

RESOLUTION 05-01-2018

DIGEST

Power of Attorney: New Duty of Confidentiality and Evidentiary Privilege

Amends Probate Code sections 4123 and 4128 and Evidence Code section 912, and adds Evidence Code section 969, to create duties of confidentiality and an evidentiary privilege for communications between a person acting under a power of attorney and the principal.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code sections 4123 and 4128 and Evidence Code section 912, and adds Evidence Code section 969, to create duties of confidentiality and an evidentiary privilege for communications between a person acting under a power of attorney and the principal. This resolution should be disapproved because it will facilitate financial elder abuse by requiring secrecy and concealment in dealing with a vulnerable elder's assets, and will increase the resulting harm.

Current law does not specify whether or to what extent a person acting under a power of attorney must keep the information of the principal confidential. Current law also does not provide an evidentiary privilege for communications between the person acting under a power of attorney and the principal. The resolution would make the relationship between a principal and the person acting under a power of attorney equivalent to the relationship of attorney and client in establishing a new evidentiary privilege, and adding duties of confidentiality. The resolution creates the duties of confidentiality by borrowing the language relating to the attorney-client relationship embodied in Business and Professions Code section 6068. However, the nature of those two situations is fundamentally different. Usually, attorneys represent clients who have the requisite level of capacity to make decisions for themselves, and the client's incapacity generally terminates the attorney's authority. (See Civ. Code, § 2356, subs. (a)(2), and (a)(3); *Swartfager v. Wells* (1942) 53 Cal.App.2d 522, 527-528; *Sullivan v. Dunne* (1926) 198 Cal. 183, 192.) In contrast, a financial power of attorney may grant the person acting as the agent the power to act even after the principal is incapacitated. (See Prob. Code, § 4124.) Therefore, the principal may not be in a position to understand his or her own interests.

The resolution also creates an evidentiary privilege. Even if principal's financial information should remain confidential, creating this privilege would preclude the disclosure of wrongdoing concerning the actions of the person acting under a power of attorney.

Furthermore, unlike the rigorous training and licensure requirements for attorneys, virtually anyone is eligible to act under a power of attorney. For this reason, powers of attorney can be (and often are) used by perpetrators of financial elder abuse. The creation of a new duty of confidentiality and a new evidentiary privilege may unintentionally protect those abusers.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code sections 4123 and 4128 and Evidence Code section 912 and add Evidence Code section 969 to read as follows:

1 § 4123

2 Authority granted to attorney-in-fact; lawful subjects and purposes; property; personal care;
3 attorney-in-fact-principal privilege

4 (a) In a power of attorney under this division, a principal may grant authority to an
5 attorney-in-fact to act on the principal's behalf with respect to all lawful subjects and purposes or
6 with respect to one or more express subjects or purposes. The attorney-in-fact may be granted
7 authority with regard to the principal's property, personal care, or any other matter.

8 (b) With regard to property matters, a power of attorney may grant authority to make
9 decisions concerning all or part of the principal's real and personal property, whether owned by
10 the principal at the time of the execution of the power of attorney or thereafter acquired or
11 whether located in this state or elsewhere, without the need for a description of each item or
12 parcel of property.

13 (c) With regard to personal care, a power of attorney may grant authority to make
14 decisions relating to the personal care of the principal, including, but not limited to, determining
15 where the principal will live, providing meals, hiring household employees, providing
16 transportation, handling mail, and arranging recreation and entertainment.

17 (d) It is the duty of an attorney-in-fact to do all the following:

18 (1) To maintain inviolate the confidence, and at every peril to himself or herself to
19 preserve the secrets, of his or her principal, unless the principal has the capacity to direct the
20 attorney-in-fact otherwise.

21 (2) Notwithstanding paragraph (1), an attorney-in-fact may, but is not required to, reveal
22 confidential information relating to the authority of a principal to the extent that the attorney-in-
23 fact reasonably believes the disclosure is necessary to prevent a criminal act that the attorney-in-
24 fact reasonably believes is likely to result in death of, or substantial bodily harm to, an
25 individual.

26

27 § 4128

28 Warning statement; notice to person executing durable power of attorney

29 (a) Subject to subdivision (b), a printed form of a durable power of attorney that is sold or
30 otherwise distributed in this state for use by a person who does not have the advice of legal
31 counsel shall contain, in not less than 10-point boldface type or a reasonable equivalent thereof,
32 the following warning statements:

33

34 Notice to Person Executing Durable Power of Attorney

35 A durable power of attorney is an important legal document. By signing the durable power of
36 attorney, you are authorizing another person to act for you, the principal. Before you sign this
37 durable power of attorney, you should know these important facts:

38

39 Your agent (attorney-in-fact) has no duty to act unless you and your agent agree otherwise in
40 writing.

41
42 Your agent has a duty of confidentiality to you at every peril to himself or herself to preserve
43 your secrets, unless you have the capacity to direct your agent otherwise. However, your agent
44 may, but is not required to reveal confidential information relating to the authority you have
45 given him or her, to the extent that the agent reasonably believes the disclosure is necessary to
46 prevent a criminal act that the agent reasonably believes is likely to result in death of, or
47 substantial bodily harm to, an individual.

48
49 This document gives your agent the powers to manage, dispose of, sell, and convey your real and
50 personal property, and to use your property as security if your agent borrows money on your
51 behalf. This document does not give your agent the power to accept or receive any of your
52 property, in trust or otherwise, as a gift, unless you specifically authorize the agent to accept or
53 receive a gift.

54
55 Your agent will have the right to receive reasonable payment for services provided under this
56 durable power of attorney unless you provide otherwise in this power of attorney.

57
58 The powers you give your agent will continue to exist for your entire lifetime, unless you state
59 that the durable power of attorney will last for a shorter period of time or unless you otherwise
60 terminate the durable power of attorney. The powers you give your agent in this durable power
61 of attorney will continue to exist even if you can no longer make your own decisions respecting
62 the management of your property.

63
64 You can amend or change this durable power of attorney only by executing a new durable power
65 of attorney or by executing an amendment through the same formalities as an original. You have
66 the right to revoke or terminate this durable power of attorney at any time, so long as you are
67 competent.

68
69 This durable power of attorney must be dated and must be acknowledged before a notary public
70 or signed by two witnesses. If it is signed by two witnesses, they must witness either (1) the
71 signing of the power of attorney or (2) the principal's signing or acknowledgment of his or her
72 signature. A durable power of attorney that may affect real property should be acknowledged
73 before a notary public so that it may easily be recorded.

74
75 You should read this durable power of attorney carefully. When effective, this durable power of
76 attorney will give your agent the right to deal with property that you now have or might acquire
77 in the future. The durable power of attorney is important to you. If you do not understand the
78 durable power of attorney, or any provision of it, then you should obtain the assistance of an
79 attorney or other qualified person.

80
81 Notice to Person Accepting the Appointment as Attorney-in-Fact

82 By acting or agreeing to act as the agent (attorney-in-fact) under this power of attorney you
83 assume the fiduciary and other legal responsibilities of an agent. These responsibilities include:

84
85 1. The legal duty to act solely in the interest of the principal and to avoid conflicts of interest.

86

87 2. The legal duty to keep the principal's property separate and distinct from any other property
88 owned or controlled by you.

89
90 3. The legal duty to keep the principal's information confidential, and at every peril preserve the
91 secrets of the principal, unless the principal has the capacity to direct the agent otherwise.
92 However, the agent may, but is not required to reveal confidential information relating to the
93 authority given by the principal, to the extent that the agent reasonably believes the disclosure is
94 necessary to prevent a criminal act that the agent reasonably believes is likely to result in death
95 of, or substantial bodily harm to, an individual.

96
97 You may not transfer the principal's property to yourself without full and adequate consideration
98 or accept a gift of the principal's property unless this power of attorney specifically authorizes
99 you to transfer property to yourself or accept a gift of the principal's property. If you transfer the
100 principal's property to yourself without specific authorization in the power of attorney, you may
101 be prosecuted for fraud and/or embezzlement. If the principal is 65 years of age or older at the
102 time that the property is transferred to you without authority, you may also be prosecuted for
103 elder abuse under Penal Code Section 368. In addition to criminal prosecution, you may also be
104 sued in civil court.

105
106 I have read the foregoing notice and I understand the legal and fiduciary duties that I assume by
107 acting or agreeing to act as the agent (attorney-in-fact) under the terms of this power of attorney.
108

109
110 Date:
111
112 _
113
114 (Signature of agent)

115
116
117 _
118
119 (Print name of agent)

120
121
122 (b) Nothing in subdivision (a) invalidates any transaction in which a third person relied in
123 good faith on the authority created by the durable power of attorney.

124 (c) This section does not apply to a statutory form power of attorney under Part 3
125 (commencing with Section 4400).

126
127 § 912

128 (a) Except as otherwise provided in this section, the right of any person to claim a
129 privilege provided by Section 954 (lawyer-client privilege), 966 (lawyer referral service-client
130 privilege), 969 (attorney-in-fact-principal privilege), 980 (privilege for confidential marital
131 communications), 994 (physician-patient privilege), 1014 (psychotherapist-patient privilege),
132 1033 (privilege of penitent), 1034 (privilege of clergy member), 1035.8 (sexual assault

133 counselor-victim privilege), 1037.5 (domestic violence counselor-victim privilege), or 1038
134 (human trafficking caseworker-victim privilege) is waived with respect to a communication
135 protected by the privilege if any holder of the privilege, without coercion, has disclosed a
136 significant part of the communication or has consented to disclosure made by anyone. Consent to
137 disclosure is manifested by any statement or other conduct of the holder of the privilege
138 indicating consent to the disclosure, including failure to claim the privilege in any proceeding in
139 which the holder has legal standing and the opportunity to claim the privilege.

140 (b) Where two or more persons are joint holders of a privilege provided by Section 954
141 (lawyer-client privilege), 966 (lawyer referral service-client privilege), 994 (physician-patient
142 privilege), 1014 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim
143 privilege), 1037.5 (domestic violence counselor-victim privilege), or 1038 (human trafficking
144 caseworker-victim privilege), a waiver of the right of a particular joint holder of the privilege to
145 claim the privilege does not affect the right of another joint holder to claim the privilege. In the
146 case of the privilege provided by Section 980 (privilege for confidential marital
147 communications), a waiver of the right of one spouse to claim the privilege does not affect the
148 right of the other spouse to claim the privilege.

149 (c) A disclosure that is itself privileged is not a waiver of any privilege.

150 (d) A disclosure in confidence of a communication that is protected by a privilege
151 provided by Section 954 (lawyer-client privilege), 966 (lawyer referral service-client privilege),
152 969 (attorney-in-fact-principal privilege), 994 (physician-patient privilege), 1014
153 (psychotherapist-patient privilege), 1035.8 (sexual assault counselor-victim privilege), 1037.5
154 (domestic violence counselor-victim privilege), or 1038 (human trafficking caseworker-victim
155 privilege), when disclosure is reasonably necessary for the accomplishment of the purpose for
156 which the lawyer, lawyer referral service, attorney-in-fact, physician, psychotherapist, sexual
157 assault counselor, domestic violence counselor, or human trafficking caseworker was consulted,
158 is not a waiver of the privilege.

159

160 § 969. Attorney-in-fact-principal privilege

161 (a) For purpose of this article, the following terms have the following meanings:

162 (1) “Attorney-in-fact” means a person granted authority to act for the principal in a power
163 of attorney, regardless of whether the person is known as an attorney-in-fact or agent, or by some
164 other term. “Attorney-in-fact” includes a success or alternate attorney-in-fact and a person
165 delegated authority by an attorney-in-fact. See Probate Code section 4014.

166 (2) “Principal” means a natural person who executes a power of attorney. See Probate
167 Code section 4026.

168 (3) “Holder of privilege” means the principal has the capacity to permit the attorney-in-
169 fact to disclose a confidential communication between the principal and attorney-in-fact. If the
170 principal does not have the capacity to permit the attorney-in-fact to disclose a confidential
171 communication, the attorney-in-fact is still required to keep the information confidential.

172 (b) Subject to Section 912 and except as otherwise provided in this article, the attorney-
173 in-fact must maintain inviolate the confidence, and at every peril to himself or herself preserve
174 the secrets of the principal.

175 (c) Notwithstanding paragraph (b), an attorney-in-fact may, but is not required to, reveal
176 confidential information relating to the authority given to him or her by the principal to the
177 extent that the attorney-in-fact reasonably believes the disclosure is necessary to prevent a
178 criminal act that the attorney-in-fact reasonably believes is likely to result in death of, or

179 substantial bodily harm to, an individual.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: San Bernardino County Bar Association

STATEMENT OF REASONS

The Problem: California law currently does not provide guidance on the duty of confidentiality between an attorney-in-fact and principal. More specifically, the law does not state whether there is a duty of confidentiality or any duty at all between the attorney-in-fact and principal, and if so, who would hold the privilege to reveal the confidential information between the attorney-in-fact and principal.

The Solution: This resolution will require the attorney-in-fact to maintain a duty of confidentiality of the information between the attorney-in-fact and principal, unless the principal has the capacity to direct otherwise. However, this resolution will allow for the attorney-in-fact, at his or her discretion, to reveal confidential information relating to the authority given to him or her by the principal to the extent that the attorney-in-fact reasonably believes the disclosure is necessary to prevent a criminal act that the attorney-in-fact reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

Therefore, this resolution will add an attorney-in-fact and principal privilege. The amendments to the current law and new law will provide that the attorney-in-fact cannot reveal confidential communication between himself or herself and the principal unless the principal has the capacity to direct otherwise, or if one of the exceptions above applies.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT: Jack B. Osborn, Partner at Brown White & Osborn, 300 E. State Street, Suite 300, Redlands, California 92373, 909-798-6179, josborn@brownwhitelaw.com. Matthew B. Neufeld, Law Student Clerk at Brown White & Osborn, 300 E. State Street, Suite 300, Redlands, California 92373, 909-798-6179, mneufeld@brownwhitelaw.com.

RESPONSIBLE FLOOR DELEGATE: Jack Osborn

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TRUSTS AND ESTATES SECTION – OPPOSE

The attorney-client privilege is designed to encourage disclosure of information by clients to attorneys. There is no analogous public policy in favor of encouraging disclosure by principals to attorneys-in-fact. The proposed privilege is unnecessary, and could actually bring harm upon the principal that it is intended to protect.

While existing privilege statutes protect information transmitted between certain parties, e.g., attorney and client, this resolution would create a broader duty on the attorney-in-fact to “maintain inviolate at every peril to himself or herself the secrets of the principal who has capacity.” Thus, the proposal would impose a duty on the attorney-in-fact to protect disclosure of and “secrets” of the principal, irrespective of whether the facts constitute information transmitted between the attorney-in-fact and the principal. As such, the proposed privilege is overbroad.

The attorney-client privilege statutes set forth in Evidence Code sections 956, 957, 958, 959 and 960-961, recognize factual scenarios where the attorney-client privilege is not available. For example, there is no attorney-client privilege (i) if the services of the lawyer were sought to aid anyone to commit or plan to commit a crime or a fraud, (ii) if the lawyer reasonably believes that disclosure of any confidential communication is necessary to prevent a criminal act likely to result in the death of, or substantial bodily harm to, an individual, (iii) as to a communication relevant to an issue between parties all of whom claim through a deceased client, (iv) as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship, (v) as to certain communications with deceased clients relevant to the deceased client's intentions. This resolution does not contemplate any such exceptions. TEXCOM believes that some, if not all, of these exceptions are relevant to the role of the attorney-in-fact and would need to be considered.

Aside from the structural problems identified above, the proposal inappropriately interferes with the basic role of an attorney-in-fact to protect the principal; sometimes, protection of the principal requires disclosure of information known by the attorney-in-fact. Moreover, in some circumstances, e.g., a petition attacking the acts of the attorney-in-fact, such a privilege may even improperly shield the attorney-in-fact from liability for improper conduct.

RESOLUTION 05-02-2018

DIGEST

Probate Code: Correct Reference

Amends Probate Code section 1304 to correct a reference to a non-existent “Part” in the Probate Code.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 1304 to correct a reference to a non-existent “Part” in the Probate Code. This resolution should be approved in principle because the error in the Probate Code needs to be corrected.

Probate Code section 1304 delineates orders in trust actions that are appealable. Subsection (c) refers to orders made under Division 10 of the Probate Code which relates to proration of estate taxes and generation-skipping taxes. Division 10 consists of two Chapters but no “Parts”. The current statute makes reference to Part 1 and Part 2 and should be corrected to match Division 10 of the Probate Code.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 1304 to read as follows:

- 1 § 1304
2 With respect to a trust, the grant or denial of the following orders is appealable:
3 (a) Any final order under Chapter 3 (commencing with Section 17200) of Part 5 of Division 9,
4 except the following:
5 (1) Compelling the trustee to submit an account or report acts as trustee.
6 (2) Accepting the resignation of the trustee.
7 (b) Any final order under Chapter 2 (commencing with Section 19020) of Part 8 of Division 9.
8 (c) Any final order under ~~Part~~ Chapter 1 (commencing with Section 20100) and ~~Part~~ Chapter 2
9 (commencing with Section 20200) of Division 10.
10 (d) Determining whether an action constitutes a contest under former Chapter 2 (commencing
11 with Section 21320) of Part 3 of Division 11, as that chapter read prior to its repeal by Chapter 174 of
12 the Statutes of 2008.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: The existing Probate Code section 1304(c) references Part 1 and Part 2 of Division 10; however, a review of Division 10 reveals that there is no Part 1 that commences with section 20100

and no Part 2 that commences with Section 20200. There is clearly an error in section 1304(c): it names the wrong Division, or the reference to the "Part" is incorrect, or the reference to the sections is incorrect (or a combination).

The Solution: This resolution corrects a clear error in the Probate Code by replacing the word "Part" with the word "Chapter" in section 1304(c).

No other construction resolves the error. One could construe 1304(c) as an attempt to reference to Division 11 (not Division 10), Part 1, commencing with Section 21101 (not 20100), and, Part 2 commences with 21200 (not 20200). However, Division 11 deals with the CONSTRUCTION OF WILLS, TRUSTS, AND OTHER INSTRUMENTS. This construction would introduce redundancy. The appeal of an order regarding construction of a Trust is covered by 1304(a) which provides that "(a) Any final order under Chapter 3 (commencing with Section 17200) of Part 5 of Division 9, ..." is appealable. Section 17200(b)(1) provides for the construction of a trust instrument, and thus is already appealable under 1304(a). Thus, it would be redundant to construe PC 1304(c) as an attempt to refer to Division 11.

This construction is parallel and consistent with the surrounding code. Division 10 deals with the Proration of taxes. Section 1303 includes a clear reference to Division 10, Ch 1, Section 20100 and Ch 2, Section 20200, indicating that section 1303 intended to have a provision for the appealability of an order for proration of taxes. An appeal under a trust is equally relevant as an appeal under a will. Thus, it appears that PC 1304(c) was meant to be parallel to 1303(l).

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT: Alicia M. Gamez, Esq., 220 Montgomery Street, Suite 1200, San Francisco, CA 94104 Tel: 415-341-8143 Fax: 415-500-2777, alicia@gamezlaw.com

RESPONSIBLE FLOOR DELEGATE: Alicia M. Gamez, Esq.

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TRUSTS AND ESTATES SECTION - SUPPORT

TEXCOM supports this correction of an apparent error in the Probate Code.

RESOLUTION 05-03-2018

DIGEST

Trusts: Definition of Instrument

Amends Probate Code section 45 to clarify the definition of “instrument” to include a document that either establishes or amends a trust.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 45 to clarify the definition of “instrument” to include a document that either establishes or amends a trust. This resolution should be approved in principle because it would clarify an ambiguity in the Probate Code.

The word “trust” is often used in two different senses. First, it is often used to refer to the relationship created under the trust instrument. For example, it is common for practitioners in this area to refer to a trustee holding an asset “in trust” for a beneficiary. Second, the word “trust” is sometimes used to refer to the physical document that establishes the terms of that trust relationship. For example, a trustee may send a copy of “the trust” to beneficiaries. In that context the words “the trust” would refer to the physical pages providing the governing terms rather than the abstraction of the relationship it established between trustee and beneficiary. There does not appear to be any authority squarely addressing the use of this homograph.

Aviles v Swearingen (2017) 16 Cal.App.5th 485, cited in the resolution, does not directly address this issue. Instead, the case is directed to the intent of the settlor as applicable to Probate Code section 21310. Further, the resolution correctly points out that the additional primary authority that does exist is not squarely on point in making this distinction. The most commonly used practice guides in this area (which would generally be viewed by courts as the most persuasive authority) similarly do not appear to resolve this issue.

Consequently, the use of the word “trust” in Probate Code section 45 is ambiguous because it is susceptible to more than one meaning. This resolution addresses the issue by clarifying which meaning is meant in which context.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 45 to read as follows:

- 1 § 45
- 2 “Instrument” means a will, a document establishing a trust, a document amending a trust,
- 3 a deed, or other writing that designates a beneficiary or makes a donative transfer of property.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Sacramento County Bar Association

STATEMENT OF REASONS

The Problem: Probate Code section 45 defines an instrument to include a “trust.” By including a “trust” in the definition of an “instrument,” Probate Code section 45 says a trust is a document. A trust is not a document. “A trust is a fiduciary relationship with respect to property in which the person holding legal title to the property - the trustee - has an equitable obligation to manage the property for the benefit of another - the beneficiary.” (*Moelter v. Superior Court* (1997) 16 Cal. 4th 1124, 1133-1134.) Under Probate Code section 16000, “[o]n acceptance of the trust, the trustee [generally] has a duty to administer the trust according to the trust instrument”

The Solution: The solution is to amend Probate Code section 45 to provide that an instrument includes a document establishing or amending a trust. This amendment would not only correct an erroneous Probate Code definition, but it would also clarify uncertainty a recent no-contest clause case has created.

In *Aviles v Swearingen* (2017) 16 Cal.App.5th 485, the court held that the no-contest clause in a trust document did not apply to an amendment to that document because the amendment was an instrument and did not itself include a no-contest clause. The court did not cite to Probate Code Section 45’s definition of “instrument.” Probate Code section 45 lists a trust as an instrument but does not list an amendment to a trust. Probate Code section 45 lists a will as an instrument, and Probate Code section 88 provides that a will includes a codicil (amendment). Therefore, under Probate Code section 45, when read in conjunction with Probate Code section 88, a will and an amendment to a will are instruments. The Probate Code should expressly state that an amendment to a trust instrument is an instrument. That would create consistency between trust instruments and wills. It would also provide a statutory basis for the holding in *Aviles* that for a no-contest clause to apply to a trust document amendment the amendment must contain the no-contest clause. This amendment would remove any uncertainty the lack of statutory analysis in *Aviles* might create.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified. The Probate Code refers to “trust instrument” in various places, but this amendment would not impact those statutes.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT: Sil Reggiardo, Downey Brand LLP, 621 Capitol Mall, Suite 1800, Sacramento, CA 95814-4731, Phone: (916) 520-5374, E-mail: sreggiardo@downeybrand.com.

RESPONSIBLE FLOOR DELEGATE: Sil Reggiardo

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TRUSTS AND ESTATES SECTION - SUPPORT IN PRINCIPLE

This resolution correctly observes that a “trust” is not a document, but a fiduciary relationship respecting property. The proposed amendment to clarify Probate Code section 45 in this regard is a sensible one. However, TEXCOM notes that not all trusts are required to be in writing, such that the first written instrument regarding a trust may actually not “establish” the trust, but instead memorialize an existing unwritten trust. Thus, a potential improvement to the proposed amendment might be to replace the word “establishing” with “memorializing” (or another word to that effect), such that the definition of instrument would include a “document memorializing a trust.”

RESOLUTION 05-04-2018

DIGEST

Conservatorships: Susceptibility to Undue Influence

Amends Probate Code section 1801 to allow the court to consider evidence of an individual's susceptibility to undue influence as a factor in deciding whether to establish a conservatorship.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 1801 to allow the court to consider evidence of an individual's susceptibility to undue influence as a factor in deciding whether to establish a conservatorship. This resolution should be approved in principle because it adds an important component for the court to consider when evaluating the need for a conservatorship of the person.

Presently, Probate Code section 1801 subdivision (a) allows the court to appoint a conservator of the person for someone who is unable to provide properly for their personal needs for physical health, food, clothing or shelter. A conservator of the person decides where the conservatee lives, whether at home or in an institution, manages the conservatee's medical care, medication, food, and can even have the authority to limit contact between the conservatee with certain family members or others. But, the Probate Code does not specifically give the court authority to consider the person's susceptibility to undue influence when appointing a conservator of the person. This is in contrast to Probate Code section 1801, subdivision (b) where the court does consider undue influence when determining whether a conservatorship of the estate is needed. Since the court is already evaluating whether the proposed conservatee is vulnerable to undue influence when establishing a conservatorship of the estate, it makes sense for the court to be able to use this evidence when evaluating whether a conservatorship of the person is needed.

Welfare and Institutions Code section 15610.70 defines "undue influence" as "excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results inequity." In determining undue influence under Welfare and Institutions Code section 15610.70, the court considers evidence of an influencer who controls necessities of life, medication, the victim's interaction with others, and isolation. California Adult Protective Services already recognizes the need to consider undue influence regarding a person's ability to provide for their own health, food, clothing and shelter through their "California Undue Influence Screening Tool (CUIST)." Since these same factors form the basis of determining whether a conservatorship of the person is needed, it makes sense for a court to consider evidence of whether the person is susceptible to undue influence when evaluating whether to grant a conservatorship of the person.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 1801 to read as follows:

1 § 1801

2 Subject to Section 1800.3:

3 (a) A conservator of the person may be appointed for a person who is unable to provide
4 properly for his or her personal needs for physical health, food, clothing, or shelter except as
5 provided for the person as described in subdivision (b) or (c) Section 1828.5. Evidence of an
6 individual's susceptibility to undue influence may be considered in determining whether the
7 person is unable to provide for his or her personal needs as provided in this subdivision.

8 (b) A conservator of the estate may be appointed for a person who is substantially unable
9 to manage his or her own financial resources or resist fraud or undue influence, except as
10 provided for that person as described in subdivision (b) or (c) of Section 1828.5. Substantial
11 inability may not be proved solely by isolated incidents of negligence or improvidence.

12 (c) A conservator of the person and estate may be appointed for a person described in
13 subdivisions (a) and (b).

14 (d) A limited conservator of the person or of the estate, or both, may be appointed for a
15 developmentally disabled adult. A limited conservatorship may be utilized only as necessary to
16 promote and protect the well-being of the individual, shall be designed to encourage the
17 development of maximum self-reliance and independence of the individual and shall be ordered
18 only to the extent necessitated by the individual's proven mental and adaptive limitations. The
19 conservator shall not be presumed to be incompetent and shall retain all legal and civil rights
20 except those which by court order have been designated as legal disabilities and have been
21 specifically granted to the limited conservator. The intent of the Legislature, as expressed in
22 Section 4501 of the Welfare and Institutions Code, that developmentally disabled citizens of this
23 state receive services resulting in more independent, productive, normal lives is the underlying
24 mandate of this division in its application to adults alleged to be developmentally disabled.

25 (e) The standard of proof for the appointment of a conservator pursuant to this section
26 shall be clear and convincing evidence.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

The Problem: Existing law provides that an inability to resist fraud or undue influence is grounds for the appointment of a conservator of the estate, but not a conservator of the person. This is a problem because undue influence often results in non-economic consequences, including the physical isolation, physical mistreatment, and interference with longstanding relationships of an elder that can result in an inability to provide for one's personal needs. The modernized definition of undue influence, effective January 1, 2014, under Welfare and Institutions Code section 15610.70, addresses this reality. The current law on conservatorships does not provide for a conservatorship of the person to address undue influence resulting in non-economic

consequences, and this must be fixed.

The Solution: The proposed amendment allows consideration of evidence of a proposed conservatee's susceptibility to undue influence as it pertains to his or her ability to properly provide for his or her personal needs.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT: Hilary J. Vrem, 1550 Hotel Circle North, Suite 300, San Diego, CA 92108-2911, voice 619-696-7066, fax 619-696-6907, e-mail hilary@bjjlaw.com and D. Robert Dieringer, 402 West Broadway, Suite 1950, San Diego, CA 92101, voice 619-831-6984, fax 619-239-7900, email rdieringer@gbflawyers.com

RESPONSIBLE FLOOR DELEGATE: Hilary J. Vrem

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TRUSTS AND ESTATES SECTION - OPPOSE

This resolution is unnecessary, as evidence of an individual's susceptibility to undue influence may already be considered by the court—even without the proposed statutory amendment—under Probate Code section 1801, subdivision (a), in determining whether the person is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter. Moreover, this resolution would create a new consideration relating to the appointment of a conservator of the person (i.e., the individual's susceptibility to undue influence) in a way that is inconsistent with the existing undue influence-based requirement applicable to conservatorships of the estate (i.e., substantial inability to resist fraud or undue influence). The basis for the distinction is unclear. Finally, whereas substantial inability to resist fraud or undue influence may not be proved solely by isolated incidents of negligence or improvidence in the context of a conservatorship of the estate under Probate Code section 1801, subdivision (b), the proposed amendment to Probate Code section 1801, subdivision (a), contains no similar limitation; as a result, it does not adequately protect the subject individual's fundamental liberties.

RESOLUTION 05-05-2018

DIGEST

Financial Elder Abuse: Add Exception for Reasonable Value of Services

Amends Welfare and Institutions Code section 15657.6 to add an exception to financial elder and dependent adult abuse by allowing reasonable value for support.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Welfare and Institutions Code section 15657.6 to add an exception to financial elder and dependent adult abuse by allowing reasonable value for support. This resolution should be disapproved because the proposed language does not accomplish the stated goal.

Under current law, section 15657.6 potentially imposes liability against a defendant where an elder (defined as anyone over the age of 65) or a dependent adult paid a reasonable sum of money for necessities of life. The resolution seeks to create an exception to liability for financial elder or dependent adult abuse for receiving the reasonable value of things furnished to the person necessary for the support of the person or the person's family. The purpose of the resolution is a good one; no one should be liable for financial elder or dependent adult abuse for providing things or services necessary for support of the individual.

However, the resolution does not accomplish this goal because it references Civil Code section 38, which relates to people generally that are not competent to enter into contracts. Civil Code section 38 does not refer to people over the age of 65 or dependent adults which is what the elder or dependent adult abuse statute protects.

Thus, reference to Civil Code section 38 does not accomplish the stated goal because financial elder or dependent adult abuse can apply to anyone over the age of 65 or a dependent adult, whether competent or incompetent, and Civil Code section 38 applies only to a person "entirely without understanding." A better solution would be to replace the proposed language as follows: "Except for payments or things received in exchange for the reasonable value of things furnished to an elder or dependent adult for the support of the person or the person's family . . ."

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Welfare and Institutions Code section 15657.6 to read as follows:

1 § 15657.6

2 Except as provided in Civil Code §38, aA person or entity that takes, secretes,
3 appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or
4 retaining the real or personal property of an elder or dependent adult when the elder or dependent
5 adult lacks capacity pursuant to Section 812 of the Probate Code, or is of unsound mind, but not
6 entirely without understanding, pursuant to Section 39 of the Civil Code, shall, upon demand by
7 the elder or dependent adult or a representative of the elder or dependent adult, as defined in
8 subdivision (d) of Section 15610.30, return the property and if that person or entity fails to return
9 the property, the elder or dependent adult shall be entitled to the remedies provided by Section
10 15657.5, including attorney’s fees and costs. This section shall not apply to any agreement
11 entered into by an elder or dependent adult when the elder or dependent adult had capacity.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County

STATEMENT OF REASONS

The Problem: Existing language in the Financial Elder Abuse statute would impose liability on a defendant where the elder transferred a reasonable sum of money to the defendant in return for the provision of necessities of life, such as food or water. Incompetents have been held liable for the reasonable value of services for those transactions under Civil Code section 38. This problem was identified by the Rutter Group Elder Abuse Litigation Practice Guide.

The Solution: This would provide an exception to the Elder Abuse statute to the extent a person incompetent of contracting pays or becomes indebted for items deemed necessary for the support of the person or his/her family. This would still require the person to pay for the reasonable value of those items/services, but would not require the person/vendor to return all monies received as a result of that transaction under Welfare & Institutions Code §15657.6.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT: Melissa L. Bustarde, Mayfield Bustarde, LLP, 462 Stevens Ave., Suite 303, Solana Beach, CA 92075, (858) 793-8090, bustarde@mayfieldbustarde.com

RESPONSIBLE FLOOR DELEGATE: Melissa L. Bustarde

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TRUSTS AND ESTATES SECTION - OPPOSE

TEXCOM believes the proposed carveout language is too broad. Given that much elder financial abuse (and the ensuing litigation) is perpetrated by the elder's family member(s), including caregivers, the proposed language appears inconsistent with the public policy underlying the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) in that it would let this significant class of potential abusers off the hook based on the language of Civil Code section 38. The proposal to exempt from the scope of Welfare and Institutions Code section 15657.6 the value of "things furnished" by those persons or vendors who provide services or items deemed necessary for the elder's support or family needs to be more narrowly tailored. The proposed language would appear to undermine at least part of EADACPA's intent.

RESOLUTION 05-06-2018

DIGEST

Elder Abuse: Order for Anger Management

Amends Welfare and Institutions Code section 15676.03 to authorize the court to order anger management classes in Elder Abuse Restraining Order matters.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolution 06-02-2016, which was approved as amended.

Reasons:

This resolution amends Welfare and Institutions Code section 15676.03 to authorize the court to order anger management classes in Elder Abuse Restraining Order matters. This resolution should be approved in principle because it would give the court authority to order a restrained person to participate in an elder abuse prevention or batterer’s program.

The current statute does not give the court the option of ordering a restrained person to participate in this type of program. The proposed amendment would grant the court the authority, when issuing a protective order to prevent elder abuse, to also order the restrained person to participate in an elder abuse prevention or batterer’s program. This would give the court a tool similar to that which is already available for domestic violence restraining orders. Further, because family members are often the perpetrators, this approach would give the court a less disruptive option to attempt to heal family relationships by providing the tools and information to the abuser to break the cycle of abuse.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend the Welfare and Institutions Code section 15675.03 to read as follows:

- 1 § 15675.03
- 2 (a) (1) An elder or dependent adult who has suffered abuse, as defined in Section
- 3 15610.07, may seek protective orders as provided in this section.
- 4 (2) A petition may be brought on behalf of an abused elder or dependent adult by a
- 5 conservator or a trustee of the elder or dependent adult, an attorney-in-fact of an elder or
- 6 dependent adult who acts within the authority of a power of attorney, a person appointed as a
- 7 guardian ad litem for the elder or dependent adult, or other person legally authorized to seek the
- 8 relief.
- 9 (3) (A) A petition under this section may be brought on behalf of an elder or dependent
- 10 adult by a county adult protective services agency in either of the following circumstances:
- 11 (i) If the elder or dependent adult has suffered abuse as defined in subdivision (b) and has
- 12 an impaired ability to appreciate and understand the circumstances that place him or her at risk of
- 13 harm.

14 (ii) If the elder or dependent adult has provided written authorization to a county adult
15 protective services agency to act on his or her behalf.

16 (B) In the case of a petition filed pursuant to clause (i) of subparagraph (A) by a county
17 adult protective services agency, a referral shall be made to the public guardian consistent with
18 Section 2920 of the Probate Code prior to or concurrent with the filing of the petition, unless a
19 petition for appointment of a conservator has already been filed with the probate court by the
20 public guardian or another party.

21 (C) A county adult protective services agency shall be subject to any confidentiality
22 restrictions that otherwise apply to its activities under law and shall disclose only those facts as
23 necessary to establish reasonable cause for the filing of the petition, including, in the case of a
24 petition filed pursuant to clause (i) of subparagraph (A), to establish the agency's belief that the
25 elder or dependent adult has suffered abuse and has an impaired ability to appreciate and
26 understand the circumstances that place him or her at risk, and as may be requested by the court
27 in determining whether to issue an order under this section.

28 (b) For purposes of this section:

29 (1) "Abuse" has the meaning set forth in Section 15610.07.

30 (2) "Conservator" means the legally appointed conservator of the person or estate of the
31 petitioner, or both.

32 (3) "Petitioner" means the elder or dependent adult to be protected by the protective
33 orders and, if the court grants the petition, the protected person.

34 (4) "Protective" order means an order that includes any of the following restraining
35 orders, whether issued ex parte, after notice and hearing, or in a judgment:

36 (A) An order enjoining a party from abusing, intimidating, molesting, attacking, striking,
37 stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not
38 limited to, making annoying telephone calls as described in Section 653m of the Penal Code,
39 destroying personal property, contacting, either directly or indirectly, by mail or otherwise, or
40 coming within a specified distance of, or disturbing the peace of, the petitioner, and, in the
41 discretion of the court, on a showing of good cause, of other named family or household
42 members or a conservator, if any, of the petitioner. On a showing of good cause, in an order
43 issued pursuant to this subparagraph in connection with an animal owned, possessed, leased,
44 kept, or held by the petitioner, or residing in the residence or household of the petitioner, the
45 court may do either or both of the following:

46 (i) Grant the petitioner exclusive care, possession, or control of the animal.

47 (ii) Order the respondent to stay away from the animal and refrain from taking,
48 transferring, encumbering, concealing, molesting, attacking, striking, threatening, harming, or
49 otherwise disposing of the animal.

50 (B) An order excluding a party from the petitioner's residence or dwelling, except that
51 this order shall not be issued if legal or equitable title to, or lease of, the residence or dwelling is
52 in the sole name of the party to be excluded, or is in the name of the party to be excluded and any
53 other party besides the petitioner.

54 (C) An order enjoining a party from specified behavior that the court determines is
55 necessary to effectuate orders described in subparagraph (A) or (B).

56 (D) When issuing such Protective order, the court may also order the following:

57 (i) After notice and a hearing, the court may issue and order requiring the restrained party
58 to participate in an elder abuse prevention or batterer's program approved by the probation

59 (ii) (aa) If the court orders a restrained party to participate in an elder abuse prevention or

60 batterer’s program pursuant to subdivision (ii), the restrained party shall do all of the following:

61 (1) Register for the program by the deadline ordered by the court. If no deadline is
62 ordered by the court, the restrained party shall register no later than 30 days from the date the
63 order was issued.

64 (2) At the time of enrollment, sign all necessary program consent forms for the program
65 to release proof of enrollment, attendance records, and completion or termination reports to the
66 court and the protected party, or his or her attorney. The court and the protected party may
67 provide to the program a fax number or mailing address for purposes of receiving proof of
68 enrollment, attendance records, and completion or termination reports.

69 (3) Provide the court and the protected party with the name, address, and telephone
70 number of the program. The Judicial Council shall promulgate forms as necessary to effectuate
71 this subdivision.

72 (iii) The courts shall, in consultation with local elder abuse programs, develop a resource
73 list of referrals to appropriate community elder abuse programs and services to be provided for
74 each application for an order under this section.

75 (5) “Respondent” means the person against whom the protective orders are sought and, if
76 the petition is granted, the restrained person.

77 (c) An order may be issued under this section, with or without notice, to restrain any
78 person for the purpose of preventing a recurrence of abuse, if a declaration shows, to the
79 satisfaction of the court, reasonable proof of a past act or acts of abuse of the petitioning elder or
80 dependent adult.

81 (d) Upon filing a petition for protective orders under this section, the petitioner may
82 obtain a temporary restraining order in accordance with Section 527 of the Code of Civil
83 Procedure, except to the extent this section provides a rule that is inconsistent. The temporary
84 restraining order may include any of the protective orders described in paragraph (4) of
85 subdivision (b). However, the court may issue an ex parte order excluding a party from the
86 petitioner’s residence or dwelling only on a showing of all of the following:

87 (1) Facts sufficient for the court to ascertain that the party who will stay in the dwelling
88 has a right under color of law to possession of the premises.

89 (2) That the party to be excluded has assaulted or threatens to assault the petitioner, other
90 named family or household member of the petitioner, or a conservator of the petitioner.

91 (3) That physical or emotional harm would otherwise result to the petitioner, other named
92 family or household member of the petitioner, or a conservator of the petitioner.

93 (e) A request for the issuance of a temporary restraining order without notice under this
94 section shall be granted or denied on the same day that the petition is submitted to the court,
95 unless the petition is filed too late in the day to permit effective review, in which case the order
96 shall be granted or denied on the next day of judicial business in sufficient time for the order to
97 be filed that day with the clerk of the court.

98 (f) Within 21 days, or, if good cause appears to the court, 25 days, from the date that a
99 request for a temporary restraining order is granted or denied, a hearing shall be held on the
100 petition. If no request for temporary orders is made, the hearing shall be held within 21 days, or,
101 if good cause appears to the court, 25 days, from the date that the petition is filed.

102 (g) The respondent may file a response that explains or denies the alleged abuse.

103 (h) The court may issue, upon notice and a hearing, any of the orders set forth in
104 paragraph (4) of subdivision (b). The court may issue, after notice and hearing, an order
105 excluding a person from a residence or dwelling if the court finds that physical or emotional

106 harm would otherwise result to the petitioner, other named family or household member of the
107 petitioner, or conservator of the petitioner.

108 (i) (1) In the discretion of the court, an order issued after notice and a hearing under this
109 section may have a duration of not more than five years, subject to termination or modification
110 by further order of the court either on written stipulation filed with the court or on the motion of
111 a party. These orders may be renewed upon the request of a party, either for five years or
112 permanently, without a showing of any further abuse since the issuance of the original order,
113 subject to termination or modification by further order of the court either on written stipulation
114 filed with the court or on the motion of a party. The request for renewal may be brought at any
115 time within the three months before the expiration of the order.

116 (2) The failure to state the expiration date on the face of the form creates an order with a
117 duration of three years from the date of issuance.

118 (3) If an action is filed for the purpose of terminating or modifying a protective order
119 prior to the expiration date specified in the order by a party other than the protected party, the
120 party who is protected by the order shall be given notice, pursuant to subdivision (b) of Section
121 1005 of the Code of Civil Procedure, of the proceeding by personal service or, if the protected
122 party has satisfied the requirements of Chapter 3.1 (commencing with Section 6205) of Division
123 7 of Title 1 of the Government Code, by service on the Secretary of State. If the party who is
124 protected by the order cannot be notified prior to the hearing for modification or termination of
125 the protective order, the court shall deny the motion to modify or terminate the order without
126 prejudice or continue the hearing until the party who is protected can be properly noticed and
127 may, upon a showing of good cause, specify another method for service of process that is
128 reasonably designed to afford actual notice to the protected party. The protected party may waive
129 his or her right to notice if he or she is physically present in court and does not challenge the
130 sufficiency of the notice.

131 (j) In a proceeding under this section, a support person may accompany a party in court
132 and, if the party is not represented by an attorney, may sit with the party at the table that is
133 generally reserved for the party and the party's attorney. The support person is present to provide
134 moral and emotional support for a person who alleges he or she is a victim of abuse. The support
135 person is not present as a legal adviser and may not provide legal advice. The support person
136 may assist the person who alleges he or she is a victim of abuse in feeling more confident that he
137 or she will not be injured or threatened by the other party during the proceedings if the person
138 who alleges he or she is a victim of abuse and the other party are required to be present in close
139 proximity. This subdivision does not preclude the court from exercising its discretion to remove
140 the support person from the courtroom if the court believes the support person is prompting,
141 swaying, or influencing the party assisted by the support person.

142 (k) Upon the filing of a petition for protective orders under this section, the respondent
143 shall be personally served with a copy of the petition, notice of the hearing or order to show
144 cause, temporary restraining order, if any, and any declarations in support of the petition. Service
145 shall be made at least five days before the hearing. The court may, on motion of the petitioner or
146 on its own motion, shorten the time for service on the respondent.

147 (l) A notice of hearing under this section shall notify the respondent that if he or she does
148 not attend the hearing, the court may make orders against him or her that could last up to five
149 years.

150 (m) The respondent shall be entitled, as a matter of course, to one continuance, for a
151 reasonable period, to respond to the petition.

152 (n) (1) Either party may request a continuance of the hearing, which the court shall grant
153 on a showing of good cause. The request may be made in writing before or at the hearing or
154 orally at the hearing. The court may also grant a continuance on its own motion.

155 (2) If the court grants a continuance, any temporary restraining order that has been
156 granted shall remain in effect until the end of the continued hearing, unless otherwise ordered by
157 the court. In granting a continuance, the court may modify or terminate a temporary restraining
158 order.

159 (o) (1) If a respondent, named in an order issued under this section after a hearing, has
160 not been served personally with the order but has received actual notice of the existence and
161 substance of the order through personal appearance in court to hear the terms of the order from
162 the court, no additional proof of service is required for enforcement of the order.

163 (2) If the respondent named in a temporary restraining order is personally served with the
164 order and notice of hearing with respect to a restraining order or protective order based on the
165 temporary restraining order, but the respondent does not appear at the hearing, either personally
166 or by an attorney, and the terms and conditions of the restraining order or protective order issued
167 at the hearing are identical to the temporary restraining order, except for the duration of the
168 order, then the restraining order or protective order issued at the hearing may be served on the
169 respondent by first-class mail sent to the respondent at the most current address for the
170 respondent that is available to the court.

171 (3) The Judicial Council form for temporary orders issued pursuant to this subdivision
172 shall contain a statement in substantially the following form:

173 If you have been personally served with a temporary restraining order and notice of hearing, but
174 you do not appear at the hearing either in person or by a lawyer, and a restraining order that is
175 the same as this temporary restraining order except for the expiration date is issued at the
176 hearing, a copy of the order will be served on you by mail at the following address:

177 If that address is not correct or you wish to verify that the temporary restraining order was
178 converted to a restraining order at the hearing without substantive change and to find out the
179 duration of that order, contact the clerk of the court.

180 (p) (1) Information on a protective order relating to elder or dependent adult abuse issued
181 by a court pursuant to this section shall be transmitted to the Department of Justice in accordance
182 with either paragraph (2) or (3).

183 (2) The court shall order the petitioner or the attorney for the petitioner to deliver a copy
184 of an order issued under this section, or a reissuance, extension, modification, or termination of
185 the order, and any subsequent proof of service, by the close of the business day on which the
186 order, reissuance, extension, modification, or termination was made, to each law enforcement
187 agency having jurisdiction over the residence of the petitioner, and to any additional law
188 enforcement agencies within the court's discretion as are requested by the petitioner.

189 (3) Alternatively, the court or its designee shall transmit, within one business day, to law
190 enforcement personnel all information required under subdivision (b) of Section 6380 of the
191 Family Code regarding any order issued under this section, or a reissuance, extension,
192 modification, or termination of the order, and any subsequent proof of service, by either one of
193 the following methods:

194 (A) Transmitting a physical copy of the order or proof of service to a local law
195 enforcement agency authorized by the Department of Justice to enter orders into the California
196 Law Enforcement Telecommunications System (CLETS).

197 (B) With the approval of the Department of Justice, entering the order or proof of service

198 into CLETS directly.

199 (4) Each appropriate law enforcement agency shall make available information as to the
200 existence and current status of these orders to law enforcement officers responding to the scene
201 of reported abuse.

202 (5) An order issued under this section shall, on request of the petitioner, be served on the
203 respondent, whether or not the respondent has been taken into custody, by any law enforcement
204 officer who is present at the scene of reported abuse involving the parties to the proceeding. The
205 petitioner shall provide the officer with an endorsed copy of the order and a proof of service,
206 which the officer shall complete and send to the issuing court.

207 (6) Upon receiving information at the scene of an incident of abuse that a protective order
208 has been issued under this section, or that a person who has been taken into custody is the
209 respondent to that order, if the protected person cannot produce an endorsed copy of the order, a
210 law enforcement officer shall immediately attempt to verify the existence of the order.

211 (7) If the law enforcement officer determines that a protective order has been issued but
212 not served, the officer shall immediately notify the respondent of the terms of the order and
213 where a written copy of the order can be obtained, and the officer shall at that time also enforce
214 the order. The law enforcement officer's verbal notice of the terms of the order shall constitute
215 service of the order and is sufficient notice for the purposes of this section and for the purposes
216 of Section 273.6 of the Penal Code.

217 (q) Nothing in this section shall preclude either party from representation by private
218 counsel or from appearing on the party's own behalf.

219 (r) There is no filing fee for a petition, response, or paper seeking the reissuance,
220 modification, or enforcement of a protective order filed in a proceeding brought pursuant to this
221 section.

222 (s) Pursuant to paragraph (4) of subdivision (b) of Section 6103.2 of the Government
223 Code, a petitioner shall not be required to pay a fee for law enforcement to serve an order issued
224 under this section.

225 (t) The prevailing party in an action brought under this section may be awarded court
226 costs and attorney's fees, if any.

227 (u) (1) A person subject to a protective order under this section shall not own, possess,
228 purchase, receive, or attempt to receive a firearm or ammunition while the protective order is in
229 effect.

230 (2) The court shall order a person subject to a protective order issued under this section to
231 relinquish any firearms he or she owns or possesses pursuant to Section 527.9 of the Code of
232 Civil Procedure.

233 (3) Every person who owns, possesses, purchases, or receives, or attempts to purchase or
234 receive a firearm or ammunition while subject to a protective order issued under this section is
235 punishable pursuant to Section 29825 of the Penal Code.

236 (4) This subdivision does not apply in a case in which a protective order issued under this
237 section was made solely on the basis of financial abuse unaccompanied by force, threat,
238 harassment, intimidation, or any other form of abuse.

239 (v) In a proceeding brought under paragraph (3) of subdivision (a), all of the following
240 apply:

241 (1) Upon the filing of a petition for a protective order, the elder or dependent adult on
242 whose behalf the petition has been filed shall receive a copy of the petition, a notice of the
243 hearing, and any declarations submitted in support of the petition. The elder or dependent adult

244 shall receive this information at least five days before the hearing. The court may, on motion of
245 the petitioner or on its own motion, shorten the time for provision of this information to the elder
246 or dependent adult.

247 (2) The adult protective services agency shall make reasonable efforts to assist the elder
248 or dependent adult to attend the hearing and provide testimony to the court, if he or she wishes to
249 do so. If the elder or dependent adult does not attend the hearing, the agency shall provide
250 information to the court at the hearing regarding the reasons why the elder or dependent adult is
251 not in attendance.

252 (3) Upon the filing of a petition for a protective order and upon issuance of an order
253 granting the petition, the county adult protective services agency shall take all reasonable steps to
254 provide for the safety of the elder or dependent adult, pursuant to Chapter 13 (commencing with
255 Section 15750), which may include, but are not limited to, facilitating the location of alternative
256 accommodations for the elder or dependent adult, if needed.

257 (w) Any willful disobedience of any temporary restraining order or restraining order after
258 hearing granted under this section is punishable pursuant to Section 273.6 of the Penal Code.

259 (x) This section does not apply to any action or proceeding governed by Title 1.6C
260 (commencing with Section 1788) of Part 4 of Division 3 of the Civil Code, Chapter 3
261 (commencing with Section 525) of Title 7 of Part 2 of the Code of Civil Procedure, or Division
262 10 (commencing with Section 6200) of the Family Code. Nothing in this section shall preclude a
263 petitioner's right to use other existing civil remedies.

264 (y) The Judicial Council shall develop forms, instructions, and rules relating to matters
265 governed by this section. The petition and response forms shall be simple and concise, and shall
266 be used by parties in actions brought pursuant to this section.

267 (z) This section shall become operative on July 1, 2016.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem: Presently, the court in Elder Abuse Restraining Orders cannot or is not empowered to use resources as are granted in Domestic Violence Restraining Orders and many of those that are before the court are family matters. A judicial officer has expressed that it would be beneficial to have the discretion to be able to order this type of program.

The Solution: This resolution will permit the Court to use the same resources and issue the same orders in Elder Abuse Restraining case that are currently used in Domestic Violence Restraining Order situations. This legislation will empower judicial officers in Elder Abuse Restraining Order matters to use the same resources that are available in Domestic Violence Restraining Order matters.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISTATION

None known.

AUTHOR AND/OR PERMANTENT CONTACT: Nikki P. Miliband, Esq. of Good Wildman, 19000 MacArthur Boulevard, Suite 575, Irvine, CA 92612, nmiliband@goodwildman.com, (949) 955-1100.

RESPONSIBLE FLOOR DELEGATE: Nikki P. Miliband, Esq.

COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TRUSTS AND ESTATES SECTION - SUPPORT

TEXCOM agrees that the court should be authorized to order a restrained party to attend anger management classes following the issuance of a protective order in elder abuse cases. Such may allow the restrained party to learn how to manage anger issues in a way that facilitates behavior modification, prevents ongoing elder abuse, and fosters family reunification.

RESOLUTION 05-07-2018

DIGEST

Trusts: Taxation Based on Residence of Fiduciary

Amends Revenue and Taxation Code section 17742 to prohibit taxing a trust based on the residence of the fiduciary acting as the trustee.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Revenue and Taxation Code section 17742 to prohibit taxing a trust based on the residence of the fiduciary acting as the trustee. This resolution should be disapproved because administration of a trust in California invokes the jurisdiction of the California courts, the possibility of double taxation has already been addressed, and a non-resident beneficiary will generally not be subject to California income tax to the extent that income is distributed to them.

If a trust is administered by a trustee in California, the venue for trust proceedings will generally be in California. (Prob. Code, § 17003.) If a beneficiary wishes to litigate the actions of the trustee, he or she can petition a California court for redress. The resolution would deprive California of revenue associated with the burden of having an administration in California, which provides the trust with the use of the California court system. Trust proceedings (especially for ongoing trusts) may go on for years or even decades. These burdens placed upon California courts would only be increased in the future if access to our courts were provided free of charge. Courts receive a substantial portion of their funding from the California taxpayers. It is therefore appropriate that trusts should be subject to taxation in California.

Also, California already allows a credit to the extent that income taxes are paid in another state. (Rev. & Tax Code §§ 18001-18011; Cal. Code of Regs. Tit. 18, §§ 18001-1, 18001-2; FTB Schedule S.) Consequently, the potential inequity of double state taxation has already been adequately addressed in other provisions of the Revenue and Taxation Code.

Further, distributions to a non-resident beneficiary will not be taxed in California unless the distributions are attributable to California source income. (Rev. & Tax Code §17734.) In other words, if the trustee wants to avoid California income taxes, he or she only needs to distribute the distributable net income of the trust to the nonresident beneficiary in order to avoid the imposition of California income taxes. The exception is California source income (e.g. income from California real estate) that would be taxable in California even if the income generating asset was not held by a trust.

California has a well thought out and equitable approach to the taxation of trusts. The resolution would disrupt this well-reasoned balance.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Revenue and Taxation Code section 17742 as follows:

1 § 17742

2 ~~(a)~~ Except as otherwise provided in this chapter, the income of an estate or trust is
3 taxable to the estate or trust. The tax applies to the entire taxable income of an estate, if the
4 decedent was a resident, regardless of the residence of the ~~fiduciary or~~ beneficiary, and to the
5 entire taxable income of a trust, if the ~~fiduciary or~~ beneficiary (other than a beneficiary whose
6 interest in such trust is contingent) is a resident, regardless of the residence of the settlor.

7 ~~(b) For purposes of this article the residence of a corporate fiduciary of a trust means the~~
8 ~~place where the corporation transacts the major portion of its administration of the trust.~~

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Contra Costa County Bar Association

STATEMENT OF REASONS

The Problem: Existing law allows a trust, that would otherwise not be taxable in California, to be taxable in California if the fiduciary or trustee is a resident of California. Under current law, a non-California trust could become taxable in California even if the settlor, beneficiaries, or trustee are non-residents of California if the fiduciary later becomes a resident of California. This is likely to conflict with the original settlor's intent if the settlor took steps to establish the trust situs in another state. This also discourages fiduciaries from being employed and/or earning taxable income within the State of California.

The Solution: This resolution would eliminate the taxability of a trust in California if said taxability is *solely* based on the residence of the fiduciary.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT: Christina Weed, Mendes Weed, LLP, 1655 N. Main Street, Suite 240, Walnut Creek, CA 94596, Phone: (925) 953-2920, cweed@cwlawoffices.com.

RESPONSIBLE FLOOR DELEGATE: Christina Weed