



LEGISLATIVE PROPOSAL

TRUSTS & ESTATES SECTION

TO: Saul Bercovitch, Director of Governmental Affairs, California Lawyers Association

FROM: Yvonne Ascher, Chair, Trusts and Estates Section Executive Committee
Mark Poochigian, Vice Chair, Trust and Estates Section Executive Committee
Carlena Tapella, Chair, Litigation Subcommittee

DATE: December 11, 2018

RE: Proposal to Modify Probate Code section 17200(a) (contained in the “Trust Law”, set forth in Division 9, Part 5, Chapter 3, of the Probate Code) to Expand Class of Persons with Standing to Bring Trust Contest Petitions in Proceedings under the Probate Code to Former Beneficiaries Named in Prior Trust Instruments who Have Been Completely Disinherited in Subsequent Trust Instruments

SECTIONCONTACTS:

<p>Contact Information:</p> <p>Howard A. Kipnis Hickson, Kipnis & Barnes, LLP 11622 El Camino Real, Ste. 100 San Diego, CA 92130 Phone: 858-623-1111 Fax: 858-623-9114 hkipnis@hicksonkipnis.com</p> <p>Litigation Subcommittee Chair:</p> <p>Carlena L. Tapella Webb & Tapella, a Law Corporation 7311 Greenhaven Drive, Suite 273 Sacramento, CA 95831 Phone: 916-447-1675 Fax: 916-447-8009 ctapella@probateattorneys.com</p>	<p>Section Legislative Co-Chairs:</p> <p>Jana Ellerman Guthrie & Ellerman APC 3108 Ponte Morino Drive, Ste 240 Cameron Park, CA 95682 Phone: 530-677-1693 Fax: 530-677-0633 jana@guthrieandellerman.com</p> <p>Mary deLeo Weintraub Tobin 400 Capitol Mall, Floor 11 Sacramento, CA 95814 Phone: 916-558-6049 Fax: 916-446-1611 mdeleo@ameintraub.com</p>
--	--

SUMMARY OF PROPOSAL:

Probate Code section 17200(a) defines the class of persons who can bring proceedings under the Probate Code concerning the internal affairs of a trust or to determine the existence of a trust. It provides that, except where a trust is revocable, “a trustee or beneficiary of a trust” may petition the court having jurisdiction over the trust concerning the internal affairs of the trust or to determine the existence of the trust. Under Probate Code section 17000, the court having jurisdiction over the trust has “exclusive jurisdiction” over proceedings concerning the internal affairs of a trust, and “concurrent jurisdiction” over actions and proceedings to determine the existence of trusts.

Recently, the Fifth District Court of Appeal in the case of *Barefoot v. Jennings* (8/14/18) 27 Cal.App.5th 1, held that a person named as a beneficiary and successor trustee in an earlier trust instrument but who was not named in the current trust instrument lacked standing to bring a petition under Section 17200 to contest the trust. The *Barefoot* opinion adopted a narrow definition of a person considered a “beneficiary” of a trust under Probate Code section 24, such that persons who were once named as beneficiaries in previous versions of the trust, but removed in the current trust instrument, lack standing to bring a proceeding under the Probate Code to contest a trust. According to the court in *Barefoot*, those persons must instead pursue their contest claims in a civil proceeding.

As a result, there is now an anomaly in that certain classes of contestants of testamentary instruments, such as will contestants and other trust contestants (i.e., beneficiaries whose interests in the trust are merely diminished in subsequent instruments, as well as persons who are complete strangers to the trust but who can demonstrate that they will benefit by contesting the trust), may pursue their contests in probate proceedings, while a narrow class of trust contestants—specifically, former trust beneficiaries who are completely disinherited in the current trust instrument—lack standing to bring a trust contest in proceedings under the Probate Code and instead can only bring a trust contest in a civil proceeding. This anomaly creates the very real danger that multiple proceedings seeking the same relief (i.e., challenges to the validity of amendments to a particular trust) may be brought by different parties in different courts and in different venues, which could produce inconsistent results.

The proposed modification to Section 17200(a) will rectify this by enabling all trust contestants who can demonstrate that they would benefit from setting aside a trust or a trust instrument to bring their contest claims in proceedings under the Probate Code.

ISSUES AND PURPOSE:

Existing Law: Probate Code section 17200(a) limits the class of persons who have standing to bring proceedings in the court having jurisdiction over a trust concerning the internal affairs of the trust or to determine the existence of the trust to “trustees and beneficiaries”. This section, which is contained in Part 5, Chapter 3 of the Trust Law (Probate Code §§ 15000, *et seq.*), currently provides in pertinent part as follows:

§ 17200. Petitioners; Grounds for Petition.

- (a) Except as provided in Section 15800, a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust or to determine the existence of the trust.

The recent case of *Barefoot v. Jennings* (8/14/18) 27 Cal.App.5th 1, interpreted this to mean that only those beneficiaries and trustees named in the current trust instrument have standing to a petition under this section.

This Proposal: This proposal would modify Probate Code section 17200(a) to add another class of persons who may pursue certain limited types of proceedings in the court having jurisdiction over a trust, generally referred to as trust contests. Under the current version of Section 17200(a), where the petition concerns “the internal affairs of the trust”, only “a trustee or a beneficiary of a trust” will have standing to bring such petitions in probate court. This will not change. However, the proposal will expand the class of persons who have standing under Probate Code section 17200 to bring petitions “to determine the existence of the trust, or the validity of a trust instrument or provision”. Under the proposal, such petitions may be brought in the court having jurisdiction over the trust not only by “a trustee or a beneficiary of a trust”, but also by “an interested person (other than a creditor)”. This modification addresses the holding in *Barefoot v. Jennings* (2018), 27 Cal.App.5th 1, where the court held that a narrow class of trust contestants, i.e., those who had been named as trust beneficiaries but were completely disinherited by subsequent amendments or restatements to a trust, could not file a trust contest in the court having jurisdiction over the trust, but instead could only pursue such claims in a civil proceeding.

The Problem: It is generally accepted that the court designated to adjudicate proceedings under the Probate Code (typically referred to as the “probate court”) is the preferred venue for parties whose interests are affected by a testamentary instrument, such as a will or trust. For this reason, probate court judges are generally more familiar than civil court judges with the relevant law, issues and procedures that typically arise in will and trust contest cases. Such proceedings also implicate specialized procedural statutes governing notice, venue, as well as other rules of procedure that are unique to probate proceedings. The greater expertise and jurisdiction-specific experience of probate judges promote judicial efficiency and uniformity in decision-making, which along with the statutory framework ensuring notice to all interested persons, reduces conflicts in the interpretation and application of the laws governing the enforcement of testamentary instruments.

However, the recent case of *Barefoot v. Jennings* (8/14/18) 27 Cal.App.5th 1, has exposed an anomaly in the law that forecloses a very narrow class of trust contestants from pursuing their trust contest claims in proceedings under the Probate Code and instead forces them to pursue such relief in a civil proceeding. This creates the very real danger of a multiplicity of proceedings seeking the same relief pursued in different courts and in different venues resulting in the risk of inconsistent outcomes. The goal of this proposed legislative change is to allow all trust contests to be filed and adjudicated in proceedings before the court having jurisdiction over the trust as set forth in the Probate Code, without affecting the rights of a contestant to also pursue available remedies in a civil proceeding where appropriate.

Again, contests to testamentary instruments have traditionally been adjudicated in proceedings brought under the Probate Code. For example, persons disinherited by a will have standing as an “interested person” under Probate Code section 48 to contest the will in a probate proceeding. When the contest is to the validity of a trust or trust instrument, at least prior to the published decision in the *Barefoot* case, all forms of trust contest petitions were commonly adjudicated in proceedings brought under the Probate Code. However, the *Barefoot* case has exposed an anomaly that currently exists in the law which prevents a narrow class of trust contestants from pursuing their trust contests in such proceedings and requires them instead to pursue their claims exclusively in a civil action.

For example, as to the class of trust contestants who have never been named as beneficiaries in the trust but who have been disinherited by a trust (for example, intestate heirs, will beneficiaries, or beneficiaries named in another trust whose assets were transferred into the subject trust), Probate Code section 850 confers standing to “a trustee or any interested person” to contest the trust. Also, in the case of persons currently named as beneficiaries of a trust but whose beneficial interests were merely reduced or diminished by subsequent trust instruments, Probate Code section 17200 authorizes them to pursue a trust contest in proceedings under the Probate Code.

However, in those situations where the contestant was named in an earlier trust instrument but was completely disinherited/removed by a subsequent amendment of or restatement to the trust, prior to the *Barefoot* case, practitioners traditionally would be able to establish standing in a Probate Code proceeding to challenge the validity of the subsequent trust instruments by alleging rights as a vested beneficiary of the trust under Probate Code section 17200. This section, which is contained in Part 5, Chapter 3 of the Trust Law (Probate Code §§ 15000, *et seq.*), currently provides in pertinent part as follows: “Except as provided in Section 15800, a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust or to determine the existence of the trust.”

In the *Barefoot v. Jennings* case, the deceased settlors’ daughter had been previously named as the successor trustee and as a beneficiary in her parents’ trust. However, the daughter was completely disinherited and removed in the trustee succession provisions contained in multiple subsequent amendments and restatements that were executed by her mother prior to her mother’s death. Following her mother’s death the daughter brought a proceeding under Probate Code § section 17200 to invalidate the subsequent versions of the trust on the grounds of lack of capacity and undue influence allegedly perpetrated by her siblings. The Court of Appeal affirmed the court’s dismissal of the daughter’s trust contest petition, finding that because petitioner was neither a trustee nor a current named beneficiary in the last version of the amended trust, petitioner lacked standing under Probate Code section 17200 to challenge the prior versions of the trust. The *Barefoot* court adopted a narrow definition of “beneficiary” set forth in Probate Code section 24, finding that it limited those persons authorized to bring a petition for relief under Probate Code section 17200 to the trustee and beneficiaries that are named in the trust instrument in effect at the time the trust becomes irrevocable. The court further noted that preventing the petitioner from pursuing her contest in such a proceeding would not deny her a remedy, since she could refile her claims in a civil action.

Barefoot highlights an anomaly that if not remedied legislatively would create a two-tiered system whereby strangers to a trust as well as beneficiaries with diminished interests may bring a trust contest in proceedings under the Probate Code, whereas completely disinherited trust beneficiaries must pursue their contest claims in a civil action. This exposes the very real possibility that different parties, each of whom may benefit by pursuing a contest to invalidate instruments to a particular trust, must nonetheless pursue their contests in different courts, which could lead to inconsistent results.

HISTORY:

The Trusts and Estates Section Executive Committee is not aware of any similar bill that has been introduced either in this session or during a previous session.

PENDING LITIGATION:

Barefoot v. Jennings, Supreme Court of California Case No. S251574 (Petition for Review filed October 18, 2018), still pending as of December 11, 2018.

LIKELY SUPPORT & OPPOSITION:

We anticipate that trust and estate practitioners will support this proposal because it will resolve an anomaly that currently exists based upon the language of Probate Code section 17200, which prevents a narrow class of trust contestants from filing and adjudicating their trust contest claims in proceedings under the Probate Code. We do not anticipate opposition to this proposal.

FISCAL IMPACT:

There is no anticipated fiscal impact.

TEXT OF PROPOSAL:

[Proposed Amendments to Probate Code]

Probate Code section 17200 would be amended to read as follows:

(a) Except as provided in Section 15800, ~~a trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust or to determine the existence of the trust.~~

(1) A trustee or beneficiary of a trust may petition the court under this chapter concerning the internal affairs of the trust.

(2) A trustee, beneficiary, or interested person (other than a creditor) of a trust may petition the court under this chapter to determine the existence of the trust, or the validity of a trust instrument or provision.

(b) Proceedings concerning the internal affairs of a trust include, but are not limited to, proceedings for any of the following purposes:

- (1) Determining questions of construction of a trust instrument.
- (2) Determining the existence or nonexistence of any immunity, power, privilege, duty, or right.
- (3) Determining the validity of a trust provision.
- (4) Ascertaining beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument.
- (5) Settling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers.
- (6) Instructing the trustee.
- (7) Compelling the trustee to do any of the following:
 - (A) Provide a copy of the terms of the trust.
 - (B) Provide information about the trust under Section 16061 if the trustee has failed to provide the requested information within 60 days after the beneficiary's reasonable written request, and the beneficiary has not received the requested information from the trustee within the six months preceding the request.
 - (C) Account to the beneficiary, subject to the provisions of Section 16064, if the trustee has failed to submit a requested account within 60 days after written request of the beneficiary and no account has been made within six months preceding the request.
- (8) Granting powers to the trustee.
- (9) Fixing or allowing payment of the trustee's compensation or reviewing the reasonableness of the trustee's compensation.
- (10) Appointing or removing a trustee.
- (11) Accepting the resignation of a trustee.
- (12) Compelling redress of a breach of the trust by any available remedy.
- (13) Approving or directing the modification or termination of the trust.
- (14) Approving or directing the combination or division of trusts.
- (15) Amending or conforming the trust instrument in the manner required to qualify a decedent's estate for the charitable estate tax deduction under federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by final regulations and rulings of the United States Internal Revenue Service.
- (16) Authorizing or directing transfer of a trust or trust property to or from another jurisdiction.
- (17) Directing transfer of a testamentary trust subject to continuing court jurisdiction from one county to another.
- (18) Approving removal of a testamentary trust from continuing court jurisdiction.
- (19) Reforming or excusing compliance with the governing instrument of an organization pursuant to Section 16105.

(20) Determining the liability of the trust for any debts of a deceased settlor. However, nothing in this paragraph shall provide standing to bring an action concerning the internal affairs of the trust to a person whose only claim to the assets of the decedent is as a creditor.

(21) Determining petitions filed pursuant to Section 15687 and reviewing the reasonableness of compensation for legal services authorized under that section. In determining the reasonableness of compensation under this paragraph, the court may consider, together with all other relevant circumstances, whether prior approval was obtained pursuant to Section 15687.

(22) If a member of the State Bar of California has transferred the economic interest of his or her practice to a trustee and if the member is a deceased member under Section 9764, a petition may be brought to appoint a practice administrator. The procedures, including, but not limited to, notice requirements, that apply to the appointment of a practice administrator for a deceased member shall apply to the petition brought under this section.

(23) If a member of the State Bar of California has transferred the economic interest of his or her practice to a trustee and if the member is a disabled member under Section 2468, a petition may be brought to appoint a practice administrator. The procedures, including, but not limited to, notice requirements, that apply to the appointment of a practice administrator for a disabled member shall apply to the petition brought under this section.

(c) The court may, on its own motion, set and give notice of an order to show cause why a trustee who is a professional fiduciary, and who is required to be licensed under Chapter 6 (commencing with Section 6500) of Division 3 of the Business and Professions Code, should not be removed for failing to hold a valid, unexpired, unsuspended license.