that it is to take effect immediately as an urgency statute.

35. Statute of Limitations For Claims Arising From Agreement with a Decedent Did Not Apply To Claim Based on Trust Amendment. [SPB]

SMITH V. MYERS (2024) 103 Cal.App.5th 586 (June 27, 2024

Short Summary: The settlor's daughter, to whom the settlor had granted a 45.8 percent interest in his ranch, and her husband, brought an action seeking an order confirming the validity of a purported amendment to a trust. The original instrument directed trustee to distribute the settlor's remaining 54.2 percent interest in the ranch to the settlor's wife upon the settlor's death, to identify daughter and husband as trust beneficiaries, and to direct transfer of the settlor's remaining right, title, and interest in the ranch to the daughter and husband upon his death. The daughter and husband also sought to remove the wife as trustee of the trust. The Glenn County Superior Court denied the wife's motion for summary adjudication based on the statute of limitations contained in Code of Civil Procedure section 366.3 (finding that the petition dealt with "the internal affairs of a trust, not a promise relating to a

distribution"), denied the wife's motion for reconsideration, and, following a bench trial, entered judgment for the daughter and husband. Wife appealed.

The Third District Court of Appeal affirmed, concluding that the statute of limitations for claims arising from a promise or agreement with a decedent to distribution from an estate or trust did not apply, and the amendment did not constitute promise or agreement to distribute property within meaning of the statute. The Court of Appeal reasoned that the daughter and husband did not allege that the settlor made an agreement with anyone or promised to anyone to create testamentary documents that would provide distribution. The Court of Appeal further reasoned that they also did not allege that the settlor made a binding promise that they would gain full title to the ranch when he died; they simply alleged that the amendment itself requires distribution, the amendment is valid, and they are entitled to receive the distribution under the amendment.

Note: The Court of Appeal rejected the wife's argument that section 366.3 applied because the Trust instrument was a "trust agreement." While the Trust instrument may have been viewed as a contract between the settlor and trustee, it remained revocable.

36. Court Confirms Standard for Non-Clients to Sue Drafting Attorney for Malpractice [JWP]

GROSSMAN V. WAKEMAN [2024] 104 Cal. App. 5th 1012 (11/19/2024)

Short Summary: Decedent's son and grandchildren sued estate planning attorneys for malpractice. Decedent's estate was valued at $18 million. His 2012 estate planning documents, prepared by the attorneys, disinherited Decedent's son and grandchildren, leaving his entire estate to his fourth wife (who was independently wealthy).

The case was submitted to a jury, who in a special verdict found: (i) son and grandchildren were "the intended beneficiaries of" the documents; and (ii) attorneys had "breach[ed] the standard of care in the preparation" of the documents; and (iii) son and grandchildren were damaged by such negligence. The jury awarded damages totaling $9.5 million.

The Appeals Court reversed, holding that there was insufficient evidence to show attorneys owed a duty of care to son and grandchildren. There was no "clear, certain and undisputed evidence of Decedent's intent" to leave his estate to son and grandchild and not his fourth wife. Testimony from the attorney who met with Decedent, and others, indicated that that the evidence of Decedent's alleged intent was disputed.

Recall the February 2023 case of Gordon v. Ervin Cohen & Jessup LLP, (2023) 88 Cal.App.5th 543. That case clarified the duty attorneys owe nonclients such as potential beneficiaries. It's main holding is that, "[C]ourts will recognize a duty to a nonclient plaintiff – and thereby allow that plaintiff to sue the lawyer for legal malpractice – only when the plaintiff, as a threshold matter, establishes that the client, in a clear, certain and undisputed manner, told the lawyer, 'Do X' (where X benefits the plaintiff)." The holding in this case is consistent with Gordon because it held that there was no such "clear, certain and undisputed evidence of Decedent's intent."

37. SB 1399 (Stern) Transfer of real property: transfer fees [EAN]

Status 9/22/24 Chaptered – Secretary of State – Chapter 475 Statutes of 2024

Per Legislative Counsel's Digest:

Existing law generally regulates the transfer of real property, including by prohibiting, on or after January 1, 2019, the creation of a transfer fee, except as provided. Existing law defines "transfer fee" to mean, subject to certain exceptions, a fee payment requirement imposed within a covenant, restriction, or condition contained in a deed, contract, security instrument, or other document affecting the transfer or sale of, or any interest in, real property that requires a fee be paid as a result of transfer of the real property.

This bill would additionally exempt from that provision private transfer fee covenants if specified requirements are met, including that the covenants are created pursuant to an agreement entered into before June 1, 2009, the covenants are applicable to land that is identified in the agreement, and the agreement was in settlement of litigation or approved by a government agency or body.

38. Social Media Companies Were Not Providers of Electronic Communication Services (ECS) Within Meaning of Federal Stored Communications Act (SCA) [SPB]

SNAP, INC. V. SUPERIOR COURT (2024) 103 Cal.App.5th 1031 (July 23, 2024) [Reviewed Granted By California Supreme Court]

Short Summary: The underlying matter was a criminal murder proceeding. IN the context of pre-trial discovery involving subpoenas served on Meta, Inc. (Meta) and Snap, Inc. (Snap) regarding records relating to Facebook, Instagram, and Snapchat accounts, the San Diego Superior Court denied

motions to quash and ordered records produced. Snap and Meta filed petitions for a writ of mandate.

On appeal, the Fourth District Court of Appeal recognized that this was a writ proceeding presenting a question of first impression that was raised but not decided by the California Supreme Court in *Facebook, Inc. v. Superior Court* (2020) 10 Cal.5th 329 (Touchstone): Whether the business models of social media companies like Meta and Snap, under which they access their customer's data for their own business purposes, excludes them from the limitations imposed on the disclosure of information by the Stored Communications Act (18 U.S.C. § 2701 et seq., the "SCA"). Ultimately, the Fourth District Court of Appeal affirmed in part and reversed in part, concluding that while good cause existed for the subpoenas, the companies' ability to access and use their customers' information takes them outside the strictures of the SCA. The Court of Appeal ultimately issued a peremptory writ directing the trial court to set aside its order, and issue a modified order directing petitioners to produce the subpoenaed information *in camera* to the trial court for it to determine whether the material should be produced to defense counsel.

Note: On September 18, 2024, the California Supreme Court granted a petition for review due to this opinion causing a conflict among the appellate courts.

39. Ninth Circuit Affirms Loans without Expectation of Repayment are Gifts [JWP]

ESTATE OF MARY P. BOLLES V. COMMISSIONER [9th Cir 2024] No. 22-70192 (4/1/2024)

Short Summary: This case is an appeal from a 2002 Tax Court estate tax case involving intrafamily loans. Mom transferred $1,063,333 to her son between 1985 and 2007. Son did not pay any amounts back after 1988. In 1995 mom started work on her estate plan. As part of that work, she changed her trust from eliminating son as a beneficiary, to including him in a formula that accounted for the "loans." Also signed a 1-page document acknowledging loans to son, but also stating, son has neither the assets nor the earning capacity to repay all or any part of the amount previously loaned. IRS took position that all amounts were gifts. Petitioner took position that all amounts were loans. The Tax Court held that amounts through 1989 were loans, and amounts in 1990 and later were gifts. Son had no ability to repay, and thus no expectation of repayment, on amounts in 1990 and later years.

The Ninth Circuit, in a decision "not for publication," affirmed the Tax Court.

40. AB 1868 (Friedman) Property taxation: assessments: affordable housing [EAN]

Status 9/25/24 Chaptered – Secretary of State – Chapter 553 Statutes of 2024

Per Legislative Counsel's Digest:

Existing law requires the county assessor to consider, when valuing real property for property taxation purposes, the effect of any enforceable restrictions to which the use of the land may be subjected. Under existing law, these restrictions include, among other enumerated items, a recorded contract with a nonprofit corporation that meets prescribed requirements, including requirements that the nonprofit corporation has received a welfare exemption for properties intended to be sold to low-income families who participate in a special no-interest loan program, and that the contract includes a deed of trust on the property in favor of the nonprofit corporation to ensure compliance with the terms of the program, as described.

This bill would, for purposes of valuing property by the county assessor, establish a rebuttable presumption that, at the time of purchase, an assessor shall not include the value of the above-described deed of trust. By changing the manner in which county assessors assess property for property taxation purposes, this bill would impose a state-mandated local program.

The bill would also make a technical, nonsubstantive change to those provisions.

This bill would incorporate additional changes to Section 402.1 of the Revenue and Taxation Code proposed by AB 2897 to be operative only if this bill and AB 2897 are enacted and this bill is enacted last.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

41. Civil Actions: Electronic Service. [SPB]

AB 2283 (Pacheco; July 18, 2024)

Short Summary: This bill amends Code of Civil Procedure section 1010.6. The service of documents in a civil action by electronic means is allowed pursuant

to rules adopted by the Judicial Council. Prior law required a court, on and after July 1, 2024, to electronically transmit documents to a party who is subject to mandatory electronic service, or who has consented to accept electronic service, as specified.

This bill extends the deadline for courts to comply with the requirement described above to July 1, 2025, and would make a conforming change to clarify that court's electronic transmittal of documents constitutes service of those documents. This bill also declares that it is to take effect immediately as an urgency statute.

42. USSC Affirms that Corporate Owned Life Insurance Proceeds Included in Value of Corporate Stock for Estate Tax Valuation Purposes [JWP]

CONNELLY V. UNITED STATES [2024] No. 23–146 (6/6/2024)

Short Summary: Brothers Michael and Thomas Connelly were the sole shareholders of Crown C Corporation ("Crown"). A buy-sell agreement provided that should the surviving brother not exercise the right to purchase the deceased's shares, Crown was to redeem the shares. The company obtained a $3.5 million life insurance policy on each brother. Michael died first in 2013 and Crown used $3 million of the life insurance proceeds to redeem his shares, effectively valuing Crown at $3.89 million. On audit of the estate tax return for Michael's estate, IRS argued that Crown's valuation was too low and should include the life insurance proceeds, bringing the value to $6.86 million and leading to a $1 million deficiency. The estate paid the deficiency and sued for a refund in District Court. The District Court granted summary judgment, agreeing with IRS that the life insurance proceeds should be included in the value of Crown when valuing Michael's shares in his estate.

On Appeal, the court upheld the District Court and declined to follow the 2005 *Estate of Blount* decision. The court concluded that a proper valuation of Crown in accordance with IRC § 2042 and Treas. Reg. § 20.2042-1(c)(6), read in conjunction with Treas. Reg. § 20.2031-2(f)(2), must include the life insurance proceeds without treating the redemption obligation as an offsetting liability. Proper valuation requires inclusion of the life insurance proceeds in the stock valuation. The Eighth Circuit also found that the buy-sell agreement's valuation provision did not fix the stock value for estate tax purposes. The Court looked to IRC § 2703 and buy-sell agreement case law to reach its conclusion.

Before the U. S. Supreme Court, the Supremes held that the contractual obligation to redeem shares is not necessarily a liability that reduced the corporation's value for purposes of the federal estate tax. In this case, Crown's

contractual obligation to redeem Michael's shares did not diminish the value of those shares. The judgment of the Eighth Circuit was affirmed.

43. AB 1880 (Alanis) Minors: artistic employment [EAN]

Status 9/27/24 Chaptered – Secretary of State – Chapter 610 Statutes of 2024

Per Legislative Counsel's Digest:

Existing law regulates certain contracts for artistic employment between an unemancipated minor and third parties, including employment as an actor, dancer, musician, comedian, singer, stuntperson, voice-over artist, or other performer or entertainer, or sports participant. Existing law provides for the establishment of a Coogan Trust Account, as specified, for the purpose of preserving for the benefit of the minor 15% of the minor's gross earnings or a greater percentage, if requested by the minor's parent or guardian.
This bill would specifically include a content creator in these provisions and would define "content creator" as an individual who creates, posts, shares, or otherwise interacts with digital content on an online platform and engages in a direct contractual relationship with third parties, as specified.

44. Financial Institutions: Service of Process. [SPB]

AB 2067 (Dixon; September 12, 2024)

Short Summary: This bill amends sections 488.610, 684.115, and 701.030 of the Code of Civil Procedure, relating to enforcement of judgments. The Enforcement of Judgments Law, governs the enforcement of, among other things, money judgments and judgments for possession of personal property in civil actions. Existing law requires a writ, notice, order, or other paper relating to the enforcement of a judgment to be served on the judgment creditor or, if applicable, the judgment creditor's attorney. Under existing law, a financial institution is permitted, and if it has more than nine branches or offices within the state is required, to designate one or more central locations for service of legal process within the state. Except as specified, service of legal process at a central location of a financial institution is effective against all deposit accounts and all property held for safekeeping, as collateral for an obligation owed to the financial institution, or in a safe-deposit box if, among other conditions, the deposit accounts or properties are held by the financial institution at any branch or office covered by central process and located within the state.

This bill permits a financial institution to designate a third-party agent, as defined, as a central location for service of legal process. If the financial institution designates a third-party agent as a central location, the bill requires

the financial institution to designate another central location. The bill prohibits each central location from being located in the same county as another designated central location.

45. Courts: Remote Court Reporting [SPB]

AB 3013 (Maienschein; September 14, 2024)

Short Summary: This bill adds and repeals section 69959.5 of the Government Code. Existing law authorizes a superior court to appoint official court reporters and specifies the fees for court reporting services. Existing law prohibits courts from using remote court reporting, as defined, to produce the record of any court proceedings and from expending any funds to purchase equipment or software to facilitate the use of remote court reporting.

This bill, notwithstanding these provisions, authorizes, beginning July 1, 2025, the Superior Courts of the Counties of Alameda, Contra Costa, Los Angeles, Mendocino, Monterey, Orange, San Bernardino, San Diego, San Joaquin, San Mateo, Santa Clara, Tulare, and Ventura to conduct pilot projects to study the potential use of remote court reporting to make the verbatim record of certain court proceedings. The bill requires, if the superior court elects to conduct a pilot project, the remote court reporting to be performed only by official reporters who meet specified qualifications and conditions. The bill requires the official reporters to be physically located in a court facility while performing the remote court reporting or, alternatively, authorizes the superior court and the exclusive representative of the official reporters to meet and confer to reach agreement no later than June 30, 2025, to include additional offsite locations to test remote court reporting. The bill authorizes no more than 20 percent of full-time official court reporters, or for courts with fewer than 10 full-time official court reporters, 2 court reporters, in the participating county to participate in the pilot project. The bill specifies the requirements for participating superior courts to be equipped by June 30, 2025. The bill authorizes remote court proceedings to be used to report proceedings in limited civil, law and motion for unlimited civil cases, family law, child support, probate, juvenile dependency, juvenile delinquency, felony and misdemeanor criminal proceedings except preliminary hearings, trials, and death penalty cases, and authorizes transcripts created through remote court reporting to be used whenever a transcript of court proceedings is required. The bill prohibits court reporters participating in the pilot project from being held responsible for failures in technology or equipment and, if technology or audibility issues inhibit the court reporter's ability to accurately capture and certify a verbatim record, the bill would require the court to temporarily suspend the proceeding until the issues can be resolved. The bill prohibits a trial court from retaliating or threatening to retaliate against a court reporter who notifies the judicial officer that technology or audibility issues are impeding the creation and

certification of the verbatim record of a proceeding. The bill requires each participating court to submit specified data and information to the Judicial Council on the results of the pilot project. The bill requires the Judicial Council to compile the results from each participating court and to prepare a report for the Legislature within 6 months of the conclusion of the pilot project. The bill requires the pilot projects to terminate no later than July 1, 2026, or earlier if a participating court determines that the use of remote court reporting is prejudicing the rights of litigants or the interests of justice.

46. Civil Actions: Enforcement of Money Judgments [SPB]

AB 2837 (Bauer-Kahan; September 24, 2024)

Short Summary: This bill amends sections 684.130, 685.070, 703.510, 703.570, 703.580, 703.610, 704.115, 704.220, 706.021, 706.022, 706.103, and 706.105 of the Code of Civil Procedure, regarding the enforcement of money judgments. Existing law defines what types of property are subject to and exempt from the enforcement of money judgments, as specified, including certain retirement plans. Existing law also requires judgment creditors seeking to enforce money judgments to provide notice to judgment debtors, as specified. Existing law provides rules for claiming exemptions from the enforcement of money judgments and provides requirements for the adjudication of such exemptions. Existing law defines "personal debt" for the purposes of renewing the period of enforceability of a judgment to mean money due or owing or alleged to be due or owing from a natural person arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for the debtor's personal, family, or household purposes.

This bill expands the types of retirement plans exempt from money judgments, as specified, and exempts such property to the extent necessary to provide specified support for, and satisfy tax obligations of, the judgment debtor. The bill revises the enforcement provisions described above by requiring a judgment creditor to take additional steps to verify a judgment debtor's address and provide notice of enforcement to a judgment debtor, by requiring a court to order the return of exempt property that has been levied upon, and limiting the time period during which an earnings withholding order may be enforced and the frequency with which such an order may be sought. The bill requires a financial institution to protect from levy cumulatively exempt funds belonging to the debtor and held in multiple accounts. The bill generally applies these revised enforcement provisions to cases in which the judgment creditor seeks to enforce judgment based on recovery of personal debt described above.

47. Judiciary Omnibus [SPB]

AB 3281 (September 28, 2024)

Short Summary: This bill amends a plethora of California law. Of most relevance to trust and estate matters, are the following.

(6) Existing law requires the party intending to move for a new trial to file a notice of intention to move for a new trial, as specified, either before the entry of judgment or within 15 days of the date of mailing notice of entry of judgment by the clerk of the court or service by any party of written notice of entry of judgment, or within 180 days after the entry of judgment, whichever is earliest.

This bill revises the requirement to file a notice of intention to move for a new trial from within 15 days of the date of mailing notice of entry of judgment to within 15 days of serving the notice.

(9) Existing law defines "absence of conflicting information relative to parentage" to include entries such as "unknown," "not given," "refused to state," or "obviously fictitious names."

This bill clarifies that "absence of conflicting information relative to parentage" means the absence of conflicting information relative to the existence or nonexistence of a parent and child relationship, as defined.

(10) Existing law authorizes a person asserting that the error exists in any certificate of birth, death, fetal death, or marriage already registered, to make an affidavit under oath stating the changes necessary to make the record correct, which must be supported by the affidavit of one other credible person having knowledge of the facts, and file it with the state or local registrar.

This bill clarifies that those facts include, but are not limited to, the correction of typographical, spelling, or statistical errors.

Existing law makes these provisions applicable to a certificate of birth only in the absence of conflicting information relating to parentage on the originally registered certificate.

This bill requires that an amendment of a certificate of birth would only be available in the absence of conflicting information relative to the existence or nonexistence of a parent and child relationship, as defined, on the originally registered certificate of birth.

(11) This bill amends Probate Code section 1209. Existing law requires when notice that is required to be given to the State of California in connection with a proceeding under the Probate Code, it is to be given to the Attorney General, as specified. Existing appellate case law (i.e., *Breslin v. Breslin*) holds that a party

who receives notice of, but who fails to participate in, court-ordered mediation is bound by the result.

This bill declares that the Attorney General does not waive the right to object to a proposed settlement that adversely impacts a charitable gift by failing to appear at a mediation, a mandatory settlement conference, or another court-ordered alternative dispute resolution proceeding related to that settlement.

48. Civil Disputes [SPB]

SB 940 (Umberg; September 29, 2024)

Short Summary: This bill adds Article 10.1 (commencing with Section 6173) to Chapter 4 of Division 3 of the Business and Professions Code, adds sections 1799.208 and 1799.209 to the Civil Code, and amends sections 1281.9, 1282.6, and 1283.05 of, adds section 1281.93 to, and repeals Section 1283.1 of, the Code of Civil Procedure, relating to civil disputes.

(1) Existing law, the Consumer Contract Awareness Act of 1990, defines a consumer contract as a writing prepared by a seller that provides for the sale or lease of goods or services or the extension of credit, as specified, for personal, family, or household purposes, among other provisions. The act requires a seller to deliver a copy of a consumer contract to the consumer at the time the contract is signed, and prohibits the waiver of any provisions of the act. Existing law prohibits an employer from requiring specified employees, as a condition of employment, to agree to a provision that would require the employee to adjudicate outside of California a claim arising in California or deprive the employee of the substantive protection of California law with respect to a controversy arising in California, as specified.

This bill, for contracts entered into, modified, or extended on or after January 1, 2025, prohibits a seller from requiring a consumer, as a condition of entering into a contract, to agree to a provision that would require the consumer to arbitrate outside of California a claim arising in California or to arbitrate a controversy arising in California under the substantive law of a state other than California, as specified.

Existing law, the Small Claims Act, requires each superior court to have a small claims division, and provides that the small claims court has jurisdiction over specified actions.

This bill gives consumers the option to have a dispute adjudicated pursuant to the Small Claims Act if a consumer contract requires a dispute under the contract to be arbitrated and the dispute may be adjudicated pursuant to the Small Claims Act.

(2) Existing law, the California Arbitration Act, provides a statutory framework for the enforcement of contractual arbitration under California law. The act establishes that a written agreement to submit a present or future controversy to arbitration is valid, enforceable, and irrevocable, except to the extent that the contract could otherwise be revoked under general contract law principles. The act defines a neutral arbitrator as one who is selected jointly by the parties or by the parties' arbitrators, or is appointed by the court if the parties or their arbitrators cannot jointly select an arbitrator. The act requires a person selected to serve as a neutral arbitrator to disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt as to the proposed neutral arbitrator's impartiality. The act requires the disclosure to include, among other things, whether or not the proposed neutral arbitrator has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral with a party to the proceeding, or is participating in, or has participated within the last 2 years in, discussions regarding such prospective employment or service.

This bill, in a consumer arbitration case, except as specified, requires the disclosure of any solicitation, as defined, made after January 1, 2025, and within the last 2 years by, or at the direction of, a private arbitration company to a party or lawyer for a party. The bill would prohibit the solicitation of a party or lawyer for a party during the pendency of the arbitration.

The act authorizes depositions to be taken and discovery obtained in arbitration proceedings, as specified. The act deems those deposition and discovery provisions to be incorporated into every agreement to arbitrate specified disputes and provides that those provisions are incorporated into other disputes only if the agreement so provides. This bill repeals the provisions deeming those deposition and discovery provisions to be incorporated into every agreement to arbitrate specified disputes and providing that those provisions are incorporated into other disputes only if the agreement so provides. The bill makes conforming changes.

(3) Existing law, the State Bar Act, provides for the licensure and regulation of attorneys by the State Bar of California, a public corporation governed by a board of trustees comprised of appointed and elected members. Existing law authorizes a law corporation to practice law if certain conditions are met.

This bill requires the State Bar to create a program to certify alternative dispute resolution firms, providers, or practitioners that includes specified components, including procedures for a firm, provider, or practitioner to become a certified alternative dispute resolution firm, provider, or practitioner, as specified, and different levels of tiers for certification, as specified. The bill authorizes the State Bar to charge a fee to cover the reasonable costs of administering the program, as specified.