Probate Department Newsletter

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Parting Words from Hon. John G. Evans (Ret.)

Greetings Desert Probate Bar:

In 2017, after nine years on the bench, I was assigned to the probate department upon Judge Cox's retirement. I literally had no experience in probate, having spent almost 29 years as a civil litigator before my appointment to the bench. When I first took the bench I received a civil assignment.

Probate, to me, simply involved two concepts - capacity and undue influence. I know better now.

Ironically, after five years into my assignment, when I am finally beginning to feel comfortable with many of the concepts, I am retiring. Not because I don't enjoy my assignment, but because I enjoy my new grandchildren more.

For most of my career, I have said that it is a well-known fact that the Desert Bench and Bar have the best relationship than any other in the State of California. I can now say with confidence that the Desert Probate Bar is the best in the State of California.

Tom Johnson, and the team he assembled, were instrumental in my development as a probate judge. I could not have asked for better support. And of course, I was fortunate to have Juanita Diaz' experience and institutional knowledge to help me in the courtroom along with my reporter Crystal Johnson and Deputy Bakar. They became my team.

But, I want you, the Desert Probate Bar, to know how wonderful it has been for me to have had such a talented, knowledgeable, professional and civil group of attorneys appear in my court on a regular basis. You, as a whole, deserve much credit for helping me learn probate and making my assignment enjoyable. For that I am grateful.

I will always be partial to civil litigation, but I have truly enjoyed presiding over the desert probate department. I wish you all well. Remain civil in your practice and, to paraphrase JFK's famous remarks:

> Ask not what your court can do for you,
> but what you can do for your court."

And remember, "You don't always get what you want, but if you try sometimes, you get what you need."

Mick Jaeger

Thank you.

Upcoming CLE Presentations of Interest

Sept 21-23, 2023: 2023 Annual Meeting California Lawyers Association

Oct 16-20, 2023 - 43rd Tax & Estate Planning Forum

Nov 1, 2023 - 44th Annual Inland Empire Estate Planning Seminar

Nov 5-9, 2023 - 60th Annual Hawaii Tax Institute Conference

Nov 17, 2023 - 49th Annual Trust and Estate Conference by USC Gould School of Law

TRUSTEE INCAPACITY AND FILLING ANOTHER TRUST "EMPTY CHAIR"**

This is a sequel to a related article last year, *Settlor Incapacity and Filling the "Empty Chair"*, discussing amendments to Probate Code sections 15800 and 16069. That article addressed the so-called "empty chair problem" -- where the settlor, who typically holds the power of trust revocation, is incompetent, and thus has left empty the "chair" of the person to whom the trustee's duties flow. The new provisions aimed to limit the class of beneficiaries who fill this "chair" -- and are thus entitled to certain trust information under the Probate Code -- while imposing new disclosure duties on the trustee, when no person holding the power to revoke the trust is competent.

The prior article analyzed interpretive questions and practical challenges raised by requiring certain trustee disclosures upon the settlor's incompetence, without mandating assessment of competence (or incompetence) or reliance on any particular type of proof of incompetence.

This article further discusses another "empty chair" problem – when the settlor/initial trustee is *de facto* incompetent, but is not clearly *legally* incompetent, and no successor trustee has yet to officially take over the trusteeship.

Mandatory Disclosure, but Optional Incompetency Determination. Probate Code § 15800(b)(1) requires that the trustee provide a notice to the beneficiaries and a complete copy of the trust instrument, to each beneficiary who would be entitled to receive a mandatory or discretionary distribution of trust income or principal if the settlor had died, within 60 days of the trustee "obtaining information establishing the incompetency of the last person" holding the power of revocation. Section 15800 (b)(2) requires the trustee to account to those same beneficiaries at least annually, and to respond to such a beneficiary's request for information under Probate Code § 16061. Probate Code § 15800(c), however, provides that, "to establish incompetency for the purposes of subdivision (b), the trustee *may* rely on either" the trust's specified method or a judicial determination of incompetency. *(Italics added.)*

Probate Code § 15800 thus leaves unclear if there is any proof of incompetence the trustee *must* rely on or whether there is any limit to the type of evidence a successor trustee can disregard, in refusing to provide the notice § 15800 requires. Insofar as a trustee can disregard various levels of putative proof of the settlor's incompetence, the mandate of disclosure under § 15800(b) seems also in a sense precatory, absent a legal reform clarifying the type or level of proof of incompetence the trustee *shall* or *must* rely on.

Trustee Incapacity; a Second "Empty Chair". When no settlor of a revocable trustee is *de facto* competent, but no successor trustee has taken over, the "chair" of the trusteeship is also in similar sense *de facto* "empty". Such ambiguous situations, where a settlor/trustee seems incapacitated – but no successor trustee has officially taken over in their place – were a common challenge before Probate Code § 15800 was amended, and continue to be a challenge. An impaired settlor/trustee was and continues to be vulnerable, when a predator in their midst prefers that the impaired settlor continue to be trustee, perhaps to be more easily able to unduly influence or financially abuse the settlor, compared to the situation where a competent successor trustee steps in and imposes sound management. Sometimes the designated successor trustee is the predator in the settlor's orbit, who prefers avoiding assuming the trusteeship, to maintain the facade that questionable financial transactions, orchestrated by the predator, are the choice of the trustee/settlor, and to conceal the "puppet master" role the predator is really playing. Moreover, the predator may prefer to defer or avoid assuming the trusteeship so as to defer or avoid assuming the many strict fiduciary duties of a trustee.

Amended Probate Code § 15800 in no way created these situations, but it could conceivably aggravate them, by adding to the incentives of a corrupt designated successor trustee to avoid officially taking over as trustee. Before, the various information rights of a beneficiary generally had to be exercised by the beneficiary by requesting the information. (A main exception is the annual accounting requirement of Probate Code § 16062.) Now, a successor trustee is required to give the specific information specified in amended § 15800, regardless of whether any beneficiary wanted it or requested it. This mandatory transparency, though laudable, may encourage predators to try to maintain a status quo where an incapacitated settlor is nominally the trustee of their trust, although in reality the trustee "chair" is *de facto* empty.

The new notice requirement in § 15800(b) -- which resembles the current notice requirement upon a trust becoming irrevocable in whole or part on the death of a settlor under § 16061.7 -- is thus a major expansion of the duties of successor trustees. Although a major impetus for the amendment was to narrow the class of beneficiaries entitled to receive such information, in doing that, it imposed substantial new affirmative duties of notice and disclosure not dependent on express beneficiary request. In effect, partly in response to trust information being potentially owed upon request to a very a wide class of beneficiaries, the new statute requires that such information must be provided, absent beneficiary request -- albeit to a narrower class of those beneficiaries.

Possible Reforms to Probate Code § 15800. To the extent amended § 15800 allows a successor trustee to properly turn a blind eye to the initial trustee/settlor's evident incapacity, this suggests that amended § 15800(b) may be improved by being legislatively modified or judicially interpreted to impose some sort of duty of reasonable inquiry on the successor trustee, to ascertain the settlor's capacity and to be positively required to rely on certain information establishing incapacity. This seems especially appropriate when a beneficiary or other concerned person has taken affirmative steps to clearly put the successor trustee on notice about the condition of the initial trustee/settlor.

Such a reform as to *acting* successor trustees may be less suitable for a merely *designated* successor trustee, who has yet to assume the trusteeship or the duties that come with it. But to avoid the problem of the *de facto* empty trustee chair, consideration could be given to a mechanism to put the designated trustee to a prompt decision on whether to accept or renounce the trusteeship -- even if it is not fair to impose any further trustee-like duties on a person who has yet to become trustee. One possibility is to authorize a person who is designated as the next alternate successor trustee to provide the first designated successor trustee notice of the incapacity of the settlor, and that they have a certain period of time in which to expressly accept or reject the trusteeship in writing, and if they do not do so within that time, they will be presumed to have declined the trusteeship in favor of the next designated successor trustee. (Such a notice/decision mechanism could similarly be authorized to be used by certain beneficiaries or some nominees of the settlor.) Some such mechanism could help protect settlor's who have *de facto* vacated the trusteeship, but have a designated successor trustee intent on exploiting that *de facto* vacancy.

Conclusion. Amended § 15800 addresses the risks of financial elder abuse and undue influence that arise when a trustee takes over for an impaired settlor, by providing other beneficiaries with rights to information that will empower them to enforce the rights and to protect the interests of the vulnerable settlor. But if that protection leaves the designated successor trustee wide discretion in various situations to deny that the succession of trusteeship has *de facto* happened or that it should officially happen, that greatly undermines the intended protection.

These concerns suggest that amended § 15800(b) may be improved by being legislatively modified or judicially interpreted to impose some sort of duty of reasonable inquiry on the successor trustee, to ascertain the settlor's capacity and to be positively required to rely on certain information establishing incapacity.

To address the problem of the *de facto* empty trustee "chair", where the initial trustee/settlor is *de facto* incompetent, but no designated successor has taken over, the discussion considered reforms to put the designated trustee to a prompt decision -- on whether to accept or renounce the trusteeship – without imposing any further trustee-like duties on a person who has yet to become trustee.

The *de facto* vacancy of the trusteeship is a fraught situation, especially where an impaired settlor/trustee lacks insight into or denies his/her impairment, resents questioning of his/her capacity, or may even retaliate by trying to amend his/her trust to remove or disinherit a designated successor. Disputes over such questions seem likely to continue to be a subject of litigation between beneficiaries (seeking to impose such trustee duties) and successor trustees (seeking to avoid them).

* Disclaimer: This article is for informational purposes only, and does not constitute legal advice.
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