

1/21/98

New Administration

Recently Enacted Trust-Related Legislation

AB1172 included a number of sections that promise to affect daily practice commencing this year.

By Marshal A. Oldman and Susan J. Cooley

During the 1997 legislative session, the Probate Section of the State Bar of California once again dominated the discussion of probate and trust-related legislation. The State Bar's omnibus bill, AB1172, included numerous sections that made both technical and substantive changes to the California Probate Code that will affect daily practice.

Two of the themes of the legislative effort were bringing trust administration closer in line with that of decedent estates and providing greater access to information for beneficiaries and other persons affected by the terms of living trusts as they become irrevocable.

While other bills affecting probate were also enacted, AB1172 generated the discussion that kept numerous groups occupied at the state Capitol throughout the legislative session. Some sections were deleted because they raised the ire of the title insurance industry and of the California Bankers Association. Other sections were modified as legislative veterans gave everyone the benefit of his or her thoughts and opinions. The result was a bill that provided more substance than some of the previous omnibus bills as the State Bar section reached into more controversial areas.

AB1172 included a number of sections that promise to affect daily practice commencing this year. This is especially true in the area of trust administration. Among the important sections are the following:

Sections 1060 and 16063 of the Probate Code have been coordinated so that an accounting under Section 16063 must provide only the information required under that section unless the accounting is to be filed with the court. In that instance, the provisions for a uniform accounting format under Section 1060 must be followed.

New Section 16061.5 has been enacted and requires that a beneficiary or heir of the decedent receive a copy of the decedent's trust, upon request, at such time that the trust becomes entirely or partially irrevocable. If

the trust is only partially irrevocable, only those portions, along with other terms that affect the irrevocable portion, need to be disclosed.

Section 16061.7 was enacted to require that a trustee notify all beneficiaries of an irrevocable trust (or portion thereof), along with the heirs of a deceased settlor, of the existence of the trust within 60 days of the trust becoming irrevocable or of the discovery of a person entitled to notice. If no court has made a determination of the heirs, the trustee must make a good-faith determination of the heirs and give them notice.

The notice must contain the following information:

- n The identity of the settlor and the date of execution of the trust instrument.
- n The name, address and telephone number of the trustee.
- n The address of the principal place of administration of the trust.
- n Any additional information required to be disclosed as part of the notice by the trust instrument.
- n That the recipient of the notice is entitled to receive a copy of the trust or, at least, its irrevocable portions.
- n A warning in 10-point type that the recipient may contest the trust only within the later of 120 days of the date of the mailing of the notice or 60 days after receipt of a copy of the trust, provided that the copy is requested within the 120-day period.

A trustee who fails to give the required notice is liable for all damages, including attorney fees and costs, for the person to obtain compliance. A provision in a trust that seeks to waive the effect of this section is void as a matter of public policy.

Section 16061.8 provides the statute of limitation of a contest action mentioned in the warning required under Section 16061.7.

Section 21350 has expanded the classes of persons who are not able to inherit under a testamentary instrument to include a care custodian of a dependent adult. A dependent adult is defined in the section by reference to the California Welfare and Institutions Code.

Probate Code Section 21600 et seq. has been added to broaden the concept of omitted spouses and children to all testamentary instruments and not just to wills. The omitted spouse or child will receive his intestate share of the estate provided that the spouse was married or the child came into existence only after the execution of all testamentary instruments. Accordingly, the execution of a will, codicil, trust or amendment to a trust after the date of marriage or birth will effectively nullify the

right of the omitted spouse or child under this section.

These sections apply to the estates of persons dying after Jan. 1. Estate plans should be checked carefully for any effects on a decedent's trust as a result or omission of a spouse or child.

The various scattered sections of the Probate Code that authorize appeals of specific orders have been repealed and consolidated at Section 1300 et seq. This reorganization was not intended to change the law on appealable orders.

The sections requiring service of orders appointing conservatorships and guardianships by mail prior to the issuance of letters have been repealed.

Section 8226 has been amended to limit the time period for the introduction of a later will to probate, after the admission of an earlier will, to the later of 120 days after the order admitting the earlier will or 60 days after the proponent discovers the later will.

In other legislation, Section 1213 was added and requires notice to the surety company of a petition to surcharge, remove or suspend a personal representative. Objections to an accounting must also be mailed to the surety company, along with notice of an attorney bringing a motion to withdraw. Additionally, notice of the order removing or suspending the fiduciary shall be served on the surety company within five days.

Section 1800.3 was added to prohibit the appointment of a conservator of the person for a nonresident if another proceeding is pending in another jurisdiction. The same bill also added abduction as a specific form of elder abuse under the Welfare and Institutions Code. Abduction is the removal of a dependent or elder adult from the state of California. This provision may see some substantial changes during the upcoming year.

The foregoing highlights indicate substantial changes in daily trust administration and probate practice. The provisions for beneficiary and heir notification will affect every trust in administration at this time. While it is possible that corrective legislation may limit the effect of the sections to trusts of persons dying after a particular date, at this time the legislation may be applicable to all trusts currently in existence and irrevocable.

Some believe that the notice section is limited by Section 3 to persons dying after Dec. 31, 1997; however, the right to a copy is applicable to all trusts. This will eliminate the probably erroneous notion that living trusts are confidential documents once they become irrevocable and practitioners should be careful not to mention this as an advantage when suggesting trusts to their clients.

In the meantime, the State Bar section is working on its new omnibus bill, which should be introduced early this year and is likely to contain a

dozen new proposals. This will most likely yield further innovations in probate and trust, which will keep all practitioners busy.

Marshal A. Oldman and Susan J. Cooley specialize in probate matters at Oldman, Cooley & Leighton in Encino.