TRUSTEE'S MILLION DOLLAR QUESTION: WHO IS ENTITLED TO NOTICE OF TRUST ADMINISTRATION?

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I. INTRODUCTION

The identity of the persons entitled to notice of a trust administration is less clear than is the identity of those entitled to notice of a probate administration. The statutes governing notice of a trust administration are ambiguous and what is worse, trustees generally do not have the protections afforded by a court supervised administration. As a result, a trustee may face significant liabilities many years after a trust administration has been completed.

II. PROBATE ADMINISTRATION NOTICE REQUIREMENTS

A probate administration is initiated by the filing of a petition for administration.[1] The persons entitled to notice are expressly defined by statute. Probate Code section 8110 provides:

> At least 15 days before the hearing of a petition for administration of a decedent's estate, the petitioner shall serve notice of the hearing by mail or personal delivery on all of the following persons:
>
> (a) Each heir of the decedent, so far as known to or reasonably ascertainable by the petitioner.
>
> (b) *Each devisee, executor, and alternative executor named in any will being offered for probate, regardless of whether the devise or appointment is purportedly revoked in a subsequent instrument.* (Emphasis added.)[2]

To determine which non-heirs are entitled to notice, a petitioner need look no further than the names listed in the will and any codicils that the petition seeks to have probated.[3] Once the order admitting a will to probate or appointing a personal representative becomes final, it is generally a conclusive determination of the court's jurisdiction and cannot be collaterally attacked.[4] This general rule is subject to three exceptions.

First, an order will not be conclusive if it was procured by extrinsic fraud,[5] but even where an heir's existence is known to a devisee, the personal representative's failure to provide notice may not be fatal. The court in *Stevens v. Torregano* (1961) 192 Cal. App. 2d 105 held that the executor's failure to provide notice to the decedent's only child did not constitute a basis for setting aside a previously entered decree of distribution because the executor was not aware of the child's existence. This was true even though one of the devisees was aware of the child and did not inform the executor that the child existed. There was no evidence that the executor ever asked the devisee whether the decedent had any children, and the devisee had no affirmative duty to make this fact known.[6] Consequently, extrinsic fraud was not present.[7]

Secondly, a "court order . . . based on the erroneous determination of the decedent's death" will not be conclusive.[8] While Tom Sawyer making a surprise appearance before the probate court may rarely arise in practice,[9] this illustrates the extent to which the personal representative is insulated from personal liability. Where a missing person presumed to be dead does reappear, the personal representative is liable only to return the property still in their possession, less fees, costs, and expenses incurred to date.[10] The missing person has even fewer remedies against distributees.[11] In other words, the personal representative in a probate administration generally will not be subject to personal liability for previous distributions even where the person whose assets were distributed turns out to be alive.[12]

The third exception is perhaps the most significant in its distinction from the notice of a trust administration. A personal representative will not be subject to liability for distributions made to date where a subsequent codicil surfaces providing for a different plan of distribution. Probate Code section 8226 provides:

> (a) If no person contests the validity of a will or petitions for revocation of probate of the will within the time provided in this chapter, admission of the will to probate is conclusive, subject to Section 8007.
>
> (b) Subject to subdivision (c), a will may be admitted to probate notwithstanding prior admission to probate of another will or prior distribution of property in the proceeding. The will may not affect property previously distributed, but the court may determine how any provision of the will affects property not yet distributed and how any provision of the will affects provisions of another will.
>
> (c) If the proponent of a will has received notice of a petition for probate or a petition for letters of administration for a general personal representative, the proponent of the will may petition for probate of the will only within the later of either of the following time periods:
>
> > (1) One hundred twenty days after issuance of the order admitting the first will to probate or determining the decedent to be intestate.
> >
> > (2) Sixty days after the proponent of the will first obtains knowledge of the will.

Probate Code section 8270(a) generally requires that a contest be filed within 120 days of the order admitting the will to

probate.[13] Unless a particular exception applies, the probate court's order can even be binding upon those who did not receive notice.[14] Perhaps that is as it should be, but the outcome may be far different for a trustee in a trust administration.

III. THE DILEMMA CREATED BY NOTICE REQUIREMENTS IN A TRUST ADMINISTRATION

The notice requirements in a trust administration are more ambiguous than in a probate administration. In particular, it is not clear whether a beneficiary or successor trustee whose name was deleted by a subsequent amendment is entitled to notice. This may require the trustee to choose between instigating litigation by providing notice where it may not be required, or facing potential liability for failing to provide the notice.

Under the most circumstances, notice is required either where a trust has become irrevocable or there has been a change of trustees.[15] The persons entitled to notice are set forth in Probate Code section 16061.7(b), which provides:

> The notification by the trustee required by subdivision (a) shall be served on each of the following:
>
> (1) Each *beneficiary* of the irrevocable trust or irrevocable portion of the trust, subject to the limitations of Section 15804.
>
> (2) Each heir of the deceased settlor, if the event that requires notification is the death of a settlor or irrevocability within one year of the death of the settlor of the trust by the express terms of the trust because of a contingency related to the death of a settlor.
>
> (3) If the trust is a charitable trust subject to the supervision of the Attorney General, to the Attorney General. (Emphasis added.)[16]

Unlike Probate Code section 8110(c), which requires notice to any person named in any will "offered for probate, regardless of whether the devise or appointment is purportedly revoked in a subsequent instrument," Probate Code section 16061.7(b) does not specify whether a person deleted by a subsequent amendment is still entitled to notice.[17]

Consider the effect of this ambiguity on the question of who is entitled to notice of the administration of a trust that has been amended and restated. On the surface, an amended and restated trust is analogous to a subsequent will that revokes a prior will. Beneficiaries of a will revoked by a later will are not entitled to notice because "their" will has not been "offered for probate" within the meaning of Probate Code section 8110(b). By contrast, and as noted above, beneficiaries of a will whose bequests are deleted by a later codicil are still entitled to notice of the administration.[18] Thus, in a probate, the notice requirements are clear and the similarity between a will that revokes a prior will and a restated trust might tempt a trustee to ignore the beneficiaries named in the old instrument. The trustee might be tempted to give notice only to those named in the restated trust.

The trustee who does this acts at his peril. Probates offer interested parties several procedural protections not available to trust beneficiaries. Probates are public proceedings. Beneficiaries receive at least constructive notice, through publication of the notice of the petition for administration. And anyone may review the court's file to learn of the later will. A trustee who ignores these differences and fails to give notice to the beneficiaries deleted by a subsequent restatement of the trust may find later that a court disagrees with this judgment. Such a court could impose liability upon the trustee under Probate Code section 16061.9:

> (a) A trustee who fails to serve the notification by trustee as required by Section 16061.7 on a beneficiary shall be responsible for all damages, attorney's fees, and costs caused by the failure unless the trustee makes a reasonably diligent effort to comply with that section.
>
> (b) A trustee who fails to serve the notification by trustee as required by Section 16061.7 on an heir who is not a beneficiary and whose identity is known to the trustee shall be responsible for all damages caused to the heir by the failure unless the trustee shows that the trustee made a reasonably diligent effort to comply with that section. For purposes of this subdivision, 'reasonably diligent effort' means that the trustee has sent notice by first-class mail to the heir at the heir's last mailing address actually known to the trustee.
>
> (c) A trustee, in exercising discretion with respect to the timing and nature of distributions of trust assets, may consider the fact that the period in which a beneficiary or heir could bring an action to contest the trust has not expired.

It may appear at first blush that a person deleted by a subsequent amendment is not a "beneficiary" for purposes of Probate Code sections 16061.7 and 16061.9. The term "beneficiary" is defined by Probate Code section 24 as follows:

"Beneficiary" means a person to whom a donative transfer of property is made or that person's successor in interest, and:

(a) As it relates to the intestate estate of a decedent, means an heir.

(b) As it relates to the testate estate of a decedent, means a devisee.

(c) As it relates to a trust, means a person who has any present or future interest, vested or contingent.

(d) As it relates to a charitable trust, includes any person entitled to enforce the trust.

While it could be argued that a person whose name was deleted no longer has an "interest" in the trust for purposes of Probate Code section 24(c), that is not the end of the story. One consequence of the service of notice is that it limits the recipient's time to contest the trust or amendment. Probate Code section 16061.8 states:

> No person upon whom the notification by the trustee is served pursuant to this chapter may bring an action to contest the trust more than 120 days from the date the notification by the trustee is served upon him or her, or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered to him or her during that 120-day period, whichever is later.

This statute of limitations never begins to run if the deleted person is not served with the Probate Code section 16061.7 notice. Such a person could therefore file a contest at any point in the future. Even if the trust contest is not ultimately successful, the assets may have already been distributed. The trustee would then be required to pay legal fees associated with defending the contest out of their own pocket. Should a person have an interest in an earlier trust instrument restored by successfully contesting a subsequent trust amendment, the results may be even more disadvantageous for the trustee.

As noted above, Probate Code section 16061.9 may result in the imposition of personal liability where a trustee fails to provide notice to a "beneficiary." Where a person has his interest in a trust restored by a successful contest of an amendment, his status as a "beneficiary" would also appear to be restored. To the extent that the person's status as a beneficiary is viewed as having been restored retroactively to the date of death, the trustee's obligation to serve notice would have arisen at the date of death. The trustee may therefore be subject to liability under Probate Code section 16061.9 for having failed to serve the notice. Unlike a personal representative in a probate administration, the Probate Code does not expressly limit the liability of a trustee to assets that remain undistributed.[19] A trustee could therefore be subject to liability in the millions of dollars.

It is true that Probate Code section 16061.9(a) does contain an exception to the imposition of liability where "the trustee makes a reasonably diligent effort to comply with [Probate Code § 16061.7]." In addition, the trustee's duties under Probate Code section 16061.7 are narrowed somewhat by Probate Code section 16061.7(d), which states:

> The trustee need not provide a copy of the notification by trustee to any beneficiary or heir (1) known to the trustee but who cannot be located by the trustee after reasonable diligence or (2) unknown to the trustee.[20]

It is unclear whether a court would find that the trustee exercised reasonable diligence in failing to serve a person whose name appears in an earlier version of a trust instrument. While the trustee may claim that it was not known at the time notice was required that the person would regain their status as beneficiary, it is not entirely clear whether that would mean the beneficiary was "unknown to the trustee." A court could very well find to the contrary. A reading of the prior version of a trust instrument would presumably provide the trustee with knowledge that the person existed, even if not the person's status as a beneficiary.

Prudence therefore dictates that notice be provided to persons named in prior trust instruments, even if not otherwise required by the literal terms of section 16061.7. It is clear that the trustee will not be subject to liability for serving notice where it is not required,[21] which suggests that a trustee should serve as many people as possible, out of an abundance of caution. However, there may be a variety of reasons why a trustee would be reluctant to do this. One reason may be that the trustee believes that the person will initiate litigation if they are served with notice. This requires the trustee to take a calculated risk. Perhaps the person will never learn of the trust or the deleted terms naming them as a beneficiary, and therefore litigation will be avoided altogether. Even delaying the discovery of the trust until after assets have been distributed may discourage the person from filing a contest where the person concludes that the trustee does not have assets sufficient to cover a judgment. Whatever the reasoning, the trustee may point to the ambiguity in the law regarding whether the trustee was required to serve notice to a deleted beneficiary in their defense.[22]

IV. CONCLUSION

Even if one is inclined to believe that a trustee who does not serve notice of a trust administration to a deleted beneficiary deserves to be held liable, the point is that the Probate Code is ambiguous as to whether persons named in prior trust instruments are entitled to notice of the administration of a subsequent trust instrument. Rather than requiring a trustee to infer what is required of them, the preferable approach would be for the legislature to expressly define the trustee's duty to provide notice to persons named in prior trust instruments.

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ENDNOTES

1. Prob. Code, § 8000.
2. If a will involves a charitable trust, service on the Attorney General may also be required. Prob. Code, § 8111.
3. The term "will" includes codicil. Prob. Code, § 88.
4. Prob. Code, § 8007(a).
5. Prob. Code, § 8007(b)(1).
6. As a side note, a constructive trust was not imposed upon the assets received by the devisee. The *Stevens* court indicated that the result may have been different if a fiduciary relationship existed between the devisee and the heir unknown to the executor, or if the executor had asked the devisee whether an heir existed: "There is also a case in which an heir, who was asked by the attorneys for the administrator about other heirs, did not disclose their existence. Being asked, he had a duty to speak." *Stevens v. Torregano, supra,* 192 Cal. App. 2d at 125.

7. That is not to say that extrinsic fraud can never be shown. For example, in *Estate of Carter* (2003) 111 Cal. App. 4th 1139, the administrator failed to provide notice to two women who claimed to be the decedent's children, despite the fact that the administrator was in possession of information that would have lead a reasonable person to infer that the women might be heirs. In holding that the decree of distribution should be set aside, the court noted that:

   "[R]easonably ascertainable," as used in Probate Code section 8110, [has] a broad meaning, sufficient to include individuals (1) whose identities are known to the petitioner and (2) who reasonably might be heirs. Only then can a *neutral* decision maker adjudicate the merits of their claim to heirship. Any other rule makes the petitioner for administration a judge in his or her own cause." (Carter, at p. 1142 [italics in original].)

8. Prob. Code, § 8007(b)(2).

9. At least, that would seem to be the case based upon the lack of published case law involving this issue. It should also be noted that if the determination of death was erroneous, the reference to the person as a "decedent" in Probate Code section 8007(b) is not entirely accurate.

10. Prob. Code, § 12408(a)(1).

11. Probate Code section 12408(a)(2) states that a court must find the return of the property to be "equitable," and that the action must be brought within five years.

12. Prob. Code, § 12408(c). Not surprisingly, there is an exception for fraud or intentional wrongdoing. See Prob. Code, § 12408(b).

13. In the case of a minor or incompetent without a guardian or conservator, a contest may be brought at any time before the entry of the order for final distribution. Prob. Code, § 8270(b).

14. See *Stevens v. Torregano, supra,* 192 Cal. App. 2d 105.

15. Prob. Code, § 16061.7(a).

16. Probate Code section 15804 refers to certain beneficiaries with contingent or future interests.

17. It could be asserted that a distinction exists between a trust amendment and a complete restatement of a trust. As noted above, beneficiaries of a will whose bequests are deleted by a later codicil are still entitled to notice of the administration. However, beneficiaries of a will are not entitled to notice where their bequest is deleted by an entirely new will because the earlier will has not been "offered for probate" within the meaning of Probate Code section 8110(b). By analogy, it could be argued that a complete restatement results in an entirely new trust, which dispenses with the requirement for notice to the persons named in the initial trust document. The amendment of only a portion of the trust would then be analogous to a codicil to a will, which does not dispense with the requirement for notice.

    This distinction may not be appropriate in the trust context. Probate Code section 8110(b) expressly states that notice is only required where a will is "offered for probate," whereas there is no such express provision with respect to notice in a trust administration. Moreover, a beneficiary under an earlier will would at least receive constructive notice of the probate administration through publication of the notice of the petition for administration. This theoretically would provide the person with the opportunity to view the subsequent will in the court's file and file a contest. This opportunity normally would not exist where a trust is not being administered under court supervision.

18. Prob. Code, § 8110.

19. Probate Code section 11605 generally provides that when the probate court enters an order for distribution in a probate administration "the order binds and is conclusive as to the rights of all interested persons."

20. If the trustee has no reason to know that a subsequent trust amendment exists, presumably the trustee could rely upon this provision in claiming that they were not aware of the beneficiary. However, it is notable that a diligent effort to comply with Probate Code section 16061.7 only protects the trustee from liability under Probate Code section 16061.9. Other potential theories of liability may remain.

21. Prob. Code, § 16061.7(j).

22. Specifically, this would be the argument that the trustee was "reasonably diligent" for purposes of Prob. Code § 16061.9(a). The fact that enough ambiguity exists for this argument to be made is disadvantageous for the deleted beneficiary.

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