

COOPER-GORDON LLP

Winter 2007 Newsletter

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Welcome to our first newsletter of 2007. First of all, we want to congratulate Avery Cooper for being named one of the Top Attorneys in Southern California for the second year in a row! In this issue we are happy to introduce our new associate attorney, Katherine Su, who recently came to us from Southwestern School of Law after graduating UCLA as an undergraduate. Nolan Hiatt, our law clerk, continues with his studies in his second year at Southwestern School of Law and invaluable works extremely hard for us as well. Victor Varadi has moved on to other endeavors, but Annalisa Provence continues as our Paralegal to assist with client interaction and document preparation. Christine Donald should also be mentioned as being the longest running member of our firm, having worked for Avery for nearly twenty years as his legal



secretary. We continue our search to find the right candidate for the office assistant position left vacant by Victor. In addition, we are finally moving all of us to the Third Floor, so that Frieda and Avery, Katherine and all the support staff will be together.

We are very excited to share the remarkable success of our ever changing website, which we hope that the reader will peruse thoroughly. Many people are coming to our site and we have been able to attract readers such as yourselves who have, in turn, introduced themselves to us, many of which we have been able to help professionally. Avery and Frieda have been working hard for their clients, providing no opportunity for relaxation or reflection. Hopefully, with the aid of the newest members of our firm, we will have more time to devote to writing and speaking publicly. In this Winter 2007 issue,

we focus on some recent developments in family law and trusts and estates management, planning and litigation.

Our Focus Continues to be Finding the Best and Easiest Solutions for our Clients.

As we strive to assist our clients in taking charge of the outcomes and empowering them to make informed decisions with regard to their own legal issues, particularly through the use of alternative dispute resolution, we continue to tighten our litigation skills. We have been extremely successful in producing the results that best protect and satisfy our clients while impacting as little as possible upon our clients' financial resources and family health and well-being. We continue to specialize and emphasize the two areas of law that we practice: (1) all aspects of family law, including complex international and interstate custody and visitation matters, high-end property division issues, spousal and child support, paternity, cohabitation, pre-and post-nuptial agreements and step-parent adoption matters, and (2) all aspects of Trusts and Estates, including drafting of estate planning documents, trusts and estates litigation and trusts and estates administration.

Recently, Frieda has been handling a case of first impression where the clients are contingent beneficiaries of their grandparents' trust and their father is apparently incapacitated and the

trustee who is their father's brother they allege is neither looking out for their father's interests nor their own. They are claiming they have standing to pursue court oversight and yearly accountings on all of the trusts involved. The Court approved the Petition to Compel the trust accounting. Another interesting case which Frieda is handling involves a conservatorship for an uncle who by all accounts is unable to take care of himself, but his second wife who apparently also requires a conservatorship is unwilling for a conservator to be appointed because of the potential of loss of the family residence if his relative is appointed conservator.

Avery was recently appointed by the Court to represent a 13 year old boy who is the subject of a custody dispute. The Parents had a factual dispute regarding the boy's wishes as to how much time he wanted to spend with each of his parents. They thought that it would be prudent to have an independent person meet with their son and find out what his wishes were. The Court determined that Avery would be an appropriate person to perform that task. Due to their expertise in this area, both Avery and Frieda are appointed by the Court from time-to-time to represent minor children when they are involved in custody or visitation disputes.

Avery was also recently hired on two separate matters pertaining to Successor Trustees' failures to properly administer Trusts when they take over following the death

of the Trustor (the person who created the Trust). In both instances, the Trust remained open for an unreasonable length of time and funds which were supposed to have been distributed have not been. Avery's job is to determine whether any improprieties have occurred and to compel the distribution that the Client is entitled to pursuant to the terms of the Trust.

Recent Case Law and Legislation

There have not been too many cutting edge family law cases in the latter part of 2006. Recently, however, there was another move-away case, *Niko v. Foreman*, decided Oct. 30-06, in which the Fourth District Court of Appeal decided that the trial court did not err by applying the best interests standard and ordering a *de novo* review where a prior order gave the parents joint legal and physical custody of their child with a 50-50 time share. The dissent in this case was very strong with regard to the finality of family law judgments. Most family law attorneys are aware that in custody matters, "finality" means something else entirely from a final judgment in a simple civil case with a money judgment. Finality in custody decisions simply affects the standard of proof. *Family Code* Section 3087 requires a court to apply a best-interests test whenever considering a motion to modify a joint custody order. To call a move away a simple change in the existing parenting plan instead

of a change in the joint physical custody order, to many family law attorneys is a distinction without a difference. This may not be the first case to find a move away to simply be a change in the existing parenting plan, rather than a modification of a joint custody order. However, the practical effect of a move away order is a *de facto* custody change, given the detrimental effect that the move will have on the time share.

Nevertheless, such a change we believe the courts would permit only where there is a very strong showing that the change is in the best interests of the child and will not be too detrimental to his or her relationship with the left-behind parent.

The legislature passed what is known as the Collaborative Family Law Act enacting Fam. Code §2013 which authorizes Parties to a dissolution to use a collaborative law process to resolve their disputes, as long as they have signed a written agreement to do so. The new statute defines such a process as one in which the Parties, along any professionals whom they hire to help them, agree in writing "to use their best efforts and to make a good faith attempt" to resolve family law disputes "without resorting to adversary judicial intervention." Another statute permits state tax filing status for domestic partners. The same rules are to be applied to domestic partners and spouses for purposes of state income taxes and by recognizing earned income of

domestic partners as community property. Consistent with the cases of earlier last year, a bill became law allowing a party to an assisted reproduction agreement to bring an action to establish a parent-child relationship consistent with the agreement's intent. An amendment to the Federal Violence Against Women Act now expands the definition of "spouse or intimate partner" for purposes of the provisions on interstate stalking to include someone who has been in a romantic or intimate social relationship with the stalking target, as determined by the nature and duration of the relationship and the frequency of the couple's interactions.

In the Trusts and Estates area, there have been a few more cases dealing with the issue of what is and what is not considered to be a "contest" of a Will or Trust. This issue is addressed in more detail later on in this newsletter.

Further, in large part as a response to the recent expose⁵ in the Los Angeles Times regarding abuse of the Conservatorship process, the legislature has passed a comprehensive reform of the Conservatorship proceedings. These new laws provide greater safeguards for proposed Conservatees before a conservatorship can be instituted and, once a conservatorship *has* been set up, provides greater oversight in order to ensure that the Conservatee's wishes are taken

into account on the one hand and, that the Conservator is properly managing the Conservatee's estate. The Los Angeles Times series uncovered a number of cases where the Conservator had diverted the Conservatee's funds for his/her (the Conservator's) personal use.

Professional Associations

In addition to the organizations mentioned above, Frieda is also a member of the Executive Committee of the Family Law Section of Los Angeles County Bar Association. She is Chair of the Minor's Counsel Committee and gave a very interesting panel discussion with two judges and another attorney concerning how to remove Minor's Counsel for cause and discussing the Judicial Council's proposed Court Rules regulating Minor's Counsel. On March 26, 2007, Frieda will lead a discussion on the complex issue of fiduciary duty and harmless error surrounding the requirement in dissolution of marriage cases that both parties serve a Preliminary Declaration of Disclosure upon the other party at a joint San Fernando Valley and Los Angeles County Bar Association family law section dinner. This will be held at Sportsmen's Lodge in Studio City. Last Fall, Frieda spoke to a study group of psychologists, custody evaluators and therapists on issues relating to minors in custody disputes including the issue of who holds the privilege on behalf of the minor child and whether therapists should talk to minor's counsel

regarding their patient absent without parental consent.

Avery and Frieda are members of Los Angeles County Central Court District's "Probate Volunteer Panel." They are eligible to be appointed by the Court as an independent attorney to review Petitions in Trusts and Estates cases including new Conservatorship cases, Guardianship matters, and certain Trust disputes. In order to be appointed to this panel, a panel member must have extensive experience in these types of cases. Both Frieda and Avery have the experience which well qualifies them for admission to this Panel.

The Issue of Will and Trust Contests

Most of our readers are familiar with the phrase "Will contest." And, most of our readers who have wills and/or trusts have what are commonly referred to as "no contest clause(s)" in their estate planning documents, the idea being that if a beneficiary decides to contest the Will, he or she would lose all entitlement to the original bequest. It has been commonplace for attorneys to include "no contest" clauses in wills and trusts without discussing it with the client.

Recently, as estate planning documents have become more and more complicated, determining what is and is not considered to be a "contest" has likewise become the subject of much litigation. In turn, the simple

no contest clauses that drafters of routine estate planning documents used to insert into the instruments are in turn themselves becoming more complex. No longer do the drafters utilize the time honored one or two line phrases. Now, no contest clauses can be a page or even longer. Why have things gotten so complicated, and where are we heading with this problem?

Life in the 21st Century is becoming more and more complicated. This is true, even insofar as the composition of families is concerned. As the divorce rate (and the number of children born to unmarried couples) continues to rise, the question of exactly what any person's "family" consists of is becoming more and more difficult to determine.

Over the last 20 years or so, the determination by various Courts as to what type of Court related Petition is in fact a "contest" has become somewhat of a guessing game.

Most of us would assume that a Petition which is filed in Court and which challenges the legitimacy of a will or trust is in fact (in layman's terms) a "contest." But, what about challenging a designated beneficiary of a decedent's Individual Retirement Plan (his "IRA")? How about challenging the amount that a person is entitled to receive pursuant to the trust but not the trust itself? Both of those activities have been determined to be

“contests” thus disqualifying the Petitioners in those cases from inheriting *anything* due to their violation of the no contest clause set forth in the Trust. The challenge could also result in the payment not only of your own fees, but those of the Trustee and the attorney hired by the Trustee as well.

As a result of these harsh decisions, the legislature felt compelled to act. Decisions such as these were felt to have a “chilling” effect on potential bona fide contests. Potential contestants became fearful that anything they would file could be determined to be a contest and, that unless they were victorious in their Petition (and who could guarantee that) for filing a Petition on even a minor issue, that their entire inheritance could be placed in jeopardy.

The legislature came up with a plan. What if the potential petition could be pre-approved? In other words, what if a potential litigant were allowed to get a prior Court determination that a contemplated Petition was or was not a contest? If the Court ruled that the proposed Petition was not a contest, then the Petitioner could file it without risk of losing everything. On the other hand, if it was determined that it was a contest, then an informed decision as to what to do could be made. This was the so-called “Safe Harbor” Petition. Trusts and estates litigators commonly file such protective Petitions prior to filing

anything which could conceivably be determined to violate a no contest clause. This procedure has had the unfortunate effect of significantly lengthening the process of Trust litigation because before a simple Petition can be filed, a “safe harbor” Petition must be filed for protective purposes. This in itself has become a subject of litigation. The Party who wishes to protect the Will or Trust thus opposes the Safe Harbor Petition and argues that in fact the proposed Petition is in fact a violation of the no contest clause.

As one can see, the no contest clause issue has become somewhat of a mess. The legislature has even passed statutes attempting to define what is and what is not a violation of a no contest clause. These laws, however, have had only limited success. Moreover, for various reasons they have not been retroactively applied, i.e., they do not apply to Wills and Trusts which were drafted prior to the enactment of the laws defining what is and is not a contest.



Lately, there have been efforts made to eliminate the concept of the no contest clause altogether. In fact, in many States (but obviously not California) no contest clause are not given any force or effect. The Los Angeles County Bar Association Trusts and Estates section is split on this issue and there is no true consensus about what to do.

In the short term, the best thing for estate planners to do, is to consider who might challenge and how. The language placed in a no contest clause should be anything but “boilerplate” language and should instead be carefully thought out and

considered.

In our next newsletter, look for an article discussing the “Art of Trust Accounting.”