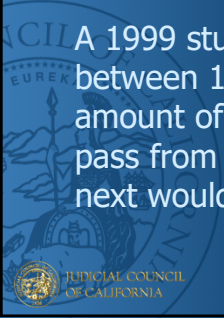


Collecting Support Through the Probate Court

Presented By:
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22nd Annual AB 1058 Child Support
Training Conference
November 13-16, 2018


Why?

A 1999 study estimated that, between 1998 and 2052, the amount of wealth that would pass from one generation to the next would be . . .

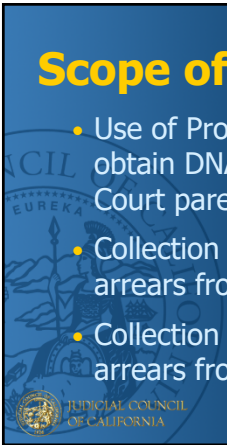


41 TRILLION Dollars



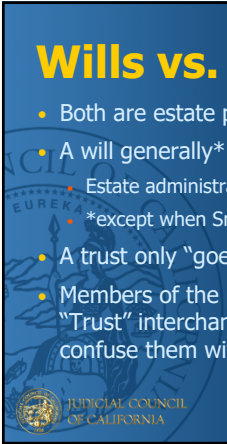


How many of those people might owe support arrears?



Scope of Presentation

- Use of Probate Court processes to obtain DNA evidence for Family Court parentage judgment
- Collection of ongoing support and arrears from trusts
- Collection of ongoing support and arrears from estates



Wills vs. Trusts

- Both are estate planning tools
- A will generally* requires a court process
 - Estate administration
 - *except when Small Estate Affidavit is used
- A trust only "goes to court" if there is a problem.
- Members of the public frequently use "Will" and "Trust" interchangeably and incorrectly, and confuse them with the Durable Power of Attorney.

Wills/Intestate Succession

- Instructions for disposition of the property in the decedent's "Estate"
- "Estate" is property still in the name/owned by the decedent after death
 - NOT life insurance proceeds
 - NOT "Payable on Death" (POD) bank accounts
 - NOT property held in Joint Tenancy with Right of Survivorship



Probate Terminology

Probate -- The process through which the legal title to property is transferred from a decedent to the beneficiaries.

Testate -- A person dies with a will.

Intestate -- A person dies without a will.

Administrator/Executor -- Person appointed to oversee the handling of an estate. Generally called a personal representative.

Decedent -- A person who has died.

Beneficiary/Heir -- A person to receive assets upon the death of the decedent.



Probate Procedure

1. Petition to Administer Estate
2. Inventory & Appraisal
3. Creditor's Claims
4. Account & Final Distribution

Ideally, per statute, takes one year, start to finish.



Probate costs and some rules

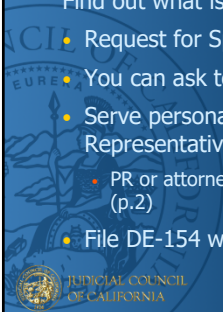
- Up front costs: Filing fee for Petition (\$435) and costs of publication (\$200-\$300 or more)
- Distribution of money to heirs requires a specific court order.
- Any actions to collect money from the estate must be done while the case is open.
 - Creditor's Claim if decedent is obligor—MOVE FAST!!
 - Before Final Distribution if heir is obligor



Getting and Staying Informed

Find out what is happening in the Probate case:

- Request for Special Notice (DE-154)
- You can ask to receive a copy of **everything**
- Serve personally or by mail on Personal Representative or their attorney
 - PR or attorney can sign to acknowledge receipt (p.2)
- File DE-154 with court

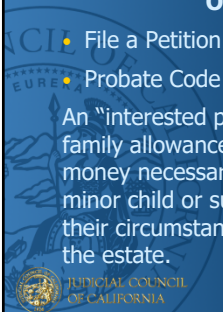


When the Decedent is the Support Obligor

Ongoing Support

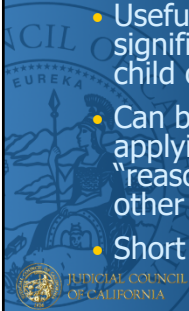
- File a Petition for Family Allowance
- Probate Code 6540 et seq

An "interested person" can file a petition for family allowance seeking a court order for money necessary for the maintenance of a minor child or surviving spouse according to their circumstances during administration of the estate.



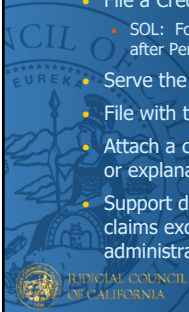
Family Allowance

- Useful if the estate assets are significant enough to support a child or surviving spouse
- Can be granted only if the person applying does not have "reasonable maintenance from other sources."
- Short term solution only



Collecting Arrears from the Estate

- File a Creditor's Claim (DE-172)
- SOL: Four months after Letters have issued or 60 days after Personal Representative gives notice to creditor
- Serve the Personal Representative
- File with the Court
- Attach a copy of the court order and documentation or explanation of the arrears balance.
- Support debts are entitled to priority over all other claims except for the expenses of estate administration.



FORM

Creditor's Claim



Small Estate Affidavit

- California non-court process for transfer of assets in small estates.
- Estate valued at less than \$150,000
- Can only be used at least 40 days after decedent's death
- Can only be used if there is no court probate or if the personal administrator has given permission
- No process for paying creditors (although the heir takes the property subject to creditors' potential future claims)



Form

Small Estate Affidavit



How Can a Creditor Prevent SEA process?

- A creditor can petition the court to appoint an administrator for the estate
 - Do this before the 40 days elapses
- Probate Code 8461 lists the priority for appointment: (a)-(p) various relatives, etc. (q) Creditors (r) Any other person
- Creditor may ask that a corporate fiduciary be appointed as administrator
 - Cost v. Benefits/size of estate



What if property is transferred by SEA?

- Probate Code 13109:

A person to whom payment, deliver, or transfer of the decedent's property is made [by Small Estate Affidavit] is personally liable [to the extent of the value of the property received] for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. [Including defenses, setoffs, cross-complaints, etc.]



Enforcement post-SEA transfer

- How would you enforce a support judgment under Probate Code 13109 against a SEA heir?

New lawsuit?

- Delay
- There's already a judgment

- Change name of obligor in support case?

• Joinder? Or RFO to substitute heir for original obligor?
Liability limited to value of property and accrued interest

Proof?



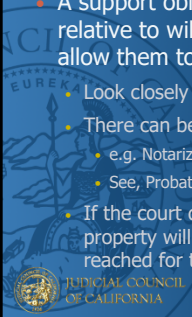
When the Support Obligor is an Heir

Goal: INTERCEPT the inheritance before it is distributed.



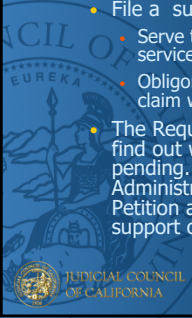
When the Support Obligor is an Heir

- A support obligor may influence an elderly relative to will their property in a way that will allow them to avoid support collection.
- Look closely at the will presented for probate
- There can be clear defects which ANYONE can raise.
 - e.g. Notarizing will instead of having two witnesses sign.
 - See, Probate Code Section 6110-6112
- If the court declines to admit the will to probate, the property will pass by intestate succession and can be reached for the support owed.



Procedure When Obligor Will Inherit

- File a support lien in the case EJ-185 (708.410)
- Serve the support obligor and file the proof of service
- Obligor has 30 days to file claim of exemption or claim waived.
- The Request for Special Notice will allow you to find out when the Petition for Final Distribution is pending. Check to make sure that the Administrator has acknowledged the lien in the Petition and intends to pay the lien from the support obligor's inheritance.



Forms

Request for Special Notice

Notice of Lien



Trusts

(Mostly) Keeping it Out of Court



Trust Terminology

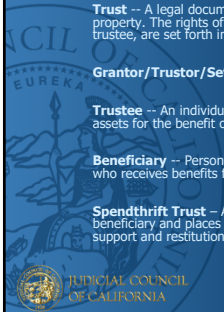
Trust -- A legal document for the control, management and distribution of property. The rights of the beneficiaries, and the rights, powers and duties of the trustee, are set forth in the trust agreement.

Grantor/Trustor/Settlor -- The person who created the trust.

Trustee -- An individual or organization which holds or manages and invests assets for the benefit of another.

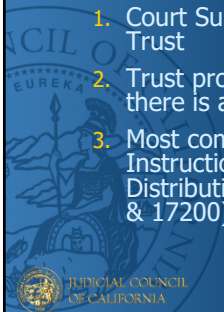
Beneficiary -- Person named in a will to receive money or property; also, person who receives benefits from a trust.

Spendthrift Trust -- A trust created to provide a fund for maintenance of a beneficiary and places it beyond his creditors' reach except for child and spousal support and restitution.



Trust Procedures

1. Court Supervision rarely required by the Trust
2. Trust proceedings usually opened when there is a problem
3. Most common processes: Petition for Instructions/Compel Account/Compel Distribution (Probate Code Sections 850 & 17200)



Obligor is Trust Beneficiary

First, try to resolve without court action:

- Contact the Trustee, provide a copy of the court order and relevant legal authorities, request voluntary payment. (You must do this before filing Probate Court Petition anyway.)
- Request a copy of the trust—you will eventually need to see the trust.
- Personalities and family dynamics—who is the trustee?



No Luck?

TIME TO GO TO COURT!



Trust Petitions

- Petition to Enforce Judgment Against Trust Beneficiary CCP 709.010
 - Exclusive remedy
 - To draft the Petition, you will need to ascertain trust provisions.
 - Are distributions mandatory? Or discretionary?
 - Is it a Spendthrift Trust?
 - Court must determine what is "equitable and reasonable under the circumstances of that particular case."
 - Look closely at Probate Code 15300-15309 when drafting the Petition



Probate Code Sections re Collection from Trusts, Generally

Probate Code Section 15300-15302: If a trust states that the beneficiary's interest is not subject to voluntary or involuntary transfer, creditors can only enforce a money judgment as allowed by (inter alia) Section 15305 (Spendthrift Trusts)

Probate Code 15303: If the trustee has discretion over whether/how much to pay the beneficiary, a creditor cannot force the trustee to exercise his/her discretion. (b) If the trustee exercises his/her discretion to pay the beneficiary, then the creditor has remedies.

Probate Code Section 15305: If the trustee is required to make payments (they are not discretionary), the court can order some or all of the support payments to be made out of the payments due to the beneficiary.



What's in the trust?

- Trusts are not automatically public record.
- Ask the trustee
- Look for a recorded Abstract of Trust in a county where trust property is located
- Order for Examination of 3rd party who has possession of property of judgment debtor (EJ-125) plus Subpoena Duces Tecum (Subp-002) to bring a copy of the trust and money distributed to obligor.
- OEX is issued/heard through the support case.



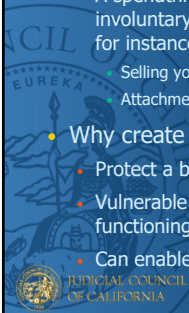
Forms

Order for Examination of 3rd Party (EJ-125)
Subpoena Duces Tecum (Subp-002)



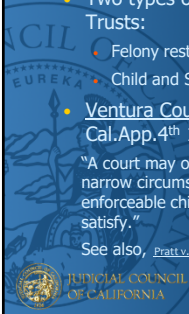
Spendthrift Trusts

- What is a spendthrift trust?
 - A spendthrift provision prohibits voluntary or involuntary transfer of the beneficiary's interest, for instance
 - Selling your future rights for a lump sum payment now
 - Attachment by creditors
- Why create one?
 - Protect a beneficiary's income
 - Vulnerable Beneficiaries (easily led, low functioning, etc.)
 - Can enable irresponsible beneficiaries



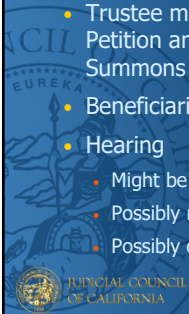
Spendthrift Trusts, Con't

- Two types of debt can be collected from Spendthrift Trusts:
 - Felony restitution (Probate Code 15305.5)
 - Child and Spousal Support (Probate Code 15305)
- Ventura County DCSS v. Brown (2004) 117 Cal.App.4th 144
 - "A court may overcome the trustee's discretion under the narrow circumstances present here: when there is an enforceable child support judgment that the trustee refuses to satisfy."
 - See also, Pratt v. Ferguson (2016) 3 Cal.App.5th 102



Procedure

- File Petition with Notice of Hearing (DE-120)
- Trustee must be personally served with the Petition and Notice of Hearing AND Probate Summons (DE-125)
- Beneficiaries can be served by mail
- Hearing
 - Might be handled in one hearing
 - Possibly multiple L&M hearings
 - Possibly could be set for evidentiary hearing

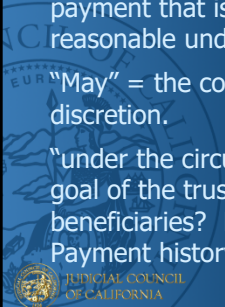




Sample Form

Petition to Enforce Judgment Against Trust Beneficiary

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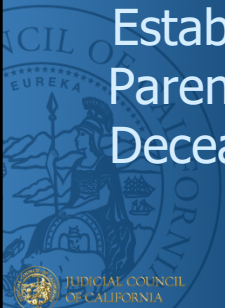
Legal Standard

The court may make an order for payment that is "equitable and reasonable under the circumstances."

"May" = the court must exercise its discretion.

"under the circumstances" What is the goal of the trust? How many beneficiaries? How much \$\$ in the trust? Payment history?

JUDICIAL COUNCIL
OF CALIFORNIA

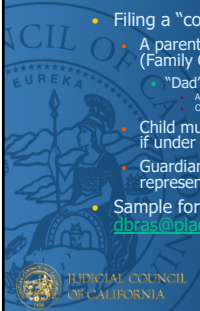


Establishment of Parentage with a Deceased Parent

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OF CALIFORNIA

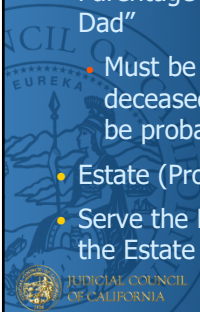
Alternatives to Probate Court

- Filing a "cooperative" parentage case:
 - A parent of the deceased parent may bring the action (Family Code 7630(c))
 - "Dad's Parents v. Mom" instead of "Mom v. Estate of Dad"
 - Avoids the need for estate administration
 - Only effective if parentage not contested.
 - Child must be a party if age 12 or older and may be a party if under age 12 (Family Code 7635)
 - Guardian ad Litem required for child if joined; need not be represented if the G.A.L. is relative of the child (FC 7635)
- Sample forms set: email request to dbras@placer.courts.ca.gov



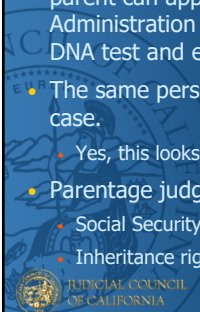
Suing the Estate

- Parentage case: "Mom v. Estate of Dad"
 - Must be filed in a county where the deceased parent's estate is or could be probated.
- Estate (Probate Case) must be opened
- Serve the Personal Representative of the Estate



Suing the Estate

- If no estate has been opened, the remaining parent can apply for Letters of Special Administration for the limited purpose of obtaining DNA test and establishing parentage.
- The same person can be on both sides of the case.
 - Yes, this looks weird.
- Parentage judgment (amended birth certificate)
 - Social Security Survivors' Benefits
 - Inheritance rights etc.



Letters of Special Administration

- Probate Code Section 8540 et seq
- Can be used to address extremely time-sensitive or limited issue.
- Timing and Notice:
 - Orders can be made at any time
 - With or without notice
 - Ex Parte Application
- Check local rules—many courts have extensive local rules regarding Probate/Estate cases which are beyond the scope of this presentation.



Forms

- Petition for Special Administration
- Ex Parte Application
- Order
- Letters



Any Questions?