

2022 LEGISLATION: NEW LAWS THAT TRUST AND ESTATE PRACTITIONERS SHOULD KNOW

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I. INTRODUCTION

The Executive Committee of the Trusts and Estates Section of the California Lawyers Association ("TEXCOM") has continued its work monitoring and commenting on bills affecting our practice area as they proceed through the Legislature. This article briefly summarizes the new laws that will be most important to trust and estate practitioners. As will be seen, reforming the conservatorship law continued to be a major preoccupation of legislators in the second half of the just-finished two-year legislative cycle. Practitioners in the areas of elder law, probate conservatorships, and LPS conservatorships must be mindful of the many new requirements imposed on them as a result of legislation enacted in the last two years.

II. GUARDIANSHIPS, CONSERVATORSHIPS, AND INCAPACITY

A. Assembly Bill No. 2288 (2021-2022 Reg. Sess.) (Choi) (AB 2288) Advance Health Care Directives: Mental Health Treatment

Status: Chaptered June 20, 2022 - Secretary of State - Chapter 21, Statutes of 2022

This bill amends Probate Code, sections 4615 and 4617 to clarify that health care decisions, within the meaning of the Health Care Decisions Law, include decisions regarding mental health. It also makes concomitant changes to the statutory form advance health care directive ("AHCD") contained in section 4701. Finally, the requirement that the AHCD must either be witnessed by two individuals or notarized is made more prominent on the statutory form.

This bill is a response to the growing awareness that many Californians will experience a mental health crisis at some point during their lifetime, and that an overburdened hospital emergency room is not the best environment in which health care professionals may need to ascertain the wishes of a patient with respect to mental health care services. Additionally, the bill is a response to a nationwide trend recognizing the benefits of advance instructions regarding psychiatric treatment. Standalone mental health specific directives known as Psychiatric Advance Directives ("PADs"), which are viewed as beneficial because they promote conversations with a patient about preferences with respect to mental health well before the need arises, have been implemented by 25 other states. California has not fully embraced this trend.

While this bill does not standardize PADs in California, it clarifies that an AHCD can be used for mental health care and treatment by making slight changes to the model AHCD form.

B. Senate Bill No. 1005 (2021-2022 Reg. Sess.) (Wieckowski) (SB 1005) Conservatorships: Sale of Personal Residence

Status: Chaptered July 1, 2022 - Secretary of State - Chapter 91, Statutes of 2022

This bill amends Probate Code, sections 2463, 2540, 2541, 2541.5, and 2591 to impose the requirements set forth in Probate Code, sections 2352.5, 2540, 2541, and 2541.5, on a conservator who seeks the partition of a conservatee's property, including the conservatee's personal residence.

This bill closes a loophole in the Probate Code that sidesteps our Legislature's intent to protect the homes of California conservatees. Understanding the value of living at home, our Legislature enacted statutory protections to prevent the unnecessary sale of a conservatee's home—referred to as the personal residence—as many California conservatorships involve elderly conservatees who live at home or could return home after a limited stay at a hospital or facility.

The personal residence of a conservatee when a conservatorship proceeding begins is presumed to be the least restrictive appropriate residence, and a conservator cannot sell a conservatee's present or former personal residence unless, among other things, the court finds by clear and convincing evidence that the conservator demonstrated a compelling need to do so for the benefit of the conservatee.

While the statutory scheme previously safeguarded the sale of the conservatee's personal residence, it did not always protect against the disposition of the conservatee's personal residence. The Probate Code empowers a conservator to bring an action for or agree to the partition of a conservatee's property, which may include the conservatee's personal residence, and almost always results in a sale (rather than a physical division). Before this bill, the Probate Code did not explicitly impose the same protective restrictions on a conservator who pursued the partition of a conservatee's personal residence as it did on a conservator who sold the conservatee's personal residence. This omission created a loophole in the law and a vulnerability in our Legislature's efforts to protect the personal residences of California conservatees. This bill closes that loophole by imposing the same restrictions in the partition context.

C. Assembly Bill No. 2338 (2021-2022 Reg. Sess.) (Gipson) (AB 2338) Health Care Decisions: Surrogates

Status: Chaptered September 29, 2022 - Secretary of State - Chapter 782, Statutes of 2022

This bill adds Probate Code, section 4717 to accomplish two important purposes that may help avoid confusion with respect to who may make health care decisions for persons unable to make those decisions themselves. First, it establishes an order of priority as to the various persons with existing authority to make such decisions for the patient. Second, it identifies the persons whom the health facility may designate to make health care decisions where there are no existing persons with such authority.

Existing law, Probate Code, section 4711, allowed for the designation of a surrogate to make decisions on behalf of a patient, by notifying the health care facility

during treatment. It also gave that surrogate priority over a nominated agent in an AHCD during the treatment. The new section 4712 provides that in the event of the incapacity of the patient, the persons with priority to make decisions for the patient are, in the following order, namely: (i) the surrogate nominated pursuant to section 4711, (ii) the agent under the AHCD, and (iii) the conservator or guardian of the patient.

Only about 30% of adults presently have AHCDs, and questions have arisen about who can make health care decisions for a patient if a patient who now lacks capacity has not executed an advance health care directive or has not named a surrogate. Section 4712 provides that the health care facility or its designee may choose a surrogate to make health care decisions on its behalf, as appropriate. The chosen person must be: (i) an adult, (ii) who has demonstrated special care and concern for the patient, (iii) is familiar with the patient's personal values and beliefs, and (iv) is reasonably available and willing to serve. The bill then provides a list of persons, without a priority, from whom the surrogate can be chosen, namely: (i) the spouse or domestic partner of the patient, (ii) an adult child of the patient, (iii) a parent of the patient, (iv) an adult sibling of the patient, (v) an adult grandchild of the patient, or (vi) an adult relative or close personal friend.

The aforementioned persons are those whom the various health care facilities were already, in practice, recognizing as the persons who should make decisions for incapacitated persons, and consequently the new statute serves as a helpful clarification of the law.

D. Senate Bill No. 1024 (2021-2022 Reg. Sess.) (Jones) (SB 1024) Replacement of an Incapacitated or Deceased Professional Fiduciary

Status: Chaptered September 27, 2022 - Secretary of State - Chapter 612, Statutes of 2022

Commencing January 1, 2024, this bill authorizes the appointment of a professional fiduciary practice administrator to act as a temporary professional fiduciary when a professional fiduciary either becomes incapacitated or dies and a vacancy exists. The procedure is similar to the practice-administrator procedure used for deceased or incapacitated attorneys.

The petition seeking appointment of the practice administrator may be filed by a conservator, agent under a power of attorney for asset management, representative of the estate, trustee of a trust, or an interested person. Notice of the hearing on the petition for appointment of the professional fiduciary practice administrator as temporary successor must be given to all persons entitled to notice in

each of the matters that are the subject of the petition. The court may then appoint the professional fiduciary practice administrator and require the professional fiduciary practice administrator to file a surety bond in each matter in which that person is appointed temporary successor.

The appointment of the professional fiduciary practice administrator must terminate, in each of the matters in which the professional fiduciary practice administrator was appointed as a temporary successor, 45 days after entry of the order appointing the professional fiduciary practice administrator. The court has discretion to extend the time limit for good cause.

The professional fiduciary practice administrator is entitled to compensation from the assets of the matter in which the administrator is appointed. The professional fiduciary practice administrator must provide written notice to all interested parties to advise them concerning the necessity and process for the appointment of a permanent successor.

E. Assembly Bill No. 1663 (2021-2022 Reg. Sess.) (Maenschein) (AB 1663) Conservatorship Bill

Status: Chaptered September 30, 2022 - Secretary of State - Chapter 894, Statutes of 2022

Assembly Bill 1663 embraces a national trend of affording greater autonomy to adults with disabilities, for whom limited conservatorships are sometimes created, while also reflecting a recent scrutiny of California conservatorship law generally. It does so by amending sections 416.17 and 416.19 of the Health and Safety Code, and sections 1456, 1800, 1800.3, 1812, 1821, 1835, 1850, 1860.5, 1863, and 2113 of the Probate Code. It further adds sections 1835.5, 1836, and 1861.5 to the Probate Code, and Division 11.5 (commencing with section 21000) to the Welfare and Institutions Code. The reforms introduced by AB 1663 are intended to promote less restrictive alternatives to conservatorships for adults with a disability, persons who are generally served by the various Regional Centers, and those most likely to use a limited conservatorship. The new law also contemplates a process of supported decision-making for persons for whom a limited conservatorship has been established.

Among AB 1663's provisions include changes to sections of the Probate Code that will give statutory preference to the proposed conservatee's choice of conservator, and which prohibit Regional Centers from serving as conservators. As does AB 2960 (discussed *infra*), which applies to conservatorships generally, AB 1663 requires petitioners to apprise the court of any alternatives to conservatorship explored by the petitioner, if any, including details as to the length and duration of attempted alternatives, and

the reasons why those alternatives do not meet the conservatee's needs. Those alternatives include, but are not limited to: (i) supported decision-making agreements, (ii) powers of attorney, (iii) AHCDs, and (iv) designations of a health care surrogate (discussed *supra*).

AB 1663 also adds a new title 11.5 to the Welfare and Institutions Code, sections 21000 through 21008, on Supported Decision-making. The new title contemplates the creation of support teams to assist disabled persons with decision-making, in order to strengthen the capacity of the adult with a disability. It includes sections that define "supported decision-making agreement," and which contain the criteria for participation in the disabled adult's decision-making team. It imposes new educational requirements directed toward judges, court investigators, court staff, attorneys, and conservators, in order to promote the use and availability of supported decision-making resources. It requires each superior court to add resources related to supported decision-making to its existing educational resources, and to provide information to conservators and conservatees about the disabled person's rights to autonomy in decision-making.

AB 1663 further makes corresponding changes to the Probate Code, where appropriate, as well as directing the Judicial Council to establish alternatives to conservatorship programs throughout the superior court system. The conforming changes point to the supported decision-making statutes in the Welfare and Institutions Code and incorporate those provisions into related Probate Code sections.

AB 1663 also imposes certain mandates on the Judicial Council that are intended to more fully implement the policy underlying supported decision-making. For example, under new Probate Code section 1836, the Judicial Council is instructed to establish a conservatorship alternatives program throughout the superior court system. The stated purposes of the program are to provide information about less restrictive alternatives to conservatorship, including supported decision-making, while anticipating the creation of an on-site center, with dedicated program staff able to provide technical support and education on various alternatives. The court is required to review cases both six months and one-year after the establishment of the case. These reviews are to be supported by a report from the court investigator, and shall be used by the court to consider modifications of the terms and conditions of the pending case, and possibly its termination as provided by statute. Many of the foregoing new mandates are as yet unfunded, and the superior court is not required to assume many of these new duties until the Legislature makes an appropriation identified for that purpose. As a result, these new changes may not take effect for some time.

Space does not permit a full discussion of the changes effected by this bill, which warrant their own, dedicated, article. Editor's note (See, *infra*, Gottlieb, p.8). Anyone whose practice encompasses working with persons with disabilities, or in the area of limited conservatorships, is urged to more thoroughly scrutinize this bill, and to be mindful of the changes it implements. TEXCOM may well arrange future seminars solely focused on the changes wrought by AB 1663, as well as publication of related educational material.

F. Assembly Bill No. 2275 (2021-2022 Reg. Sess.) (Wood) (AB 2275) Mental Health: Involuntary Commitment

Status: Chaptered September 30, 2022 - Secretary of State - Chapter 960, Statutes of 2022

This bill addresses mental health treatment under the Lanterman-Petris-Short Act (the LPS Act³) and focuses on the initial detention of the severely mentally ill. The LPS Act provides for the involuntary commitment and treatment of persons with specified mental disorders for the protection of the persons committed. Under the LPS Act, when a person, as a result of a mental health disorder, is a danger to others or to themselves, or is gravely disabled, the person may, upon probable cause, be taken into custody and placed in a facility designated by the county and approved by the State Department of Health Care Services for up to 72 hours for evaluation and treatment. If certain conditions are met after the 72-hour detention, the act authorizes the certification of the person for a 14-day period of intensive treatment and then a 30-day period of intensive treatment after the 14-day period. A certification review hearing must be held when a person is certified for a 14-day or 30-day intensive treatment detention, and it must be within four (4) days of the date on which the person is certified, although under the law in place before this bill it could be postponed for forty-eight (48) hours or until the next regularly scheduled hearing date in some smaller counties.

This bill specifies that the 72-hour period of detention begins at the time when the person is first detained. It removes the provisions for postponement of the certification review hearing. When a person has not been certified for 14-day intensive treatment and remains detained on a 72-hour hold, a certification review hearing must now be held within seven (7) days of the date the person was initially detained and the person in charge of the facility where the person is detained must notify the detained person of specified rights.

G. Senate Bill No. 1227 (2021-2022 Reg. Sess.) (Eggman) (SB 1227) Involuntary Commitment; Intensive Treatment

Status: Chaptered September 27, 2022 - Secretary of State - Chapter 619, Statutes of 2022

This bill amends section 5270.55 and adds section 5270.70 to the Welfare and Institutions Code to provide that, in the case of persons initially admitted pursuant to a "5150 hold," a further 30-day hold, in addition to the 30-day and 14-day extensions to the initial 72-hour holds already authorized under existing law, may be authorized where a showing is made that the patient may benefit from such extended treatment.

The legislative policy underlying the LPS Act is to end the inappropriate, indefinite, and involuntary commitment of persons with mental health disorders, developmental disabilities, and chronic alcoholism, as well as to safeguard a person's rights, provide prompt evaluation and treatment, and provide services in the least restrictive setting appropriate to the needs of each person. The Act authorizes a hold for seventy-two (72) hours for assessment, evaluation, and crisis intervention, where the person is a danger to themselves or others, or is gravely disabled. The Act provides for a hold of an additional fourteen (14) days in a designated facility providing intensive treatment where the person will not submit voluntarily to treatment, and an additional 30-day hold in a similar facility in certain counties. The legislative intent underlying the further 30-day hold is to reduce the number of conservator proceedings that are initiated solely to ensure that the person receives additional treatment.

Under new section 5270.70, a person may be held for a further thirty (30) days, in those counties where such holds are authorized by the local board of supervisors, subject to an outside limit of seventy-seven (77) days, including all of the prior holds. Again, the purpose is to reduce the need for conservatorship proceedings where there is a possibility that the additional hold may obviate the need for one. The statute provides for expedited determination of the facility's petition for the further hold, with notices to all interested parties, and that where the requisite showing that the person will likely benefit from the additional hold cannot be met, the person shall be released before expiration of the initial 30-day hold.

According to the bill's author, conservatorship petitions declined considerably when 5150 holds became available after 1988. While the bill's author recognizes that for some such persons a conservatorship will be inevitable, in many instances it might be avoided if further intensive treatment, such as an additional 30 days, can be provided. Such

additional periods of intensive treatment can further the legislative policy of avoiding conservatorships, with their related loss of liberty, and are a less restrictive alternative to conservatorships.

H. Senate Bill No. 1338 (2021-2022 Reg. Sess.) (Umberg) (SB 1338) The Community Assistance, Recovery, and Empowerment (CARE) Court Program

Status: Chaptered September 14, 2022 - Secretary of State - Chapter 319, Statutes of 2022

This bill is designed to provide prompt intervention for people suffering from such issues as untreated schizophrenia spectrum and psychotic disorders so that they may obtain treatment before harm, arrest, conservatorship, or institutionalization.

Interested persons can petition the court for the creation of a CARE plan for an individual experiencing a severe mental illness with a diagnosis identified in the disorder class schizophrenia and other psychotic disorders. Following a hearing, the court may approve the plan if necessary findings are made. The plan can last a year and can later be extended. There is also a graduation plan to be implemented upon graduation from the CARE plan.

A CARE plan is designed to implement services to be provided by county behavioral health agencies to provide behavioral health care, stabilization medication, and housing support to adults who are suffering from schizophrenia spectrum and psychotic disorders and who lack medical decision-making capacity.

Counties are involved in the creation and administration of CARE plans. The bill requires the Counties of Glenn, Orange, Riverside, San Diego, Stanislaus, and Tuolumne and the City and County of San Francisco to implement the program commencing October 1, 2023, and the remaining counties to commence no later than December 1, 2024.

The bill supplements the Assisted Outpatient Treatment Demonstration Project Act of 2002, known as Laura's Law, requiring most counties to provide specified mental health programs, and the LPS Act (discussed *ante*).

Designated people such as family members, people who live with the respondent, or medical professionals can petition the court for the creation of a CARE plan. The petition must be supported by evidence that the person is in need of a CARE plan or has already been committed for intensive treatment.

The court can order the respondent to participate in CARE proceedings if it finds on clear and convincing evidence

that: (i) the person is 18 or older, (ii) the person is currently experiencing a severe mental illness, as defined, (iii) the person is not clinically stabilized in ongoing voluntary treatment with the county behavioral health agency, (iv) the person is unlikely to survive without supervision, or is in need of services to prevent relapse that would result in grave disability or serious harm to the person or others, (v) participation in a CARE plan would be the least restrictive alternative, and (vi) it is likely the person will benefit from a CARE plan. If a CARE plan is established, the court can compel the person to comply with it and set further hearings as needed.

I. Assembly Bill No. 2960 (2021-2022 Reg. Sess.) (Judiciary Committee) (AB 2960) Judiciary Omnibus Sections 15 and 16

Status: Chaptered September 18, 2022 - Secretary of State - Chapter 420, Statutes of 2022

The biennial Judiciary Committee Omnibus Bill makes technical and generally noncontroversial changes to California statutes that are within the purview of the Assembly Judiciary Committee, such as cleaning up typographical errors in recently-enacted legislation, amending inaccurate gender references, and, occasionally, making substantive changes to the law. As relevant to trusts and estates, AB 2960 made important clarifications with respect to the right of a conservatee or proposed conservatee to legal counsel, and the information that a conservatorship petitioner must provide the court in the initial petition.

AB 1194, enacted in 2021, among many other changes to the conservatorship law, required the court to appoint the public defender or private counsel to represent the interests of a conservatee, a proposed conservatee, or a person alleged to lack legal capacity who is unable to retain legal counsel, and who requests the appointment of legal counsel. It further gave the proposed conservatee the right to choose and be represented by legal counsel, if they had a preference. As currently enacted, AB 1194 appeared to require court appointment of counsel only if the proposed conservatee requested it. AB 2960, however, by its amendments to Probate Code sections 1826, 1828, 1894, 1897, 2250.6, and 2253, makes clear that even if no demand is made, and whether or not a proposed conservatee is "able" to retain counsel, the court shall appoint one for the person. Of course, the proposed conservatee is free to retain counsel of their choosing. Court appointment of counsel is necessary only if none is retained.

This bill also amends Probate Code section 1821 to require that the petitioner in a conservatorship action apprise the court of suitable alternatives tried by the petitioner

or proposed conservators, if any, including details as to the length and duration of attempted alternatives and the reasons why those alternatives do not meet the conservatee's needs. Those alternatives include, but are not limited to: (i) supported decision-making agreements, as defined in section 21001 of the Welfare and Institutions Code, (ii) powers of attorney, (iii) AHCDs, and (iv) designations of a health care surrogate (discussed *ante*).

J. Senate Bill No. 1495 (2021-2022 Reg. Sess.) (Comm. on Bus., Prof., & Eco. Dev.) (SB 1495) Professions and Vocations

Status: Chaptered September 23, 2022 - Secretary of State - Chapter 511, Statutes of 2022

This bill makes a number of changes to the regulation of professions. As relevant to trusts and estates, it expands the information regarding professional fiduciaries that is collected by the Professional Fiduciaries Bureau and made available to courts.

The bill amends the Business and Professions Code to require professional fiduciaries to provide the Professional Fiduciaries Bureau with the names of the licensee's current conservatees, wards, principals, trusts, and estates, and whether the matters are court-supervised. The licensee must provide court names, court locations, and case numbers when applicable. The licensee must also provide the Professional Fiduciaries Bureau with additional information in circumstances where the fiduciary is removed. The Professional Fiduciaries Bureau is to maintain information on whether a fiduciary settled a case when there was a pending complaint of misconduct filed with the Court.

III. TRUST AND ESTATE ADMINISTRATION

A. Assembly Bill No. 1716 (2021-2022 Reg. Sess.) (Malenschein) (AB 1716) Estate Disposition

Status: Chaptered June 21, 2022 - Secretary of State - Chapter 29, Statutes of 2022

This bill clarifies the scope of spousal liability for a decedent's debts when property passes to a surviving spouse without administration under Part 2, Division 8, of the Probate Code. Under Probate Code section 13550, a surviving spouse is personally liable for the debts of the deceased spouse chargeable against the property described in Probate Code section 13551. This bill amends the description of transferred property under Probate Code section 13551 to be property that passes without administration under this part (i.e., Part 2 of Division 8 (spousal property petition)) and therefore excludes property

that passes by joint tenancy or other forms of nonprobate transfers. However, the bill also confirms that property passing by community property with right of survivorship pursuant to Civil Code section 682.1 is included as property subject to Probate Code section 13551.

There may be some concern as to why a spouse receiving property passing by community with right of survivorship is liable for a deceased spouse's debts while a spouse receiving property via joint tenancy would not be liable. The bill did nothing to change the existing rule that property passing via community property with right of survivorship is treated as community property subject to the deceased spouse's debts under Probate Code section 13551. The California Law Review Commission recommendation was clear that the bill only addresses the narrow question of whether Probate Code sections 13550 and 13551 should impose liability for property passing to a surviving spouse by nonprobate transfers other than under Part 2, Division 8, of the Probate Code. The bill does not address the broader question of whether, as a policy matter, property transferred by nonprobate transfer such as joint tenancy should be liable for a decedent's debt.

Under existing law (Probate Code section 13550), a surviving spouse was already personally liable for the debts of a deceased spouse up to the fair market value of the property described under Probate Code section 13551, less the amount of any liens and encumbrances. Section 13551 described the property, in part, as community, quasi-community, and separate property of the decedent that "passes to the surviving spouse without administration."

In *Kircher v. Kircher* (2010) 189 Cal.App.4th 1105, the appellate court interpreted Probate Code section 13551 broadly to include any property passing to the surviving spouse without administration and specifically by joint tenancy. Based on its review of the legislative intent of section 13551, potentially conflicting liability rules for nonprobate transfers, and potential loss of family protections, the California Law Review Commission recommended the scope of spousal liability for a decedent's debts under sections 13550 and 13551 be limited from the holding in *Kircher* to include only property passing to the surviving spouse under Part 2, Division 8, of the Probate Code.

Accordingly, the bill amends section 13551 to clarify the definition of property passing to a surviving spouse from a decedent chargeable for payment of decedent's debts under section 13550 to include only property passing to a surviving spouse without administration under Part 2, Division 8, of the Probate Code, thereby excluding property that passed by other forms of nonprobate transfer such as joint tenancy.

This bill also amends Civil Code section 682.1 to reiterate that property passing as community property with right of survivorship will be treated as if it had passed without administration under Part 2, Division 8, of the Probate Code and therefore will be included within the scope of section 13551. Existing law under section 682.1, subdivision (a)(2), already provided that Chapter 3 (commencing with section 13550) of Part 2, Division 8, of the Probate Code would “apply to this property.” This bill added subdivision (a)(3) to clarify that property passing as community property with right of survivorship shall be treated as if it “passed without administration under Part 2 (commencing with Section 13500 of Division 8 of the Probate Code).”

According to the legislative history of Civil Code section 682.1, this section was enacted to provide spouses the clear option to pass community property by survivorship (similar to joint tenancy) while retaining its characterization as community property for all other purposes including preserving the full step-up in income tax basis for the surviving spouse that applies to community property under 26 IRC section 1014 (a) & (b)(6). The characterization does not change liability of debts of the deceased spouse when community property passes to the surviving spouse.

B. Assembly Bill No. 2960 (2021-2022 Reg. Sess.) (Judiciary Committee) (AB 2960) Judiciary Omnibus Section 42

Status: Chaptered September 18, 2022 - Secretary of State - Chapter 420, Statutes of 2022

This is an omnibus bill that makes changes to many statutes, most of which do not impact trusts and estates. However, it did make changes to Probate Code section 15800, which governs the circumstances under which a trust’s remainder beneficiaries may have their rights accelerated such that they receive a copy of the trust, accountings, and trust-related information while the settlor is still alive but incompetent.

When Probate Code section 15800 was amended in the 2021 legislative cycle to permit remainder beneficiaries to obtain trust-related information upon the incompetence of the trust’s settlor, it contained language that arguably imposed upon the trustee a duty to take affirmative steps to determine the settlor’s capacity. This bill makes two revisions that alleviate that duty—to the extent it ever existed—on the part of trustees.

First, it revises section 15800, subdivision (b)(1), which provides the triggering event prompting trustees to provide a copy of the trust to the remainder beneficiaries. The triggering event was previously when the trustee *obtained* information establishing the settlor’s incompetence (or the incompetence of the person holding the power to revoke

the trust), but this bill makes the triggering event when the trustee *receives* such information. Some commentators believed that using the term *obtain* suggested the trustee had an obligation to actively go out and try to obtain information concerning the settlor’s competence. By changing the triggering event to “receiving” information concerning the settlor’s capacity, trustees can be more comfortable in taking a passive role with respect to seeking information concerning the settlor’s competence.

Second, this bill revises section 15800, subdivision (c), which provides the ways in which a settlor’s incompetence may be established. This revision also permits trustees to take a more passive role with respect to investigating the settlor’s competence. The subdivision used to provide, “To establish incompetency, for the purposes of subdivision (b), the trustee may rely on either of the following [method specified in the trust or court order].” This bill revised the subdivision to instead provide, “Incompetency, for the purpose of subdivision (b), may be established by either of the following [method specified in the trust or court order].” Given that the trustee reference was removed from the subdivision altogether, there is now less of an argument under the new law that it is the trustee’s job to evaluate the settlor’s competence.

C. Senate Bill No. 928 (2021-2022 Reg. Sess.) (Wieckowski) (SB 928) Public Administrators: Compensation

Status: Chaptered August 15, 2022 - Secretary of State - Chapter 151, Statutes of 2022

This bill amends Probate Code section 7666 to increase the public administrator’s minimum compensation from \$1,000 to \$3,000. Prior law provided that compensation for the public administrator (and the public administrator’s counsel, if any) was governed by Part 7 of the Probate Code, beginning with section 10800, under which the minimum compensation for the administrator was \$1,000.

D. Assembly Bill No. 2436 (2021-2022 Reg. Sess.) (Bauer-Kahan) (AB 2436) Death Certificates: Content

Status: Chaptered September 30, 2022 - Secretary of State - Chapter 966, Statutes of 2022

This bill changes the requirement that a death certificate include the full name of the father and full maiden name of the mother of the decedent to require, instead, the full names (including all legal names) of the parents of the decedent without reference to gender. It leaves unchanged the requirement that the death certificate include the birthplaces of the parents. The purpose of this bill is to identify parents of a decedent in a gender-neutral way.

E. Assembly Bill No. 1745 (2021-2022 Reg. Sess.) (Nguyen) (AB 1745) Trusts: Notifications

Status: Chaptered June 21, 2022 - Secretary of State - Chapter 30, Statutes of 2022

This bill clarifies the 120-day deadline for contesting a trust. Under Probate Code section 16061.7, a trustee is required to serve a statutory notification on all persons interested in the trust within 60 days of the following events:

- (1) when a revocable trust or a portion of a trust becomes irrevocable because of the death of a settlor;
- (2) whenever there is a change of trustee of an irrevocable trust; and
- (3) whenever a power of appointment retained by a settlor over an otherwise irrevocable trust lapses upon death.

Under Probate Code section 16061.8, the deadline to contest a trust following receipt of this statutory notification by trustee is the later of 120 days from service of the notification, or 60 days from service of the terms of the trust if delivered during that 120-day window.

The statutory notification promotes the efficient administration of trusts after the death of a settlor because it alerts all interested parties to the short 120-day deadline governing trust contests. The trustee serves the notification, typically with a copy of the trust instrument, on all interested parties within 60 days of the settlor's death. If the 120-day deadline passes without the filing of a trust contest, then the trustee can confidently administer the trust according to its terms without fear of a future contest. If someone files a trust contest within the 120-day window, then the court will determine which trust instrument governs so that the administration can proceed.

There is more than one event that may trigger the required notification under Probate Code section 16061.7. For example, a change in trustee during the post-death trust administration would trigger a notification, even if the predecessor trustee already served a notification. Under the law in effect before this bill, it was not clear whether the recipients of the notification had a new 120-day period to contest the trust following the subsequent notification.

This bill clarifies that the 120-day deadline for trust contests, after the trustee notification required under Probate Code section 16061.7, applies only when it is required by reason of the death of a settlor. This clarification is consistent with the language in Probate Code section 16061.7, subdivision (h), which only requires the trustee notification to include

a statutory warning about the 120-day deadline when the notification is required by reason of the settlor's death.

IV. LITIGATION

A. Senate Bill No. 1279 (2021-2022 Reg. Sess.) (Ochoa Bogh) (SB 1279) Guardian Ad Litem Appointments

Status: Chaptered September 29, 2022 - Secretary of State - Chapter 843, Statutes of 2022

This bill amends Probate Code section 1003 and Code of Civil Procedure section 372, both of which relate to the appointment of a guardian ad litem of an incapacitated person. The bill amends Code of Civil Procedure section 372 to clarify that a guardian ad litem may be appointed even when the person for whom the guardian ad litem is needed already has a conservator or guardian, if the court deems it expedient, and provided that: (i) notice is given to the conservator or guardian, (ii) the application discloses the existence of the conservator or guardian, (iii) the application gives reasons why the conservator or guardian is inadequate to represent the interests of the estate, and (iv) the conservator or guardian has five days to oppose the application.

The statute more comprehensively describes the persons for whom a guardian ad litem may be appointed as: (i) a person who lacks capacity to understand the nature or consequences of the action or proceeding, (ii) a person who lacks capacity to assist the person's attorney in the preparation of the case, and (iii) a person for whom a conservator may be appointed pursuant to Probate Code section 1801.

This bill also amends Code of Civil Procedure section 372 to require the applicant to disclose relevant potential conflicts of interest, and requires the guardian ad litem to disclose any conflict of interest that arises after their appointment.

The same conflict of interest requirements were also added to the Probate Code's guardian ad litem statute, specifically section 1003. The bill also amended that statute's definition of a person for whom a guardian ad litem may be appointed, to more closely track the concomitant language in Code of Civil Procedure 372. Specifically, under Probate Code section 1003, a guardian ad litem may be appointed for a "person who lacks the legal capacity to make decisions," instead of "an incapacitated person."

SB 1279 originated as a legislative proposal from TEXCOM that was intended to more closely harmonize the guardian ad litem appointment procedures of the Code of Civil Procedure and the Probate Code. One of its original objectives was to enact a provision specifying that the

guardian ad litem's powers would be limited to those specified in the order appointing him or her, something that many practitioners believe is much needed. Although the chaptered version of the bill did not include such a provision, the addition of the new conflict of interest provisions, as well as the definitional changes, constitute a worthwhile improvement on existing law.

V. ESTATE PLANNING

A. Assembly Bill No. 1866 (2021-2022 Reg. Sess.) (Chen) (AB 1866) Grantor Trusts

Status: Chaptered June 21, 2022 - Secretary of State - Chapter 22, Statutes of 2022

AB 1866 amends Probate Code section 15304, one of the trust law's spendthrift provisions, to allow the trustee of an irrevocable grantor trust to reimburse the settlor to the extent of any income tax liability the settlor incurred by reason of income that the grantor trust earned, without invalidating the spendthrift nature of that trust. The bill adds a new subsection to section 15304 that clarifies that if the settlor's sole beneficial interest in a trust is a discretionary right to be reimbursed for income taxes payable by the settlor on the income or principal of the trust, that interest, alone, will not subject the assets of the trust to claims of the settlor's creditors.

Irrevocable grantor trusts are characterized by their conflicting treatment under income tax law and transfer tax (i.e., gift, estate, and generation-skipping transfer tax) law. Under federal transfer tax law, a gift to an irrevocable grantor trust can be removed from the grantor's taxable estate as a completed gift; however, due to certain powers being intentionally retained by the settlor, the trust assets, and the corresponding income and principal, are deemed owned by the settlor under income tax law, so the settlor will be subject to income tax on the trust's income.

Because the settlor of an irrevocable grantor trust is responsible for paying income tax on trust income that the settlor never receives, many settlors would like to include a provision granting the trustee a discretionary power to pay (or reimburse the settlor for) some or all of that tax liability. California trust and estate practitioners, however, are generally cautioned under best practice principles to avoid including such "discretionary tax reimbursement powers" in irrevocable grantor trusts out of concern that doing so could cause all or a portion of the trust assets to be includible in the settlor's estate for federal estate tax purposes. As a result, many Californian settlors are encouraged to establish the trust in another state, of which there are many, that allows for discretionary tax reimbursement powers, thereby diminishing California tax revenues, and harming local estate planners.

By amending the spendthrift provisions of the trust law to clarify that the inclusion of a discretionary tax reimbursement power in an irrevocable grantor trust does not, in and of itself, cause the assets of the trust to be subject to the claims of the settlor's creditors, AB 1866; (i) incentivizes settlors to establish irrevocable trusts with California trustees and subject to California law, when they might otherwise look to a different jurisdiction to enjoy this benefit, (ii) promotes greater compliance with the payment of tax liabilities by settlor-debtors, (iii) increases California tax revenue by encouraging California taxpayer settlors to set up grantor trusts when they might otherwise use non-grantor trusts outside of California to avoid having non-reimbursable tax liability for trust income, and (iv) benefits California fiduciary business due to an increased number of California irrevocable grantor trusts.

This bill originated as a TEXCOM legislative proposal. It passed both houses of the legislature without any opposition or amendments.

B. Assembly Bill No. 2216 (2021-2022 Reg. Sess.) (Irwin) (AB 2216) The Qualified ABLE Program: Tax-advantaged Savings Accounts

Status: Chaptered September 30, 2022 - Secretary of State - Chapter 896, Statutes of 2022

ABLE Accounts, which are tax-advantaged savings accounts for individuals with disabilities and their families, were created by the enactment of the federal ABLE Act in 2014. The beneficiary of the account is the account owner, and income earned by the accounts will not be taxed. Contributions to the account, which can be made by any person (the account beneficiary, family, friends, Special Needs Trust, or Pooled Trust), must be made using post-taxed dollars and will not be tax deductible for purposes of federal taxes. The accounts are established and administered by the various states, and to date, forty-nine (49) states have enacted ABLE legislation to create such accounts. California implemented its version of an ABLE account, known as the Qualified ABLE Act, in Welfare and Institutions Code sections 4875 et. seq. The goal of such accounts is to encourage and assist individuals and families to save private funds for the purpose of supporting persons with disabilities to maintain their health, independence, and quality of life by excluding from gross income distributions from the account used for qualified disability expenses by a beneficiary of a qualified ABLE program.

AB 2216 amends Welfare and Institutions Code sections 4875, 4879, and 4885 in order to conform its provisions more closely with federal law. Specifically, it increases the annual distribution limit, which was hitherto tied to the annual federal gift tax exclusion maximum amount, to

now allow contributions up to the lesser of the poverty line income for a one-person household, or compensation as defined in Internal Revenue Code section 219(f)(1). AB 2216 also specifically allows a designated beneficiary of an ABLE account to designate, during their lifetime, another beneficiary of the account to take effect upon death.

Finally, although California's Medi-Cal estate recovery provisions allow recovery for the State from decedents' estates in the amount of medical assistance paid under the Medicaid plan, ABLE accounts are exempt from these provisions. Under AB 2216, from January 1, 2023, onward, those protections will only apply to accounts established under California's ABLE program. Hence, those who set up accounts under the ABLE act of another state will not be eligible for this exemption.

VI. CONCLUSION

The above bills are the ones that are most likely to impact the practices of trust and estate practitioners. Notably,

TEXCOM is responsible for four of the bills, which are SB 1005 (partition of conservatee's residence), SB 1279 (guardian ad litem appointment), AB 1745 (notification by trustee), and AB 1866 (grantor trusts).

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