YELLOW LIGHT: TRUSTEE MAY FOLLOW AUTHORIZATION TO DEFEND CONTESTED AMENDMENT UNTIL ENJOINED BY PROBATE JUDGE

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I. INTRODUCTION

A key issue in many California trust contests is whether the trustee can defend the action at the expense of the trust. As the holder of the checkbook, the trustee as a practical matter can hire and pay for counsel at the expense of the trust, subject only to downstream review by a probate judge. Hence, the trustee can (and often does) draw on the trust estate to fight off a contest initiated by a would-be beneficiary, to the advantage of those who stand to gain under the contested instrument.

The contestant, on the other hand, must fund the litigation out of personal resources. Prosecuting a contest is generally an uphill battle as a matter of the burden of proof.[1] Gathering and presenting evidence of mental incapacity and/or undue influence typically requires written discovery to the proponent, subpoenas for documents to the drafting attorney and medical providers, witness interviews, deposition testimony, and consultation with one or more experts. Preparing and trying a contest can cost hundreds of thousands of dollars.

In addition to paying his or her own legal expenses, the successful contestant may bear the double whammy of the unsuccessful trustee's defense costs, leaving much less or even nothing in the trust estate for the contestant to enjoy. While the trustee might be surcharged at some point for improper expenditures, the trustee may lack the resources to pay the surcharge.

Very often the fight arises in the context of a trust amendment that alters the distributive provisions in a way that substantially disfavors the future contestant. Under two cases decided a decade ago, the courts held that a trustee should not use trust resources to defend a contest over an amendment if the trust would remain intact regardless of the outcome.[2] These decisions, however, did not address the enforceability of trust instrument language expressly authorizing the trustee to defend a contest at the expense of the trust. Such language appears in many trusts, whether by customized design or as a matter of boilerplate.

This set the stage for the Court of Appeal's recent decision in *Doolittle v. Exchange Bank*,[3] which provides a new, albeit incomplete, road map for probate judges and attorneys to follow when evaluating whether a trustee can use trust funds to defend a contested trust amendment or restatement. It also is a key case for planners given that a successor trustee's ability to defend a contest may turn on whether the planner has included an express authorization to defend. Indeed, such an authorization may be far more effective in deterring and defeating an attack on a trust amendment than a no contest clause, which requires the settlor to make a gift sufficiently large to discourage the contestant and which in any event is unenforceable if probable cause supports the filing of the contest.[4]

This article will explore the legal principles that apply to the use of trust funds to defend contested amendments/restatements, and more specifically discuss the ramifications of *Doolittle*. In a nutshell, express authorization to defend language may allow the trustee to use trust assets as a war chest[5] to defend the trust; however, the contestant may persuade the probate judge to lock up the war chest such that the interested parties will have to fund their efforts out of their own pockets or through alternative arrangements.

II. CORE PRINCIPLES REGARDING TRUSTEE'S PAYMENT OF LEGAL EXPENSES FROM TRUST ASSETS

Most trust instruments contain language expressly authorizing the trustee to hire and pay for attorneys and other agents at the trust's expense, which generally empowers the trustee to do so.[6] Reinforcing such provisions, and filling the void if they are absent or incomplete, "the Probate Code is studded with provisions authorizing the trustee to hire and pay (or seek reimbursement for having paid) attorneys to assist in trust administration."[7]

Yet the overarching fiduciary duties of a trustee check his or her use of trust assets to pay for counsel. As the Probate Code cautions:

> The grant of a power to a trustee, whether by the trust instrument, by statute, or by the court, does not in itself require or permit the exercise of the power. The exercise of a power by a trustee is subject to the trustee's fiduciary duties.[8]

Any attorney embarking on litigation for a trustee should be well familiar with the cautionary language in *Donahue v. Donahue* that directs trial courts to examine fee requests.[9] The court vacated a fee award of about $5 million in past and ongoing

legal fees following the trustee's successful defense against a beneficiary's allegations of self-dealing and other breaches of trust.[10] Warning against an "overly deferential" approach, the Court of Appeal explained: "A trial court may not rubber stamp a request for attorney fees, but must determine the number of hours *reasonably* expended."[11] Scrutiny is warranted because "[p]robate courts have a special responsibility to ensure that fee awards are reasonable, given their supervisory responsibilities over trusts."[12] Although the abuse of discretion standard applies to a trial court's ruling on a fee request, the record affirmatively must show that the fee award was consistent with applicable legal principles, i.e., the award "must be able to be rationalized to be affirmed on appeal."[13]

As to when litigation expenses may be charged to a trust, the *Donahue* court stated:

> Long-established principles of trust law impose a double-barreled reasonableness requirement: the fee award must be reasonable in amount and reasonably necessary to the conduct of the litigation, but it also must be reasonable and appropriate *for the benefit of the trust.*[14]

While the *Donahue* court did not specify an order for application of these "dual criteria," it would seem that the second one in the court's formulation should be taken up first. As a threshold inquiry, the trial court should consider whether the trustee appropriately entered and then continued to participate in the litigation, guided by the "underlying principle" that the litigation must be a "benefit and service to the trust."[15] If and to the extent that the question is answered affirmatively, the court should review the trustee's expenditures in the fight and evaluate whether the trustee purchased "a Rolls Royce defense when a prudent trustee could have arrived at the same destination in a Buick, Chrysler or Taurus."[16] In other words, no matter how efficiently the trustee conducted the litigation, there is no entitlement to reimbursement if he or she improperly acted as a combatant.

The application of the "double-barreled reasonableness" requirement in *Donahue* is rather hazy. Given the trustee's successful defense of the beneficiary's allegations as to how he administered the trust, it would seem that the real issue was whether the hefty fees and costs he sought to charge were objectively reasonable. The appellate court, indeed, seemed most troubled by the number of law firms and attorneys that worked for the trustee, and the potential for duplication or other inefficiencies.[17] Yet the court remanded for further consideration of whether the expenses were incurred for the trustee's personal benefit or for the benefit of the trust, as well as an evaluation of the amount of the fees, telling the trial court to amplify its explanation in both areas.[18] Since the ruling was based on a deficient trial court explanation, the appellate court did not have to have to compartmentalize its analysis of *whether* versus *how much.*

III. *WHITTLESEY* AND *TERRY* HOLD THAT TRUSTEE MAY NOT USE TRUST ASSETS TO DEFEND CONTESTED AMENDMENT

In two cases with similar fact patterns decided over a decade ago, California appellate courts disapproved of a trustee's use of trust funds to defend contested amendments.

A. Whittlesey v. Aiello

In *Whittlesey*,[19] settlors James and Anna created a revocable trust and named their niece, Joyce, as the trustee and primary beneficiary. After Anna died, James married Margaret and amended the trust to include a $100,000 distribution to her. Then, shortly before his death James amended the trust again to name Margaret as the trustee and to designate Margaret and her son, Thomas, as the primary beneficiaries.[20]

When James died, Joyce contested the second amendment. A few months later, Margaret died and successor trustee Aiello, not a primary beneficiary, defended Joyce's contest. The trial judge found the second amendment void as the product of undue influence on the part of Margaret and Thomas, and the Court of Appeal affirmed in an unpublished opinion.[21]

The trial court then denied trustee Aiello's request for legal expenses incurred in unsuccessfully defending Joyce's contest. The parties entered into a settlement to resolve all claims, carving out any claim by Aiello's attorney (Stearns) for unpaid legal expenses.[22]

Affirming the lower court, the Court of Appeal rejected Stearns' argument that he should be paid from trust funds for his defense of the second amendment. The court observed:

> The essence of the underlying action was not a challenge to the existence of the trust; it was a dispute over who would control and benefit from it. Whether or not the contest prevailed, the trust would remain intact.[23]

The court reasoned that it would be inequitable to saddle Joyce with her own litigation expenses and those of the trustee despite the fact that Joyce had prevailed. Rejecting Stearns' argument that Aiello's defense was objectively reasonable, the court stated that:

> there was no basis for the trustee to have taken other than a neutral position in the contest. As indicated previously, the parties primarily interested in the outcome of the litigation were [Joyce] on the one hand and Margaret, and later Thomas on the other. To the extent Stearns defended the amendment, he was representing the interests of one side of the dispute over the other, not representing the interests of the trust or the trustee.[24]

Responding to the concern that the ruling might discourage attorneys from undertaking the defense in trust contests, the court stated that "[i]n situations such as that presented here, counsel must seek compensation from the parties who stand to gain from the litigation, not the trust."[25]

B. Terry v. Conlan

Almost three years later, the court in *Terry* reversed a trial court ruling allowing a trustee to use trust funds to pay for her legal expenses.[26]

Garth had three children from his first marriage, including Sholly. In his original 1999 trust, Garth left valuable real property to his second wife, Ione. In 2001, after Garth was diagnosed with a terminal illness, his children took him to see a lawyer who prepared a new trust instrument in which Garth left all his property to the children. When Garth died, Ione and the children (through Sholly as successor trustee of the 2001 trust) litigated the validity of the 2001 trust.[27]

After fifty days of a bench trial, and prior to closing argument, the parties reached settlement terms that the judge put on the record. However, Ione declined to sign the documents to effectuate the settlement, which included a "settlement trust" that would replace the prior trust instruments. The trial judge granted the children's motion to enter judgment pursuant to the settlement over Ione's objection, and she appealed. The trial judge also authorized Sholly to pay, from trust assets, past legal expenses apparently associated with the motion to enforce the settlement, along with future expenses to be incurred in defending against Ione's appeal.[28]

The appellate court reversed the order enforcing the settlement because there were ambiguities in the material terms, thus leaving the parties to resume the contest litigation.[29] This section of the opinion offers a cautionary tale for litigants who recite settlement terms in open court but leave the write-up for later.

The court went on to reverse the order permitting Sholly to use trust funds to pay the expenses she incurred in seeking to enforce the settlement. On this issue, the key question was "whether Sholly's participation in this litigation in her role as trustee was necessary to protect the property of the trust."[30] The court found the facts very similar to those in *Whittlesey*, observing that "the disputing parties are competing heirs of Garth's estate."[31] The court observed that Sholly had not taken a neutral position in the contest and instead had favored the interests of herself and her siblings.[32]

Rejecting Sholly's argument that Ione was assailing the validity of the "entire Court Approved Reformed Trust," the court explained that Ione had merely sought to invalidate an amendment to the trust, i.e., the amendment that purportedly was the product of the settlement agreement. Since her appeal would leave the underlying trust intact, Sholly was not entitled to use the trust assets to pay for her unsuccessful attempt to enforce the settlement.[33] The Court concluded:

> Sholly has not participated in this litigation as a neutral trustee to defend the trust and protect its assets; rather, she has consistently pursued her own interests and those of her siblings to the detriment of Ione. As such, she must bear her own costs in this litigation, rather than be reimbursed from the trust.[34]

Although the fees authorized by the trial court apparently pertained only to the motion to enter judgment, the court's language suggested that, like Ione, Sholly and her siblings would have to use personal resources to fund the litigation when the contest resumed.

C. The "Underlying Principle" and Unresolved Issues

In *Whittlesey* and *Terry*, the courts emphasized an "underlying principle" – in determining whether legal expenses should be paid from a trust estate, the court must evaluate whether the litigation "is a benefit and a service to the trust."[35] Both courts evaluated whether expenses should be charged to the trusts with the benefit of hindsight. In *Whittlesey*, the trustee had unsuccessfully defended the contested amendment, and in *Terry* the trustee had failed to validate the purported settlement trust.

When discussing the case law, the *Whittlesey* court suggested that the outcome of the contest, i.e., whether the trustee who defends against a contest wins or loses, is a material consideration, noting the inequity of requiring the

prevailing contestant to pay the losing trustee's expenses.[36] Yet *Whittlesey* and *Terry* also can be read for the proposition that the outcome is irrelevant given that, from the outset, "there was no basis for the trustee to have taken other than a neutral position in the contest."[37] In other words, if the real dispute is between competing beneficiaries who gain or lose depending on which iteration of the trust is validated, the fight lies between those beneficiaries. Rather than taking the field of battle, the trustee should stay on the sidelines, preserving the trust estate for the distribution that is finally approved.

Whittlesey and *Terry* left several unresolved questions.

First, does it matter whether the trustee who seeks to defend the amendment is also a beneficiary who would gain from the contested amendment? In *Terry*, trustee Sholly was unquestionably a remainder beneficiary along with her siblings, and thus had a vested interest in the outcome.[38] In *Whittlesey*, while Margaret commenced the defense of Joyce's contest, successor trustee Aiello (apparently not a beneficiary) continued the defense from shortly after it began through trial.[39] Although a trustee who is also a beneficiary may have a conflict of interest in deciding whether and how vigorously to defend, the "underlying principle" at the root of the analysis does not seem to turn on whether the trustee has a beneficial interest.

Second, what if the trust instrument at issue authorizes the trustee to defend any contest of the trust documents? There is no reference to any such express authorization in *Whittlesey* or *Terry*. In two unpublished opinions, appellate courts found that language authorizing the trustee to defend contests should be enforced, notwithstanding the "underlying principle" of *Whittlesey* and *Terry*.[40] However, in another unpublished opinion, an appellate court reached the opposite result, surcharging a trustee/beneficiary who successfully defended three out of four amendments, notwithstanding a clause in the instruments allowing the trustee to recoup expenses from the trust for defending any action described in the no-contest clauses.[41] The "underlying principle" also trumped express trust language in an unpublished opinion arising in a breach of trust context; while the instrument conferred discretion on the trustee to defend such litigation as the trustee "may deem advisable" at the trust's expense, the court implied the requirement that the legal expense must be necessary to protect trust property or otherwise for the benefit of the trust.[42]

Third, the *Whittlesey* and *Terry* courts did not address how courts should approach challenges to the use of trust funds that arise on the front end of the contest dispute, long before the court has heard the contest on its merits.

It was against this backdrop that the court recently decided *Doolittle*, which, contrary to the plaintiff's surname, does much to resolve the uncertainty that has applied to the enforceability of clauses authorizing the defense of contested trust amendments while leaving important aspects of the analysis open to clarification in future opinions.

IV. *DOOLITTLE* VALIDATES EXPRESS AUTHORIZATIONS TO DEFEND, BUT SUBJECTS THEM TO PRELIMINARY INJUNCTIVE RELIEF

A. Case Overview

Doolittle presents a classic contest scenario. Connie established a revocable trust in 1999, naming her two daughters (Susan and Carolyn) as remainder beneficiaries of an estate worth about $8.5 million. In 2004, Connie hired Juan as her gardener. Within a few months, Connie amended and restated her trust to include a large gift of real property to Juan, and added six additional residual beneficiaries including Juan, thus greatly diluting the shares of Susan and Carolyn. In 2005, Connie amended and restated her trust again, this time providing for distributions of $500,000 each to her daughters, $150,000 to each of her grandchildren, with the residue going to Juan and to six friends and caregivers.[43]

The 2005 instrument contained an elaborate no contest clause, and a portion of the primary paragraph containing the clause directed the trustee to defend at the expense of the trust "any contest or other attack of any nature on this Agreement. . . ."[44]

Exchange Bank began to serve as trustee shortly after Connie executed the 2005 instrument. Connie died in 2014 without further amending her trust.[45]

Soon after Connie died, Susan sued Juan for financial elder abuse in Marin County, claiming that he had unduly influenced and fraudulently induced Connie to sign the 2004 and 2005 trust instruments. Susan filed a separate probate petition in Sonoma County, also alleging that Connie lacked testamentary capacity and seeking to invalidate the 2004 and 2005 instruments.[46]

Exchange Bank as a third-party trustee[47] filed a petition for instructions, asking the court to confirm its authority to use trust funds to defend against both of Susan's actions. The trial court ruled in favor of Exchange Bank and Susan appealed. Because Susan's appeal caused an automatic stay of the trial court's order,[48] Exchange Bank sought and obtained leave to comply with the order notwithstanding the automatic

stay,[49] such that the defense could go forward in the trial courts while the appeal was decided.

The Court of Appeal initially disposed of Susan's argument that the authorization to defend language was inoperable because it was part of a no contest clause, and such clauses generally cannot be enforced until the court determines the contest lacks merit and was brought without probable cause. In its lengthy discussion of no contest clauses, the court observed that explicit directives to defend attacks on trust amendments are "recommended in authoritative form books" published by CEB as "an addition to a standard no-contest clause."[50] The court found that the key question was whether the defense directive penalized Susan within the meaning of the statutory definition of "no-contest clause," not the location of the directive within the instrument. The court decided that the directive did not penalize Susan because whoever prevailed in the litigation (i.e., Susan or the beneficiaries named in the 2004/2005 instruments) would ultimately bear the cost of the trustee's defense, and that Susan would have to bear her own costs as the contestant regardless of whether the trustee assumed the defense.[51]

The court then moved on to the question of whether the authorization to defend in the contested amendments could be enforced prior to a judicial determination of their validity, recognizing "some logic to Susan's contention that since the validity of the amendment conferring the trustee with the authority to defend her claims is the very subject of the litigation and has not yet been adjudicated, enforcement of the defense directive should await the outcome of the litigation."[52]

Earlier in the opinion, the court indicated that Exchange Bank as trustee (even though not a beneficiary) would have to remain neutral in the absence of an authorization to defend in the trust instrument. Relying on *Whittlesey* and *Terry*, the court explained:

> Unless the language of a trust provides otherwise, a trustee is bound to deal impartially with all beneficiaries. ([sections] 16000, 16003.) Hence, when a dispute arises as to who is the rightful beneficiary under a trust, involving no attack upon the validity or assets of the trust itself, the trustee ordinarily must remain impartial, and may not use trust assets to defend the claim of one party against the other.[53]

The *Doolittle* court found that the trust amendment language warranted a departure from the ordinary rule of impartiality for two principal reasons.

First, the court referenced the statutes recognizing that a trustee generally has the powers expressly set forth in the trust instrument unless and until they are invalidated or otherwise terminated.[54]

Second, the court reasoned that contestants alleging mental incapacity or undue influence carry "the heavy burden of proving such allegations."[55] As to capacity, the court did not specify which capacity standard would apply to the subject trust documents, other than to note that the testamentary capacity standard set forth in Probate Code section 6100.5 applies to an amendment that "in its content and complexity, closely resembles a will or codicil."[56] And the court observed that contestants must prove undue influence by "clear and convincing evidence," without recognizing that the burden may shift to the proponent to prove the absence of undue influence, either by operation of the common law or by statute.[57]

Yet the *Doolittle* court chose to give trustees a yellow light, not an unqualified green one. The court stated that the probate court may issue a preliminary injunction stopping the use of trust assets to defend the contest after weighing the equities and "upon a proper showing of likelihood of success."[58] Susan, however, had not requested preliminary relief, had not attempted to show a likelihood that she would prevail in her contest, and had not shown that the equities weighed in her favor. The trustee, on the other hand, offered evidence negating the incapacity and undue influence allegations, including an affidavit from a neuropsychologist who saw Connie and certificates of independent review from an estate planning attorney who apparently was not the drafter. Accordingly, the trial court properly permitted the use of trust funds to pay for defense expenses.[59]

Doolittle, in essence, takes a middle-of-the-road approach between competing policy concerns. On the one hand, settlors should be able to instruct their trustees to use trust assets to effectuate their estate planning intent by preserving their desired plan of distribution. A well-funded contestant may have the upper hand in litigation over beneficiaries with limited resources. On the other hand, when the contestant alleges mental incapacity or undue influence, the litigation calls into question whether the amendment indeed reflects the settlor's true wishes. The settlor and the contestant may be the victims of the proponent's asset grab. The upshot of *Doolittle* is that courts will have to make a preliminary assessment of the facts and equities if and when called upon to do so, and the decision whether to allow the use of trust funds to pay for the defense of the contest may have a major impact on the course of the litigation.

B. Does *Doolittle* Allow Motions for Preliminary Injunctions, and How Will They Be Heard?

In the absence of an explicit request for preliminary relief in *Doolittle*, the court did not have occasion to pass on the procedural device by which such relief may be sought, i.e., a civil-style motion for preliminary injunction or a petition under Probate Code section 17200. However, the court referenced a Code of Civil Procedure section that lists the grounds for issuance of an injunction (which include enforcement of an obligation that "arises from a trust"), invoked the preliminary injunction standard used in civil cases, and broadly described the powers of the probate judge.[60] Under Probate Code section 1000, it can be argued that the rules of practice applicable to preliminary injunctions in civil actions should apply in probate proceedings.

For the contestant seeking to stem the flow of defense funds to the trustee, a motion for preliminary injunction may be procedurally advantageous. If the civil notice rules apply, the contestant may be able to obtain an earlier hearing date under the Code of Civil Procedure than under the Probate Code; the former generally allows motions to be heard on sixteen court days' notice, as compared with thirty calendar days' notice for a probate petition.[61] Perhaps more importantly, the contestant may be able to require the trustee to file a written response nine court days before the hearing, and may have the right to file a reply five court days prior to the hearing.[62] Respondent trustee may argue that Probate Code section 1043 permits the filing of a response/objection at or before the hearing, or the presentation of an oral response/objection at the hearing. The contestant will also pay a reduced filing fee by submitting a motion instead of a petition.[63]

Preliminary injunction motions in civil actions are generally heard on the papers without oral testimony, while contested probate proceedings entail an evidentiary hearing unless the parties submit on the papers.[64] A preliminary injunction motion, if allowed to proceed without an evidentiary hearing, would expedite the resolution of the issue and perhaps give an added edge to the movant who gets a written reply. Conversely, if the probate judge feels compelled to allow a full blown trial, the hearing will be expensive and difficult to schedule in congested courts.

With regard to review on appeal, there is harmony between preliminary injunctions and orders issued under Probate Code section 17200. Under both frameworks, there is a right to appeal[65] and the abuse of discretion standard generally will apply.[66]

One aspect of civil preliminary injunction practice is not readily translatable in the context at hand. A party obtaining a preliminary injunction generally must post a bond to cover any damages to the defendant caused by issuance of the injunction if it is finally determined that plaintiff was not entitled to the injunction.[67] How would a probate judge go about estimating the harmful effect of an order instructing a trustee *not* to fund the defense of a contest?

C. What Evidence Will the Court Consider?

In deciding whether to grant a preliminary injunction, a court must weigh two interrelated factors: (1) the likelihood that the moving party will ultimately prevail on the merits, and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction. The determination "must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction."[68] The court will be looking for at least "some possibility" of success.[69]

To establish sufficient likelihood of success, the contestant will need to offer evidence indicating the invalidity of the challenged trust amendment. If the contestant has evidence that would shift the burden of proof on undue influence from the contestant back to the proponent, the contestant should emphasize this line of attack in the moving papers.

The availability of evidence varies greatly from case to case. Often the proponent has evidence readily available in the form of supporting testimony from a friendly drafting attorney. The contestant may need time to marshal admissible evidence of invalidity. For example, it may take several months for the plaintiff to obtain medical records from the settlor's various treating physicians and obtain an expert opinion from a forensic psychiatrist. Some key evidence may be available only by deposition, such as the testimony of the drafting attorney, but the contestant may be reluctant to take key depositions at the start of a case.

While the denial of a preliminary injunction of course does not constitute a final adjudication on the merits of the contest, and the contestant may proceed to trial,[70] the contestant may be concerned that such a ruling could embolden the proponent and weaken settlement leverage. Also, the contestant may simply determine that a preliminary injunction fight is not worth the expense or the distraction from the ultimate trial.

As to the balance of harms, the *Doolittle* court provided only one clue for probate judges: the court may consider whether the beneficiaries of the contested amendments "have

the resources" to defend the settlor's actions.[71] Interestingly, this may open up the finances of the proponent beneficiaries to inquiry in discovery, i.e., if favored sister lives comfortably, she should be able to defend the contest effectively without recourse to trust funds. But even in the *Doolittle* scenario, where the contest apparently focused on the actions of the settlor's gardener (presumably a person of modest means), it might be argued that he can readily locate counsel who would defend his substantial share of the trust on a contingency basis.

On the contestant's side, an argument that the contestant has limited resources to oppose a well-funded trustee may or may not resonate with a judge, who may wonder whether a contestant with a strong case should be able to find counsel on a contingency basis.[72] If a vigorous defense would take a relatively large bite out of the trust estate, the contestant will have the argument that he or she runs the risk of a pyrrhic victory, e.g., if the trust is worth $500,000, and both the proponent and the contestant reasonably spend $250,000, the prevailing contestant will end up with a zero net recovery. Under such circumstances, the trial judge might be receptive to imposing a cap on the trustee's expenditures in the alternative to an outright prohibition on using trust funds for the defense. The contestant might also ask the trial judge to protect certain assets so that they are not liquidated to fund the litigation.

By endorsing a trial court's power to issue preliminary injunctions, the court seemed to assume that the absence of an adequate remedy at law and that expenditure of trust assets would cause irreparable harm to the successful contestant, and indeed there is authority for the proposition that an injunction may issue to prevent dissipation of specifically identified funds.[73]

V. CONCLUSION

With the advent of *Doolittle*, trust amendments increasingly will authorize and/or direct trustees to defend contests at the expense of their trusts. Trustees provisionally can rely on such clauses to defend contests, provided that their expenses are reasonable, without petitioning the court for authorization to do so.

Contestants will have to decide whether, when, and how to try to stop the flow of trust money to fuel the trustee's defense. Litigation is likely to increase, as probate courts will see factually-complex requests for preliminary injunctions. Future cases will determine whether those requests require a full hearing with oral testimony and how courts are to parse the balance of harms among the potential beneficiaries.

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1 *Doolittle v. Exchange Bank* (2015) 241 Cal.App.4th 529, 545 (hereafter *Doolittle*) (contestant alleging incapacity or undue influence "carries the heavy burden of proving such allegations").

2 *Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221 (hereafter *Whittlesey*); *Terry v. Conlan* (2005) 131 Cal.App.4th 1445 (hereafter *Terry*).

3 *Doolittle, supra*, 241 Cal.App.4th 529.

4 Prob. Code, section 21311.

5 For a prior article in this publication using the "war chest" metaphor, see Streisand and Sanqui, *Tapping the Trust to Fund the Battle: When Trustees Can Use Trust Funds to Litigate With Beneficiaries* (2003) vol. 9, No. 1, Cal. Trusts and Estates Quarterly.

6 Prob. Code, section 16200, subd. (a).

7 *Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 97 (citing Prob. Code, sections 15684, 16243, 16247, and 17200, subd. (b)(7)).

8 Prob. Code, section 16202; see also Rest.3d Trusts, section 88, com. a, p. 256.

9 *Donahue v. Donahue* (2010) 182 Cal.App.4th 259 (hereafter *Donahue*).

10 *Id.* at pp. 262-264. The court did not detail the particular allegations against the trustee, but the dispute did not involve a contest.

11 *Id.* at p. 271 (original italics).

12 *Id.* at p. 269.

13 *Id.* at pp. 268-269 (quoting *Gorman v. Tassahara Development Corp.* (2009) 178 Cal.App.4th 44, 101).

14 *Donahue, supra*, 182 Cal.App.4th at p. 263 (original italics).

15 *Id.* at pp. 269-270.

16 *Id.* at p. 273.

17 *Id.* at p. 272.

18 *Id.* at p. 274.

19 *Whittlesey, supra,* 104 Cal.App.4th 1221.

20 *Id.* at p. 1224.

21 *Id.* at p. 1225.

22 *Id.* at p. 1225.

23 *Id.* at p. 1228.

24 *Id.* at p. 1231.

25 *Id.* at p. 1231.

26 *Terry, supra,* 131 Cal.App.4th 1445.

27 *Id.* at pp. 1449-1450.

28 *Id.* at pp. 1450-1453.

29 *Id.* at pp. 1458-1461.

30 *Id.* at p. 1461.

31 *Id.* at p. 1462.

32 *Ibid.*

33 *Terry, supra*, 131 Cal.App.4th p. 1463.

34 *Id.* at p. 1464.

35 *Whittlesey, supra*, 104 Cal.App.4th at p. 1230 (quoting *Dingwell v. Seymour* (1928) 91 Cal.App. 483, 513); accord *Terry, supra*, 131 Cal. App.4th at p. 1461. The *Donahue* court would later echo the same theme. See *Donahue, supra*, 182 Cal.App.4th at pp. 731-732.

36 *Whittlesey, supra*, 104 Cal.App.4th at pp. 1229-1230.

37 *Id.* at p. 1231.

38 *Terry, supra*, 131 Cal.App.4th at p. 1464.

39 *Whittlesey, supra*, 104 Cal.App.4th at pp. 1225, 1228.

40 *Fulstone v. Fulstone* (Sept. 13, 2005, C046485) 2005 WL 2211268 at *5-6; *Turrini v. De Young* (March 12, 2014, A137816) 2014 WL 950970 at *2-4.

41 *Amiad v. Cohen* (May 25, 2011, G043076) 2011 WL 2040817 at *5.

42 *Cardelucci v. Cardelucci* (Dec. 8, 2011, E049975) 2011 WL 6101934 at *10-12.

43 *Doolittle, supra*, 241 Cal.App.4th at p. 543.

44 *Id.* at p. 534.

45 *Id.* at p. 535.

46 *Id.* at pp. 535-536.

47 The *Doolittle* court inaccurately noted that the trustees in *Whittlesey* and *Terry* were beneficiaries, overlooking the contrary indication in *Whittlesey* as to trustee Aiello; however, the *Doolittle* court perceived "no significance to this distinction" in the issues before it. *Doolittle, supra*, 241 Cal.App.4th at p. 538, fn. 2).

48 Prob. Code, section 1310, subd. (a).

49 Prob. Code, section 1310, subd. (b).

50 *Doolittle, supra*, 241 Cal.App.4th at p. 538.

51 *Id.* at pp. 537-539.

52 *Id.* at p. 545.

53 *Doolittle, supra*, 241 Cal.App.4th at p. 537.

54 *Id.* at p. 544 (citing Prob. Code, sections 15407, 16000, 16200, and 16202).

55 *Doolittle, supra*, 241 Cal.App.4th at p. 545.

56 *Ibid.* The initial version of the *Doolittle* opinion indicated that the amendments would be subject to the testamentary capacity standard, but the court modified the opinion to refrain from opining on that issue, leaving it for the trial court on remand. In *Andersen v. Hunt* (2011) 196 Cal.App.4th 722, the court held that a simple trust amendment that is testamentary in nature should be reviewed under the testamentary capacity standard set forth in Probate Code section 6100.5, while complex trust instruments are subject to the contractual capacity standard set forth in Probate Code section 812. The courts have yet to provide clear guidance on when amendments are "simple" or "complex" for purposes of the *Andersen* analysis. See Galvin, *The Andersen Twist in Trust Contests: Testamentary Capacity Standard Sometimes Applies When Document Resembles a Will* (2011) vol. 17, No. 2, Cal. Trusts and Estates Quarterly 18.

57 *Doolittle, supra*, 241 Cal.App.4th at p. 545. By common law, a presumption of undue influence arises if the contestant shows: (1) the existence of a confidential relationship between the party making the donative transfer and the person alleged to have exerted undue influence; (2) active participation by the latter in the actual preparation or execution of the donative instrument; and (3) the receipt by that person of undue profit from the executed instrument. *Conservatorship of Estate of Davidson* (2003) 113 Cal.App.4th 1035, 1059-1060. By statute, a presumption of fraud or undue influence arises in certain circumstances, such as donative transfers to instrument drafters and care custodians. See Prob. Code, sections 21360-21392.

58 *Doolittle, supra,* 241 Cal.App.4th at p. 546.

59 *Ibid.*

60 *Ibid.*

61 Code Civ. Proc., section 1005, subd. (b); Prob. Code, section 17203.

62 Code Civ. Proc., section 1005, subd. (b).

63 The base filing fee for trust petitions is currently $435, as compared with $60 for motions. See Superior Court of California, Statewide Civil Fee Schedule, effective Oct. 10, 2015.

64 Code Civ. Proc., section 2009 (allowing affidavits "to obtain a provisional remedy"); Cal. Rules of Court, rule 3.1306, subd. (a); Prob. Code, section 1022; *Estate of Bennett* (2008) 163 Cal.App.4th 1303 (discussing interplay between Code Civ. Proc., section 2009, and Prob. Code, section 1022); *Estate of Lensch* (2009) 177 Cal.App.4th 667 (also finding error in the failure to conduct an evidentiary hearing).

65 Code Civ. Proc., section 904.1, subd. (a)(6); Prob. Code, sections 1300 and 1304.

66 *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999; *Terry, supra*, 131 Cal.App.4th at p. 1461.

67 Civ. Code, section 529; *Top Cat Productions, Inc. v. Michael's Los Feliz* (2002) 102 Cal.App.4th 474, 478.

68 *Butt v. State of California* (1992) 4 Cal.4th 668, 678.

69 *Costa Mesa City Employees' Ass'n v. City of Costa Mesa* (2012) 209 Cal.App.4th 298, 309.

70 *Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286.

71 *Doolittle, supra*, 241 Cal.App.4th at p. 546.

72 In the author's experience, prospective contestants often have difficulty finding experienced trust and estate litigation attorneys who will take a case on contingency given the challenges of pre-litigation case evaluation within the relatively short period before a contest must be filed.

73 *Heckman v. Ahmanson* (1985) 168 Cal.App.3d 119, 136 (affirming grant of preliminary injunction that restrained use of profit from sale of Disney stock because plaintiffs would be entitled to a constructive trust over those proceeds if they ultimately prevailed).