5 THINGS TO LOOK FOR 2019 IN ESTATE & TRUST LITIGATION

#1: The Volume Of Estate Litigation Will Continue To Increase

As our society grows older the likelihood of elderly people needing estate and trust planning services will no doubtedly increase. This is particularly true in the case of blended families, which will increase the rivalry between family members and thus an increase in potential for litigation. Issues. Secondly, more money is being passed down thru inheritance now than at any other time in human history, meaning there meaning there is increasing litigous in general, so it is not surporsing that this carries over to the estate litigation context. And finally, new laws relating to trusts and estates are proliferating seemingly each year, opening up new areas of poteintal disputes.

For example, within the past decade or so, we've seen a dramatic rise in the utilization of trust protectors, a proliferation of trust decanting as well as the expansion of the Uniform Trust Code to nearly two-thirds of the states.

#2 California May Reinstitue Eatate Tax Legislation on Estates Greater than $3.5 Million

California voters may consider a state-mandated tax on the assets of wealthy residents recently introduced, that could generate up to $1 Billion a year. These funds would be earmarked to benefit low-income families and programs designed to combat income inequality.

SB 378 envisions a California tax that applies to estates larger than $3.5 million for an individual, wher the federal tax applied between 2009 and 2011. The tax break grew in 2011 and was expanded dramatically through action in 2017 by the Trump Administration. To mitigate any instance of double taxation by the state and federal government, SB 378 stipulates the California version would phase out once the vaue of a deceased resident's estate hits the federal threshold. If this legislation passes, it will require a larger part of the population to revisit their estate plans accordingly and therefore will increase the likelihood of disputes between and among classess of beneficiaries.

#3: Arbitration Clauses In Wills And Trusts Will Increasingly Be The Subject Of Litigation

As more estate planners and attorneys insert mandatory arbitration clauses in wills and trusts, litigation potential will also increase becaseu the potential consequences of fiduciary misconduct and can increase the financial and legal burdens on disadvantaged beneficiaries.

Mandatory contractual arbitration is a common forum for disputes throughout California. When opening securities accounts, customers typically agree to submit their claims to arbitration before the Financial Industry Regulatory Association (FINRA).

Standardized residential real estate contracts used throughout California, including in San Francisco, San Mateo, Santa Clara and Contra Costa Counties, allow buyers and sellers to elect arbitration as an alternative to litigation in court. Commercial contracts often contain clauses calling for the resolution of disputes before the American Arbitration Association (AAA) or other commercial arbitration administrators. The arguments in favor of arbitration include speed (it's faster than court), cost (it's cheaper than court), finality (it typically doesn't allow for appeals), and expertise (arbitrators may have expertise in the subject matter giving rise to the dispute). California and Federal statutes, as well as state and federal courts, strongly favor arbitration and the enforceability of arbitration clauses.

Recently, we have noticed an increase in mandatory arbitration clauses appearing in living trusts. These clauses express a desire by the drafter to require disputes between multiple trustees, or disputes between trustees and beneficiaries, to be submitted to binding arbitration. We suspect the drafting attorneys add the arbitration clauses to trusts because they and their clients are familiar with the arguments favoring arbitration described above. Although the intention of the drafter may be in the right place, the practical reality turns out to be quite different.

In trust and estate litigation, mandatory arbitration clauses fail to deliver on many of arbitration's promises. Probate courts have the expertise litigants often seek in arbitration. Costs associated with court filings are typically far lower than the forum fees associated with private arbitration where the litigants can be required to pay the arbitrator(s) hourly rate. Arbitration often takes longer than court litigation in the trust and estate litigation context, which increases the expense to the litigants. There is no alternative dispute forum set up specifically to arbitrate trust and estate related litigation. Finally, uncertainty about an arbitrator's jurisdiction over successor trustees and beneficiaries (who never signed the trust or agreed to submit to arbitration) may be an obstacle in the administration of the trust and resolution of disputes.

As a result, these clauses have been (and will continue to be) the subject of significant litigation in states such as California, where trustees or executors seek to invoke them to compel arbitration of disputes. Opponents of the clauses frequently argue that they should be void against public policy, void under the Uniform Trust Code and other provisions of state law and shouldn't bind beneficiaries who did not have the chance to consent to their terms. We can expect further litigation ahead as states sort out whether they will permit the enforcement of those clauses or not.

#4: No Contest Clauses Will Continue To Expand In Their Scope And Breadth

Effective January 1, 2010 and applicable to all cases where the will or trust was executed after January 1, 2001, the California statutes governing No Contest Clauses have been repealed and re-written. For anyone considering challenging a will or trust that contains a No Contest Clause, it is of the utmost importance to understand the new laws pertaining to challenges and to seek the advice of legal counsel who is experienced in estate litigation.

Many estate documents contain a provision known as a No Contest Clause. This clause provides that, if any person challenges – or contests – the terms of the document, that person will be disinherited or otherwise removed as a beneficiary. These are serious consequences and should be carefully considered when deciding whether to proceed with estate litigation. Often, estate planners recommend providing for greatly reduced bequests to potential challengers to make sure they face the risk of a financial loss in the event of a contest.

Prior to 2010, the Probate Code differentiated between direct contests and indirect contests. Direct contests are challenges to a will or trust based on forgery; lack of due execution; lack of capacity; menace, duress, fraud, or undue influence; revocation; and/or disqualification of a beneficiary in a fiduciary relationship to the testator/trustor. Indirect contests challenged the validity of a will or trust on grounds other than those provided by statute. In 2010, the legislature did away with indirect contests, and changed the standard for direct contests from "reasonable cause" to "probable cause." In enacting the new laws, the Law Review Commission stated that "because forfeiture is such a harsh penalty, it is disfavored as a matter of policy. Accordingly, a no contest clause should be applied conservatively, so as not to extend the scope of application beyond what was intended."

The result is that a No Contest Clause will only be enforced against a "direct contest" that is brought without probable cause. Probable cause exists "if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery." (California Probate Code §21311(b)) In discussing the change in the standard from "reasonable" to "probable" cause, the Law Revision Commission stated that that, in order to avoid enforcement of a No Contest Clause, the contestant must not only have proof of his or her factual contentions but must also have a "legally sufficient ground for the requested relief." There must be a "reasonable likelihood" that the requested relief will be granted, and that term has been interpreted to mean "more than merely possible, but less than 'more probable than not.'"

They may also be enforced in the event of a challenge against a transfer of property on the grounds that it was not the transferor's property at the time of transfer, or a contest against the filing of a creditor's claim. (Cal. Probate C. §21311)

The other substantial change resulting from the new laws is the repeal of Probate Code §21320, which had allowed parties to request an advance ruling from the court to determine whether or not the no contest cause will be triggered by a proposed pleading.

If you are concerned that your loved one's will or trust was a forgery, was subsequently revoked, was the result of fraud, duress, undue influence, or is otherwise invalid, it is imperative that you seek competent legal counsel to avoid unwittingly triggering a No Contest Clause.

No contest clauses, tpically apply to conduct involving a direct contest to a will or trust. In the past decade or so, a number of estate planning attorneys have begun drafting much broader no contest clauses that purport to encompass conduct such as contests to beneficiary designations or joint-account designations, claims for breach of fiduciary duty against a trustee or executor, and actions that "impede" the administration of a trust or estate.

Critics of these broader no contest clauses contend that they inhibit a beneficiary's ability to hold a fiduciary accountable, and further that they violate public policy, common law, the Uniform Trust Code, and equitable principles of law. As more trusts and wills are litigated with increasingly broad (and novel) no contest clause provisions, we can expect states to make an array of new case law regarding the extent to which broad no contest clauses will be enforced.

#5: The Default & Mandatory Unanimous Rules Cause Ripe Environment for Disptes to Arise

In California, unlike most states, co-trustees must make administration decisions by unanimous consent. If there are three co-trustees, all must consent with respect to the various details of trust administration, such as hiring a real estate agent to list/sell trust property or engaging an accountant to produce accountings and tax returns.

Under California Probate Code section 15620, unanimity applies to co-trustees "unless otherwise provided in the trust instrument." Estate planning attorneys often will insert special language specifically allowing for action by a majority of co-trustees. If such wording is not included in the original trust instrument or an amendment, section 15620 requires "unanimous action."

Experienced estate planners typically counsel clients about the pitfalls of appointing co-trustees without adding a majority-rules clause.

The Uniform Trust Code (and the various modified versions adopted by the various states) contains a provision for default rules that control over the terms of any trust. In other words, the trust settlor cannot draft around them. A few of the default rules are rather broad, such as the duty of a trustee to act in good faith. Estate planning attorneys occasionally seek to limit a trustee's duties or liability in a manner that could arguably conflict with one or more of the default duties.