

Contra Costa Lawyer Online



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Mad Tax: Fury Road

Without having a grasp on the pertinent tax laws, attorneys may feel like wanderers in the desert, trying to escape the dangers that may lurk in the mistakes of failed estate plans.



Spotlight



Professional Fiduciaries to the Rescue!

If a client lacks capacity, a professional fiduciary can be appointed to protect vulnerable and incapacitated clients from abuse, neglect and exploitation.



Pro Bono Spotlight: Spoimie Nasiri

I migrated to the United States in the 1980s as a refugee from Afghanistan. As a result of my childhood experiences, I have always wanted to pay it forward, as the saying goes.

More...



Civil Jury Verdicts: December 2015

We don't often hear "I told you so" from our judges, but they certainly could say that in most cases in which a civil jury verdict is entered.



Inns of Court: Restraining Orders/The Magna Carta

Forget the Golden State Warriors and the Cleveland Cavaliers, the teams for this Inns of Court season are going to be poetry in motion.

The Contra Costa Lawyer is the official publication of the Contra Costa County Bar Association (CCCBA), published 12 times a year - in six print and 12 online issues.

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Inside: Guest Editor's Column, December 2015

Tuesday, December 01, 2015

Welcome to the December issue of Contra Costa County Lawyer magazine! I am extremely excited about this issue. I have been practicing probate and elder law for about 10 years now and found it to be one of the most exciting and interesting fields out there.

We are on the front lines of families' lives, trying to help provide protections for the vulnerable among us. To me, elder law attorneys are problem solvers. Even when involved in nasty litigation, my focus is always on what can be done to resolve the issues in the best interest of the family (and, in specific, the elder, if one is alive).



Since there tends to be a smaller bar in the probate/elder law world, there is significant congeniality among practitioners. When you have multiple cases with an attorney (and another 30 years worth of cases in front of you), you are not going to throw that relationship away for a single case. It leads to people working together collaboratively to ensure the best interest of all involved.

For this issue, we have a 1930 Philadelphia Athletics lineup of writers here to provide you with all-encompassing elder law information. Elder law has a wide array of types of cases, which span a variety of practitioners. In regard to estate planning, we have a great article from **David Oh** of Dorband and Schneider, LLP. He takes a closer look at taxes in relationship to estate planning.

We also have **Tracy Regli** of Acuna, Regli, and Klein, LLP, who dares us to think that maybe, just maybe, the probate process isn't quite as bad as you think it is! Despite her persuasive arguments, many will still opt for a trust, thinking that it will be a smoother disposition. However, even the best laid plans can self destruct, and when it does not go smoothly, it can end up in litigation. **Nathan Pastor** of the Morrill Law Firm gives us some direction on how best to handle trust litigation and goes over different options available to combat potential abuse in a trust context. Speaking of abuse, **Erin Kolko** of Temmerman, Cilley & Kohlmann, LLP, drafted a great piece on financial elder abuse litigation. May you never need help there.

Sometimes it is necessary to make decisions on behalf of another person; sometimes those people are elderly and sometimes they are not. Like bookends, we have articles looking at this process in terms of the elderly (conservatorships) and the young (guardianships). **Jonathan Thompson** of Thompson Law Offices focuses his article on conservatorships. Conservatorships can be confusing and frightening, and they are a part of the law that few attorneys handle, so it is helpful to have an attorney experienced in all types of conservatorships give us insight into how conservatorships can be used to the benefit of the conservatee. **Douglas Housman**, of the Law Offices of Carolyn D. Cain, takes up the analogous world of guardianships.

Fiduciaries: What exactly is a fiduciary and what role do they perform? In this month's

spotlight article, **Janice Kittredge** and **Diana Lowe**, private fiduciaries at California Senior Connection, shine a light on fiduciaries, the roles they perform and how they can help in trying times.

Last, but certainly not least, we have some hard-to-get MCLE credit! **Liz Barsell** and **Cynthia Sayegh** of Blackstock and Barsell, have co-written an article on estate planning ethics. If you answer the questions after reading the article, you can get MCLE credit ... and not just ANY credit, either ...ETHICS credit! Surely, this is the Contra Costa Lawyer issue that keeps on giving!

Enjoy!

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Mad Tax: Fury Road

Tuesday, December 01, 2015

Navigating the tax considerations in today's estate planning world can be tumultuous, even for the most seasoned practitioners. Without having a grasp on the pertinent tax laws, attorneys may feel like wanderers in the desert, trying to escape the dangers that may lurk in the mistakes of failed estate plans. This article addresses both newly passed and well-established tax laws to consider when creating plans for your clients.



Estate planning is more than simply generating legal documents. There are objectives, both financial and nonfinancial, to consider throughout the process. In a post-apocalyptic time when clients are veering off the traditional road and drafting their own estate plans through the Internet, it is important to remember that the true value of attorneys comes from the sound advice they offer to clients in avoiding tax, preserving wealth and ensuring that a plan accurately reflects testamentary intent.

American Taxpayer Relief Act of 2012

Estate planning goes hand-in-hand with taxation. The estate and gift taxes have transformed through the years, most recently by the American Taxpayer Relief Act of 2012 (ATRA), which was signed into law on January 2, 2013. In regard to estate planning, this law set the estate and gift tax exemption amounts to \$5 million each, indexed for inflation. ATRA also increased the estate and gift tax rates to 40 percent (up from 35 percent). For 2015, individuals can transfer \$5.43 million (\$10.86 million for married couples) free of estate and gift tax during their lifetimes or death.

Portability

A significant development that came about due to ATRA was the permanent establishment of portability for deaths after 2010. Portability is the technique that allows a client to use a deceased spouse's lifetime estate and gift tax exemption during the client's lifetime or upon death. Therefore, if one spouse dies with an estate tax exemption amount remaining, the surviving spouse's exemption will be increased by the deceased spouse's unused amount.

For example, suppose Max and Furiosa are married U.S. citizens, each having an estate of their own worth \$4.43 million. If Max were to die in 2015, Furiosa could then inherit Max's \$4.43 million estate and also port Max's \$5.43 million of unused exemption. Furiosa would have an estate worth \$8.86 million and an estate tax exemption of \$10.86 million. Furiosa now has a buffer of \$2 million (\$10.86 million less \$8.86 million) before owing any estate tax, a benefit that would have been lost without proper planning.

Portability can be a powerful estate planning tool and so it requires an attorney to consider the amount of property that a client leaves to a spouse. Spouses are able to utilize an unlimited marital deduction, meaning a client can leave any amount of property

to their spouse, through gift or death, without having to pay tax. In the above example, Furiosa inherits \$4.43 million from Max's estate without tax liability due to the marital deduction. This deduction, in conjunction with portability, is what allows a married couple to enjoy double the estate and gift tax exemption amount.

It is important for practitioners to advise their clients that portability does not occur automatically and that it can disappear. The personal representative of the deceased spouse must timely file a federal estate tax return (Form 706), otherwise risk losing the exemption. Post-death considerations, such as remarriage, may also affect the amount available.

Lifetime Gifts

For those interested in avoiding the gift and estate tax, an annual giving program can be effective in reducing one's estate on a tax-free basis. Annual exclusion gifts are useful in removing property from a client's estate and can shift income-earning property to family members in lower income tax brackets. They also shift future appreciation in the value of the transferred property to the donee.

Individuals may gift \$14,000 per person to any number of people on a yearly basis without having to pay a gift tax or file a tax return. These gifts do not count towards the \$5.43 million gift tax exemption for cumulative lifetime gifts. Any gifts made in excess of \$14,000, however, require a gift tax return (Form 709) and must be counted against the estate tax exemption amount available upon death.

Clients desiring to make a gift to a minor should consider contributions to a qualified tuition program or 529 plan. These investment vehicles are subject to a special rule allowing a client to front-load a gift at one time. For example, in 2015, an individual could transfer up to \$70,000 to a 529 plan and elect to treat the contribution as having been made over five years. If done properly, this technique enables a client to use five years of annual gift tax exclusions for a gift made in one year.

There is also an unlimited gift tax exclusion for any tuition paid directly to an educational institution or for medical payments made directly to a healthcare provider on someone's behalf. Not only are these payments free of gift tax, they do not count towards the \$14,000 exclusion amount.

Irrevocable Trusts

For clients with larger estates or charitable inclination, there are a variety of irrevocable trusts that they can establish in order to reduce their estate tax liability. Clients may utilize advanced planning techniques in order to discount the valuation of their estates, or implement plans that use the time value of money to shift wealth from one generation to the next. In a low interest-rate environment such as today, certain techniques have become more attractive because they have a better chance of becoming a winning proposition from a transfer tax standpoint. An in-depth discussion of advanced planning goes beyond the scope of this article, but clients should consult their estate planning attorneys to determine whether they should take advantage of such opportunities.

Careful estate planning can be a complex undertaking as even basic estate plans have subtle tax implications that can be precarious. Anticipating the dangers and obstructions on the tax road delivers peace of mind to your clients and can rescue them from a

perilous situation. By establishing a well-considered and comprehensive plan for your clients, you are helping them ensure their wealth and legacy.

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Lions and Tigers and Probate, Oh My!

Tuesday, December 01, 2015

When the house fell on the Wicked Witch of the East, her sister thought she was doomed. With no trust in place, all she could think about was trying to wrangle those flying monkeys through a probate court. The truth is, navigating a probate does not require a wizard.

First, determine whether or not you really have a probate estate. If the decedent has personal property that exceeds \$150,000 without beneficiary designations, pay on death instructions or joint account holders, there is a probate estate. Alternatively, if the decedent owns more than \$50,000 in real property, there is a probate estate. There are always exceptions, such as spousal property petitions and Heggstad petitions, but they are outside the scope of this article.



A common issue is that clients do not always have accurate information regarding what is in the estate or if there are designated beneficiaries. Often, financial institutions will not release account information, making it difficult for the attorney to assess if the account meets the requirements for a probate. It can be helpful to call the financial institutions and explain that California law does not require a probate for estates under \$150,000. Typically, someone will confirm if the amount is over or under without disclosing the value.

Once it is determined that a probate is necessary, the next step is filing a petition to administer the decedent's estate (Form DE-111). Fortunately in Contra Costa County, a timely hearing date can be obtained within the 45 days required by the Probate Code. In other counties, you may have to remind the clerk that they are required to set the hearing within 45 days.

One of the pitfalls for new attorneys is to forget to publish the notice in a legal publication. Avoid this by publishing immediately after you file your petition. You must publish three times before your hearing with the first publication at least 15 days before the hearing.

Once the probate is open, the court issues the letter which provides authority executor/administrator to act on behalf of the estate. An executor is a person named in the will and an administrator is a person appointed without a will, but the duties are the same regardless of title. With receipt of the letter, the executor/administrator may begin collecting assets and/or selling them. Notice also must be provided to creditors, the Franchise Tax Board and the Department of Health Care Services. The client will need to provide the attorney with asset information to prepare an Inventory and Appraisal form. This document is signed under penalty of perjury and must include all of the assets of the estate.

The Inventory and Appraisal document is the date of death value for all of the decedent's assets. The executor/administrator values the cash assets. All other property is valued by

the probate referee. Real property is valued at the fair market value at date of death without regard to any encumbrances. Stocks are valued at the date of death. An account statement should be provided to the probate referee. The more information provided regarding the condition of the assets, the more accurate the appraisal will be. Regardless of when the executor/administrator is appointed, he or she will need to account from date of death until the order for distribution is signed by the court.

If the executor/administrator has been granted authority under the Independent Administration of Estates Act, he or she may sell real property without court confirmation. If more than a year has passed since the date of death, a reappraisal for sale will need to be obtained from the probate referee. A Notice of Proposed Action must be provided to all beneficiaries or heirs at law. However, the notice period is only 15 days, unlike the 45-day period for a trust. If no objections are received, the sale may close without further action.

One advantage of probate over trust administration is that most institutions, including title companies, recognize the authority of an administrator or executor. Once the letters are presented, clients rarely have problems accessing assets or information. On the other hand, any anomaly in titling of a trust asset may cause the institution to reject the trustee's paperwork, resulting in a significant burden to the trustee to establish the authority to act.

Another advantage of probate over trust administration is that probates tend not to languish. Probate Code §12200 requires that either the petition for final distribution or a status report be filed within 12 months (18 months if a federal tax return is required). At the end of a 120-day creditor period, you can petition to close the probate, as long as all the assets are ready for distribution. In some cases, this may reduce the chance of litigation for feuding families. Knowing that the court is watching their "dishonest" family member provides some peace of mind absent in most trust administrations.

An accounting should be filed with the Petition for Final Distribution unless a waiver is obtained from heirs or beneficiaries. All expenses of the decedent and the probate including bond, probate referee and publication must be paid before concluding the probate. An attorney or executor/administrator is prohibited from accepting payment for fees from an estate until approved by the court.

Both the attorney and administrator are paid according to statute: 4 percent on the first \$100,000, 3 percent on the next \$100,000, 2 percent on the next \$800,000 and 1 percent on the next \$9,000,000. The attorney may also be reimbursed for costs advanced on behalf of the estate. Extraordinary fees may be available under certain circumstances. The fees are calculated on the gross estate value. If the estate is insolvent, creditors are paid in accordance to priority under Probate Code §11420. Costs of administration are at the top of the priority list. Therefore, attorneys and executors/administrators get paid first. Don't you just love a story with a happy ending?

As was the case with the Wicked Witch of the East, most probates consist of a few bank or brokerage accounts, a vehicle and home. The entire process can be completed in as little as six to eight months. Because of real estate prices in the Bay Area, probates tend to be lucrative. The minimum probate fee is \$5,500, but most exceed \$10,000. We are definitely not in Kansas!

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The Trust Litigator's Arsenal

Tuesday, December 01, 2015

The last nail is hammered into the coffin and the casket is lowered into the ground. In these moments of grief, competing heirs can find themselves engaged in forceful arguments. With the elder gone, and a substantial amount of money remaining in the trust, many things can go awry. Sometimes, in especially difficult situations, parties will refuse to see eye to eye on even the most basic facts. A blended family, problems with a successor trustee and hurt feelings are often at the root of trust litigation.

Of course, the majority of trust administrations go smoothly and avoid quarrels. However, even simple administrations have the potential to turn into conflicts due to arguments that didn't bubble over until after the trustor's death. The trust litigator must approach these cases with the greatest of care. Resolving trust disputes expeditiously requires great skill and tact. Machiavelli said it best: "Men will quickly forget their father's death, but not the loss of their inheritance."



This article will outline some helpful tools that trust litigators can use to resolve these situations. The California Probate Code gifts practitioners many tools that can be pivotal in helping trust litigators regain control over some of the issues outlined above.

California Probate Code §15642

California Probate Code §15642 (a)(1-6) and (e) provide a means by which interested parties can remove or suspend a trustee who is abusing his or her powers. Pending a petition for removal, a beneficiary or co-trustee can also seek immediate suspension of a trustee (Cal. Prob. Code §17206). This is usually sought in the form of emergency relief. Probate Code §15642(e) states that if it appears to the court that trust property or the interests of a beneficiary may suffer loss or injury pending the petition for removal, the court may suspend the trustee and appoint a temporary trustee.

If the beneficiary is successful in persuading the court that immediate suspension is appropriate, the court then must choose a successor trustee.

California Probate Code §§850-859

Another effective tool trust litigators can utilize is California Probate Code §850 *et seq.* This code section provides a method for retrieving property that was taken out of the trust. Additionally, if the property was taken out of the trust in bad faith, §859 allows for the recovery of double damages.

California Probate Code §850(a)(3)(B) states that the trustee or an interested person may petition the court where the trustee has a claim to real or personal property, title to or possession of which is held by another. Because of the broad language of this statute, it's relatively unproblematic to gain standing to bring an "850 petition," as they are commonly

called.

A common allegation in trust litigation is that large sums of money are missing from the trust. An 850 petition provides a statutory framework by which to pursue the missing property and bring it back into the trust. Another reason why 850 petitions have the potential to become so contentious is that §859 intersects with financial elder abuse.

California Probate Code §17200

California Probate Code §17200 is the quintessential probate code for trust litigators, granting California probate courts tremendous discretion in handling trust matters. Many of the probate court's most dynamic powers as it relates to trust litigation are derived from probate codes §§17200-17211. California Probate Code §17206 states in part: "The court in its discretion may make any orders and take any other action necessary or proper to dispose of the matters presented by the petition."

Although §17206 is seemingly expansive, there is an interesting interplay between the code sections here because §17209 states in part: "The administration of trusts is intended to proceed expeditiously and free of judicial intervention." Although these two code sections seemingly contradict each other, as it relates to trust litigation, the court will customarily hear cases concerning serious allegations of fraud or violations of the trustee's duties.

Code §17200(a) states that a trustee or beneficiary may petition the court regarding the internal affairs of the trust. Code §17200(b) then lists 23 different items that qualify as matters related to the internal affairs of a trust. A few of the most integral issues as it relates to trust litigation are: determining questions about the construction of the trust instrument; the validity of a trust provision; determining who should and should not get the trust property; how much each beneficiary should get; settling accounts; approving discretionary acts taken by the trustee; instructing the trustee; compelling accountings by the trustee; and appointing or removing a trustee.

The Neutral Third-Party Professional Trustee

Sometimes a trustee will fail to provide any information to beneficiaries despite written demands. This can lead to an atmosphere of distrust.

In an atmosphere of distrust, the hope of reaching an informal settlement becomes difficult. If this happens, the appointment of a professional trustee is an excellent option. A skilled professional trustee can be very helpful in bringing an end to trust disputes. A professional third-party neutral with no inheritance at stake doesn't have a reason to get embroiled in the passions of litigation. If a trustee will not agree to step down voluntarily, a petition for suspension or removal is a common method beneficiaries can use to suspend or remove the currently acting trustee and install a neutral.

Trust litigators representing professional trustees can preserve the professional trustee's neutral position by petitioning the court for instructions on how the court thinks they should act under §17200. This technique allows trustees to remain neutral. Another positive side to this technique is that it helps protect trustees from liability because their actions are based on the court's explicit instructions.

Whether you become involved in trust litigation in the future or not, hopefully this article

will help you to understand some of the intricacies involved in trust litigation, as well as the complications faced by attorneys, beneficiaries and trustees alike.

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Grandma Got Scammed by a Reindeer

Tuesday, December 01, 2015

The most rewarding case a trusts and estates litigator can take on is a financial elder abuse action. The growing population of seniors has unfortunately created a class of persons highly susceptible and unequipped to protect themselves from financial abuse. There are a variety of potential sources of abuse, including family members, care providers, fiduciaries, friends, neighbors and strangers.

To specifically target this pervasive problem, the Legislature developed the Elder Abuse and Dependent Adult Civil Protection Act (Elder Abuse Act), which is designed to encourage victims and their advocates to pursue actions against perpetrators of elder abuse.



By way of example, an elderly gentleman, who lived alone, was targeted by an online female escort. The woman quickly convinced the man that they were in love and took him to Reno to marry him. Immediately following the wedding, the woman added her name on title to the husband's bank accounts and began draining his liquid assets. The man realized the relationship was not genuine, but did not possess full faculties to combat the abuse.

His daughter was able to establish a conservatorship over her father through the probate court and was able to annul the marriage through the family court. In her capacity as conservator, she also had authority to pursue a financial elder abuse action against the escort to recover the funds improperly taken. The Elder Abuse Act is aimed to deter these unfortunate situations and provide solace to the elder by expediting the process for rectifying the abuse.

Definition of Financial Elder Abuse

Financial elder abuse consists of the taking or retaining of real or personal property of an elder adult for a wrongful use.[1] The victim can be deprived of the property right by means of an agreement, donative transfer or testamentary bequest.[2] It is irrelevant whether the property at issue was held directly by the elder adult or by a representative of the elder adult.[3] In other words, it qualifies as financial elder abuse even if the property was held by a person or entity on behalf of the elder, such as a conservator, trustee, attorney-in-fact or other representative of the elder's estate.[4]

An "elder" is any person living in California who is age 65 or older.[5] Since "retaining" property of an elder adult falls under the definition of financial elder abuse, it presupposes that if the perpetrator misappropriated the asset when the victim was age 64 and continued to possess the asset following the victim's 65th birthday, it would constitute financial elder abuse.[6]

Jurisdiction, Standing and Timing

A claim for financial elder abuse is an independent cause of action that can be filed in civil court.[7] Often times, the same facts support other claims, such as breach of fiduciary duty and breach of trust, which practitioners can strategically plead together as one action in probate court.[8] There are several advantages to filing an elder abuse action in probate court, including that probate judicial officers have more experience with incapacitated victims and probate departments typically have expedited calendar dates aimed to quickly stop and redress the abuse.[9]

In addition, probate judges and staff are knowledgeable regarding trust, estate and conservatorship related issues, accountings and the applicable provisions of the Probate Code.[10] However, if the case will involve complex procedural, evidentiary or damages issues, or heavy law and motion practice, it may be advantageous to file in a civil department which may have more expertise in these areas.[11]

Obviously, an elder who is victimized has standing to bring a claim on his or her own behalf.[12] The action can also be commenced during the elder's lifetime by a representative,[13] including the elder's conservator,[14] the elder's attorney-in-fact if authority to initiate litigation is provided to the agent under the power of attorney,[15] or the trustee of the elder's trust depending on the source of the assets misappropriated.[16] Death of the elder does not cause the court to lose jurisdiction over the elder abuse claim.[17] Following the elder's death, the right to commence or maintain the action passes to the decedent's estate.[18]

An action for financial elder abuse must be commenced within four years after the plaintiff discovers or, through the exercise of reasonable diligence should have discovered, the facts constituting the financial abuse.[19]

Remedies for Financial Elder Abuse

The Elder Abuse Act and Probate Code work in conjunction to provide enhanced remedies to both compensate the victim and deter perpetrators from committing acts of financial elder abuse. A plaintiff is entitled to compensatory damages and all other remedies otherwise provided by law, in addition to reasonable attorney fees and costs.[20]

Where it is proved by clear and convincing evidence that the defendant acted in bad faith and/or was guilty of recklessness, oppression, fraud or malice in the commission of the abuse, the plaintiff may recover twice the value of the property taken, as well as punitive damages and pain and suffering.[21] The defendant can also be treated as having predeceased the victim, and resultantly be prohibited from inheriting via will, trust or intestacy the property recovered through the financial elder abuse action.[22]

Due to medical advancements, each generation is enjoying progressively longer lives, but unavoidable mental and physical infirmities leave the elderly populations more susceptible to abuse. This dynamic has justifiably caused the Legislature to make prevention of financial elder abuse a priority.

Interestingly, in the climate of judicial economy, the Legislature is carving out at least this one area where they are expanding the scope of litigation to both prevent future abuse and remedy past abuses. By having the tools to recognize and remedy acts of financial

elder abuse, we as practitioners can assist in carrying out the Legislature's intent and help protect some of society's most vulnerable individuals.

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[1] Welf. & Inst. Code, section 15610.30(a).

[2] Welf. & Inst. Code, section 15610.30(c).

[3] Welf. & Inst. Code, section 15610.30(c).

[4] Welf. & Inst. Code, section 15610.30(d).

[5] Welf. & Inst. Code, section 15610.27.

[6] Welf. & Inst. Code, section 15610.30.

[7] *Perlin v. Fountain View Management, Inc.* (2008) 163 CA4th 657, 666, 77 CR3d 743; 1-11 MB Practice Guide: California Trust Litigation 11.11.

[8] *Wood v. Jamison* (2008) 167 CA4th 156, 158, 83 CR3d 877; Prob. Code, section 800; 1-11 MB Practice Guide: California Trust Litigation 11.02, 11.12.

[9] 1-4 MB Practice Guide: California Trust Litigation 4.04.

[10] 1-4 MB Practice Guide: California Trust Litigation 4.04.

[11] 1-4 MB Practice Guide: California Trust Litigation 4.04.

[12] Welf. & Inst. Code, sections 15610.30, 15657.6.

[13] Welf. & Inst. Code, sections 15610.30, 15657.6.

[14] Prob. Code, section 2462.

[15] Prob. Code, sections 4261, 4262.

[16] Prob. Code, section 16249.

[17] Welf. & Inst. Code, section 15657.3(c).

[18] Welf. & Inst. Code, section 15657.3(d)(1).

[19] Welf. & Inst. Code, section 15657.7.

[20] Welf. & Inst. Code, section 15657.5(a).

[21] Prob. Code, section 859; Welf. & Inst. Code, section 15657.5(b), (d); Code Civ. Proc., section 377.34, Civ. Code, section 3294.

[22] Prob. Code, section 259.

Conservatorships: A Last Resort?

Tuesday, December 01, 2015

What words come to mind when you hear the word, “conservatorship”? In one recent discussion with a group of potential conservators, some that came up were “confusing,” “supervised” and “the last resort.”

How would you feel if someone took away your right to make your own decisions, whether they were good or bad? What option does an attorney have when a potential client comes into the office alleging a sibling has been stealing money for gambling from their mother? What about a situation of a nosy neighbor adding himself to a family member’s bank account? What advice can an attorney give the client when an elderly parent has been taken from her home and is being isolated from the rest of the family?



In our society, the law provides a mechanism for taking control of one’s health and financial decisions; this protective type of proceeding is known as a probate conservatorship. Conservatorships are generally reserved for situations where individuals cannot make their own health care decisions, financial decisions or are subject to undue influence. The lack of basic estate planning documents and a decline in mental functioning may also result in the necessity of a conservatorship.

A Last Resort

A petitioner’s attorney must make sure that a conservatorship is indeed the last resort. The conservatorship pleadings require the petitioner to address whether alternatives to a conservatorship have been considered. If someone is able to execute a durable power of attorney or an advance health care directive, this will alleviate the need for a conservatorship. Additionally, a capacity declaration must be completed by a doctor familiar with the proposed conservatee, which concludes whether or not a conservatee lacks capacity to make his or her own health care decisions.

Conservatorship Alternatives

Since a conservatorship is court-supervised and requires various accounting and reporting to the court, alternatives should always be considered. A well-drafted estate plan, including a durable power of attorney and an advance health care directive, may be the best bet for avoiding the cost and possible frustration of a court-supervised conservatorship proceeding. If estate planning documents are in place, up to date and the named agent is willing to serve, often a conservatorship will not be necessary. However, even if someone has a complete estate plan, a conservatorship still may be needed in a situation of abuse, neglect, mismanagement or theft of assets.

Spouses or domestic partners of an incapacitated person may be able to control certain community property assets co-owned with an incapacitated spouse. Certain court petitions can request that the court approve certain actions regarding community property, which may avoid the need for a conservatorship.

A Powerful Tool

A conservatorship is a powerful tool. The conservator controls almost all decision-making for a conservatee. A conservator of the person can control where a conservatee resides. The conservator has great power in deciding the conservatee's residence, which must be the "least restrictive" appropriate alternative that is available and necessary to meet the individual's needs. The conservatee's personal residence is usually considered the least restrictive and most appropriate, subject to some exceptions.

As a conservator of the estate, one can also make beneficial decisions for a conservatee. Conservatorship assets must be marshaled and consistently accounted for. One example of powerful decision-making involves the authority to petition the court for the creation of a trust through a "substituted judgment" proceeding. If a conservatee has property sufficient to necessitate a trust, the conservator can create such legal document, which may avoid probate and preserve the assets of the conservatorship estate. If a trust is sought pursuant to conservatorship authority, it must follow certain guidelines.

Temporary Conservatorship

A powerful procedural option in a conservatorship practitioner's arsenal is a temporary conservatorship. A temporary conservatorship may be a practitioner's only option to address immediate concerns regarding a proposed conservatee. The court may allow the proposed conservator authority to make decisions as soon as five court days after giving notice to the appropriate individuals. A temporary conservatorship can be requested at the same time as the filing of a general petition for a conservatorship.

A temporary conservator must allege sufficient facts to show the immediate need for such authority. An appointed temporary conservator can act immediately on behalf of a conservatee. Some powers under a conservatorship are reserved for a general conservatorship, and are not available under a temporary conservatorship.

Court-appointed Counsel

A great deal of protection is usually provided to a proposed conservatee through the appointment of independent counsel by the court. In matters involving allegations of dementia, the court is required to appoint independent counsel to represent the proposed conservatee. Additionally, if the proposed conservatee requests counsel to represent the conservatee, the court must appoint independent counsel.

There are many benefits to independent counsel. The appointed attorney's allegiance always lies with the proposed conservatee and not the petitioner. A proposed conservatee is entitled to challenge the establishment of a conservatorship and is even afforded the right to a jury trial, a great protection of one's civil rights.

Limited Conservatorships

Sometimes a conservatorship is a wonderful tool for developmentally disabled adults, even if it is considered a last resort. A limited conservatorship is a special type of conservatorship reserved for individuals who are developmentally disabled. Once a developmentally disabled person becomes 18 years old, he or she is considered an adult in the eyes of the law and under the rules that apply to his or her doctors.

For example, a client may seek a solution to problems of medical consent for her 18-

year-old autistic child. The child cut his hand open with a knife and went with his parent to the emergency room for stitches. When the doctor went to stitch the cut, the 18-year-old child became frightened and refused further treatment, despite the parent insisting. The 18-year-old child was sent home because there was nothing the doctor could do to force medical treatment. Obtaining legal authority to make medical decisions pursuant to a conservatorship for a developmentally disabled adult can assist with such difficult decision-making.

Conservatorship practice is certainly an exciting and colorful practice area. Sometimes petitioning the court for a conservatorship is the last resort, but necessary for the highest level of protection for an individual in need.

Jonathan Thompson is an estate planning and conservatorship attorney in Walnut Creek. Jonathan also serves as court-appointed counsel for conservatees in Contra Costa.

The Gift of Giving: Guardianships of the Person and Estate

Tuesday, December 01, 2015

Guardianships sit on the other side of the probate spectrum when compared with conservatorships. In the latter, you are dealing with adults who need the protection of the courts, whereas in the former, you are dealing with children. Much the same in many aspects, guardianships are not as recognized or practiced in the legal community as often as conservatorships are. Similar to conservatorships, an individual seeking guardianship may do so by petitioning the court for either guardianship of the person, guardianship of the estate, or guardianship of the person and estate.



The major difference lies in the fact that one or both biological parents voluntarily consent to the guardianship because he or she does not have the ability or means to raise the child, due to drug or alcohol abuse addictions or because parental custody is detrimental to the minor child. Typically, friends, neighbors or extended family member of the child will petition the court to be appointed as guardian. These individuals will petition for one of the following:

Guardianship of the Person

This is appropriate when a biological mother and/or father either pass away or are alleged to be either temporarily or permanently unfit to raise the child. This can be alleged in many ways such as physical abuse, drug abuse, neglect, abandonment or failure to communicate. Remember, mere allegations will likely not be enough. A proposed guardian will likely need numerous declarations from friends, neighbors and family of the child regarding the unfit conditions he or she is living in.

Child Protective Services may need to be called out multiple times and police reports, if any, would be helpful to show the unfit environment the child is living in. Doctor reports showing the child is suffering from neglect or other physical ailments can also be used. These various documents should be included in the petition for guardianship to show the judge that under the totality of circumstances, it is in the best interest of the minor to be cared for by the proposed guardian.

Be aware, these situations are also generally the most volatile and litigated as one is essentially petitioning the court to prove that a parent should no longer be a parent; an allegation that usually does not sit well with the biological parent(s). Since parental rights are being taken away, the burden of proof is clear and convincing evidence that parental custody would be detrimental to the child. If and when a guardian of the person is ordered by the court, the guardian must now care for the child as if he or she was the guardian's own.

Guardianship of the Estate

When biological mother or father passes away unexpectedly and leaves some form of money (life insurance, etc.) to a minor child, most financial institutions will not dispense with those funds until a guardianship of the estate is established for the benefit and protection of the child. Here, usually the surviving spouse (sometimes represented by counsel) petitions the court to be appointed guardian of the estate for his or her child.

This process is usually very straightforward in that the guardian of the estate will either get bonded or, as occurs in most cases, the guardian deposits the funds into a blocked account that can only be withdrawn from with a court order. Bond is a form of insurance where the guardian pays a yearly bond premium dependent on the size of the estate. This ensures that should the estate money be lost or stolen, the bond company will reimburse the estate for the amount covered.

If the guardian of the estate is bonded, he or she opens an account where the funds can be dispensed, and eventually account for the transactions annually and then bi-annually until the child turns 18 year old. Again, when the child turns 18, the court will grant an order releasing the funds to the child after a petition (similar to an accounting petition in conservatorships) is granted.

Lastly, a guardianship of the person and estate can be required. For example, if the mother and father suddenly pass away in a car accident, an aunt or uncle, or previously nominated guardian will have to petition the court for guardianship of the person, and if there are assets to be given to the child, then guardianship of the estate will be needed as well.

One way to minimize potential litigation should something suddenly happen to the mother and father is to execute estate planning documents. Among those documents would be a nomination of guardianship, where the mother and father would nominate one or more persons to act as guardian should something happen to them. Speak with your estate planning attorney to ensure you have a nomination of guardianship completed if you have minor children.

Guardianship work can be taxing at times, as is the case in many areas of law. However, the gift provided to these innocent children knowing they will be cared for and provided for in a loving household is beyond rewarding. As attorneys, it is our duty to protect those who cannot protect themselves. Guardianship of the person and/or estate provides us the opportunity to protect children who would otherwise be subject to harmful or detrimental living conditions.

Douglas W. Housman is an Associate Attorney at the Law Offices of Carolyn D. Cain where his focus is in conservatorships, trust administrations, estate planning and guardianships. He is currently a board member of the CCCBA Elder Law Section.

Professional Fiduciaries to the Rescue!

Tuesday, December 01, 2015

Imagine that a client calls you, frantic because she received a delinquent bill notice in the mail regarding her property taxes and thinks she is going to lose her home of 40 years. You book an appointment to meet at her home because she is not as mobile since her husband died.



You arrive at her home and see piles of mail on her kitchen table, so you take a seat on the couch. As you review the notice, you inquire about other financial details, but she does not seem to know the answers. She tells you that her late husband managed their finances for the past 65 years. She also tells you that they had one child, but he recently died, too. You see that this client is overwhelmed with grief, precluding her from managing her finances appropriately. You realize that your client needs the services of a licensed professional fiduciary.

What is a professional fiduciary?

A professional fiduciary is a person with specific training who assumes responsibility for a position of trust, such as a trustee, power of attorney, conservator, etc. Fiduciaries must pass a state and national licensing exam through the Professional Fiduciaries Bureau and must adhere to strict laws that are governed by state statute.

Professional fiduciaries can be retained by a client who has capacity to enter into a legal contract, which is often drafted by an attorney. If a client lacks capacity, each California county has a Probate Court to appoint a professional fiduciary through the process of a conservatorship or trust, to protect vulnerable and incapacitated clients from abuse, neglect and exploitation.

Why are professional fiduciaries important to your client?

Like the scenario above, professional fiduciaries can step into that widow's life and assume the responsibility for her financial well-being by becoming an agent under a durable power of attorney document for personal assets. If the widow has a trust, chances are that she is the sole trustee. The fiduciary should review the trust to see what assets are in the trust and recommend that the widow consider resigning as trustee and engaging the professional fiduciary to act as trustee. These contractual changes involve the client's estate planning attorney acting on the client's behalf and independent of the fiduciary.

The first thing that a professional fiduciary does is assess where the assets are and accounts for them. This process is called "marshaling" the assets. The fiduciary presents the appropriate legal document, whether it is a durable power of attorney or a trust, to the bank or institution that holds the asset and instructs the institution to add the fiduciary onto the account, which allows the fiduciary to manage the assets. This process may be labor intensive if the assets of the client are spread out among many banks and institutions.

In addition to marshaling the known assets, it is necessary for the fiduciary to act like a private detective by looking throughout the client's home in order to find assets not known or remembered by the client. This may be items such as stock and bond certificates, coins, valuable jewelry, etc. If these items do exist, the fiduciary discusses with the client the best way to secure the assets from potential theft or loss. Once all of the assets are marshaled, the fiduciary sends out letters to the various vendors, such as PG&E, mortgage holders, credit card companies, etc., to add their name as the power of attorney for the client and instruct these companies to direct the bills to the fiduciary's office to be paid on behalf of the client.

Professional fiduciaries can also be retained as a power of attorney for health care, named in a last will and testament as the executor or brought in as an administrator to settle an estate of a decedent who passed away without a trust. Sometimes fiduciaries are brought into highly contentious family situations where the control of a loved one's estate is being contested, and the court will name a professional fiduciary to be the neutral party serving the client's best interest. Other times, fiduciaries are brought in by a family member who cannot take on the role of the fiduciary due to distance or their own ability to do so.

Stepping into a life of another is not easy. As a stranger to the client, trust is sometimes difficult to build. A relationship of trust takes regular visits with clients, informing them of progress each step of the way. Over time, clients see that the fiduciary is doing what he or she says will be done, paying their bills on time, and reducing the piles of mail that once cluttered their kitchen table. They begin to feel a sense of relief and security.

How do you become a professional fiduciary?

You can become a professional fiduciary by completing specific educational curriculum and then passing a state and national exam. Depending on your education and past work history, this journey may be short (months) or may be long (years). For more details on how to become a professional fiduciary, please visit the Professional Fiduciaries Bureau website at www.fiduciary.ca.gov.

Professional fiduciaries may become members of the Professional Fiduciary Association of California (PFAC). You can visit the PFAC website at www.pfac-pro.org for additional information about the licensing process. Members must abide by the PFAC Code of Ethics and subscribe to ensuring the highest standards of ethics and practice. A professional fiduciary who is also a member of PFAC has access to continuing education credits necessary to remain licensed, as well as the support of a legislative advocate for the development of new or changing laws to best serve the interests of clients.

Serving others as a professional fiduciary can be a very rewarding experience and one taken very seriously. We thank the legal community for partnering with us to fulfill the needs of those most vulnerable.

***Janice Kittredge** is a licensed professional fiduciary and the founder of California Senior Connection, an East Bay Area company providing supportive and trustworthy fiduciary services to seniors and those with special needs since 2008. **Diana Lowe**, also a licensed professional fiduciary, joined CSC in 2013 as a general partner enhancing the ability to serve clients. Together, they assist people in getting their financial and personal affairs in order when family members are not available, giving peace of mind to those who cannot help themselves.*

Pro Bono Spotlight: Spojmie Nasiri

Tuesday, December 01, 2015

An Interview with Spojmie Nasiri

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What is your legal background and what kind of law have you practiced?

I received my Bachelor of Arts degree in political science from the University of California, Davis, and my Juris Doctor from Golden Gate University School of Law. I am a member of the California Bar and admitted to practice before the California Supreme Court and the U.S. District Court for the Northern District of California.

I currently practice immigration law exclusively with emphasis on family-based immigration, citizenship and deportation defense. I am an active member of the American Immigration Lawyer's Association. I was selected by the National Advocates Top 100 Lawyers for 2015, American Society of Legal Advocates Top 40 Lawyers under 40 in 2015 and also Rising Star by Super Lawyers for 2015. Also, I was recently elected as president of the Eastern Alameda County Bar Association.

What got you interested in pro bono work?

I migrated to the United States in the 1980s as a refugee from Afghanistan. My first experience upon arriving as a young refugee was the countless people that provided my family and me with support in adjusting to our life here. This positive experience left me feeling grateful for all that had been done for my family and me by strangers who only had the desire to provide us with support to adjust to a new life.

One of the difficult aspects of my childhood was that while I was able to migrate to the United States with my siblings, my mother, unfortunately, could not come with us because her immigration papers were not processed properly. As a result of these mistakes, I lived without my mother for almost 10 years, and this had a tremendous impact on my life growing up and my desire to become an immigration attorney.

I have never forgotten the kindness of those individuals who helped my family and their gracious welcome and support. As a result of my childhood experiences, I have always wanted to pay it forward, as the saying goes. I have been privileged to receive my law degree and my goal and ambition has always been to help those less fortunate. Representing some of my clients on a pro bono basis has given me the opportunity to give back to the community, especially those who cannot afford legal representation and face imminent deportation from the United States.

What kind of pro bono/volunteer work do you do?

A wide variety!

- I have served as a pro bono attorney at the immigration legal clinic at UC Davis and have represented clients pro bono at the San Francisco Immigration Court.
- I have volunteered for the Contra Costa and Alameda County Lawyers in the Library programs for several years.
- I conduct a monthly immigration legal clinic at La Familia Community Center in Hayward, and present a two-hour monthly immigration clinic, where I provide free immigration consults and take on limited pro bono cases.
- I provide free legal consultation and limited representation for clients referred from Centro Services, Catholic Charities, International Institute of the Bay Area and Centro Legal.
- For the past year, I have visited detained immigration inmates at the Federal Correction Institute in Dublin on a monthly basis and provided pro bono services.
- I also provide limited pro bono legal services to the Afghan community throughout the Bay Area.
- I serve as president of the Eastern Alameda County Bar Association.

I currently serve as president of the Executive Committee Board for Council on American Islamic Relations (CAIR) for the San Francisco Bay Area Chapter. CAIR's mission is to enhance understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims and build coalitions that promote justice and mutual understanding. CAIR's vision is to be leading advocate for justice and mutual understanding.

What have you gained from taking on this pro bono work?

My most rewarding cases are pro bono cases, as the clients have so much trust and hope in me and by winning their cases, I have the opportunity to make a difference in their lives. I feel very fortunate and honored to be a part of my clients' lives and to have had the opportunity to impact them in a positive way.

What is up next for you?

In the coming years, my goal is to expand my immigration law practice. I am also working on opening an immigration legal clinic at the local mosque in Pleasanton. More importantly, I want to prepare myself to take the exam to become a California certified legal specialist in immigration law and continue to serve immigrants throughout the Bay Area, United States and worldwide.

Leaving the Million-dollar Estate to the “Help”

Tuesday, December 01, 2015

Earn one hour of Legal Ethics MCLE credit by reading the article below and answering the questions on the Self-Study MCLE test. Send your answers, along with a check (\$20 per credit hour for CCCBA members / \$30 per credit hour for non-members), to the address on the test form. Certificates are dated as the day the form is received.



A new client has scheduled an appointment with you to create a trust, or restate an existing trust. When she arrives, her caregiver has come along. You assume the caregiver will be sitting in the lobby, but she asks her caregiver to join the two of you in your meeting.

After pleasantries and your typical intake questions, your client informs you that she will be making her caregiver a beneficiary. You are now on high alert. You already weren't comfortable with the caregiver being present, but now that you know your client is leaving everything to the caregiver, you have a real concern about potential elder abuse. Before jumping to the worst-case scenario, there are several factors to first consider.

The law says that in order for a will to be valid, your client must have testamentary capacity. What does this mean? Does your client know who she is, does she know who her family is and does she understand the property she has? The burden is rather low. Clients may be well aware of who they are and what they own, but have no understanding that they could be acting under the influence or manipulation of a caregiver.

In fact, according to Probate Code section 21380, when a client leaves a donative gift to a caregiver, it is automatically presumed by law to be the product of undue influence or fraud. Thus, it is up to the caregiver as beneficiary to demonstrate by clear and convincing evidence that the donative transfer was not the product of fraud or undue influence. This is no easy hurdle to overcome and careful consideration should be given when one is faced with this situation.

Indeed, it is not all that uncommon for a client to think he or she owes a caregiver

everything and feels an obligation to compensate the caregiver through a donative gift. After all, many clients develop a very tight bond with their caregiver. The caregiver is with them constantly and tends to their most sensitive needs. Often, clients spend more time with their caregiver than anyone else in their life, including their family. It is natural to feel gratitude and appreciation for the caretaker.

However, if a caregiver is pressuring the client to name the caregiver as beneficiary, the client may feel even more obligated to financially provide for the caregiver, regardless of the fact that the client is already paying for the caregiving services. Indeed, even an innocent comment can be influential on this susceptible group.

Likewise, there are other considerations to ponder. Should a person be able to show appreciation by making a monetary gift to a caregiver? Should we be able to leave our assets to whom we choose, even when these wishes arise from the last phase of life and at the expense of a lifetime of relationships? It's difficult for family members to accept such a disposition even absent any wrongdoing.

As attorneys, we have the obligation to be aware of the possibility of such circumstances. There are certain steps that we can take to ensure our clients are not taken advantage of. We should look at the client's history in his or her current and prior estate plans. Does the client have children? Are the children estranged or involved? Is there a history of omitting the children as beneficiaries?

In the asking of the questions, we will get a sense of our client's capacity. At some point, you will need to explain to your client the necessity to speak with him or her privately and inquire into the relationship with the caregiver.

In order to best protect the client and make sure his or her planning goals are met, it is critical to be sure you are confident in the client's desires. Moreover, to prevent the donative gift from being contested, you will want to demonstrate in the documents that your client is acting freely with no undue influence from his or her caregiver.

Once we are comfortable that our client has capacity and is not unduly influenced, we need to do our best to avoid a costly contest and the possibility of our client's wishes being circumvented. Probate Code section 21384 offers a partial solution to this problem; specifically, the presumption of fraud and undue influence as defined in section 21380 is not applicable if an independent review of the gift is made by an independent attorney in accordance with parameters of this code section.

In addition to establishing the client's testamentary capacity, recording the client by video can also be a useful form of evidence to avoid litigation. The client can plainly state his or her wishes. This evidence can be used to disprove incapacity and undue influence. Depending on the degree of friction or animosity in the family, this may be an advisable recommendation to clients. The attorney also needs to assess the client's appearance and condition to determine if a video will be helpful or actually detrimental. It's an added expense but, as the saying goes, an ounce of prevention is worth a pound of cure.

In addition to the legal hurdles facing unnatural dispositions, there are many social, cultural and psychological influences directing the outcome of these cases. Many adult children believe that they are entitled to an inheritance. If we let go of that idea, how many of these cases would be litigated? We accept it as normal that we are going to have some cases where adult children are going to fight over their inheritance. The value

of money itself drives much of the conflict.

Another factor contributing to the fray is sibling rivalry. A comment often heard is “it’s not fair.” In some cases, the caregiver is one of the children. This doesn’t seem to make an uneven distribution more palatable. Is “fair” an even distribution to the children? Perhaps “fair” is to allow people to give according to their wishes. Maybe it would be fair to give more to a child that has made sacrifices for the parent, or to give to the child with greater need even if that child did not make the wisest choices in life.

As attorneys, our job is not to make moral judgments, but to implement our clients’ wishes in a manner that minimizes or avoids conflict. Being aware of the undercurrent of these beliefs and issues can help us navigate these cases.

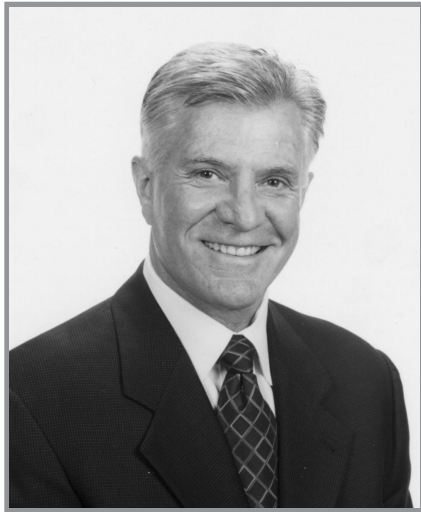
Ultimately, it is important to trust your gut and feel comfortable in honoring your client’s request. If you feel that your client is being taken advantage of, and after a thorough discussion, the two of you cannot reach an agreement, then it is best to refer them elsewhere.

Earn one hour of Legal Ethics MCLE credit by reading the article and answering the questions on the Self-Study MCLE test. Send your answers, along with a check (\$20 per credit hour for CCCBA members / \$30 per credit hour for non-members), to the address on the test form. Certificates are dated as the day the form is received.

Blackstock, Barsell & Sayegh, P.C., is a three-lawyer Estates and Trusts firm that has practiced out of Walnut Creek since the firm’s beginning in the early 1980s. Our firm specializes in estate planning, trust and probate administration, real estate law, and business matters such as formation and modifications. Real property issues include sale of property, deeds, notes and deeds of trust, and contracts.

Civil Jury Verdicts: December 2015

Tuesday, December 01, 2015



The number of jury trials going out in our state trial courts continues to drop each year, and the trials-to-actual-verdict ratio seems to experience an even greater percentage drop. The experience in our local Bay Area courts follows the downward trend. Of course, the reasons are many and varied and open to wild speculation.

Anecdotally, we are told civil filings are down, thus fewer cases are in the system. There is also speculation that successful mediations have led to settlements in most cases. The incredible cost of experts is another reason we see cases resolving before trial. Certainly the courts are under severe budget constraints and our judges simply do not have the time to conduct trials given the number of

cases each civil trial judge is saddled with.

That, perhaps, helps to explain the pressure brought to bear by our civil courts to get things resolved, and don't forget the experience of civil trial judges watching their civil jury verdicts go exactly as predicted. We don't often hear "I told you so" from our judges, but they certainly could say that in most cases in which a civil jury verdict is entered.

I'm not really sure how long I have been writing the Civil Jury Verdicts column for the Contra Costa Lawyer, but it has been many years. Although the number I write about is certainly way down, the predictability of the results remains the same. Clearly, insurance companies use statistics to predict outcomes and case values, and depending on your perspective, they generally get it right.

Recently, I had a discussion with a claims representative at a conference. That person worked for a large and very well-known insurance company, with a large in-house law firm. I was told the company had taken cases to trial only twice in the past year. That is how the world has changed in the civil trial world. Although my most interesting verdicts over the years were those which were aberrant and did not follow what was predicted, I cannot tell you how many times I have written about a rejected offer or a rejected demand, with a very large adverse verdict.

I have repeated many times what Judge Cahill said to me in San Francisco some years ago when he was still on the bench and I had a significant adverse verdict go against my client in a jury trial. He said in words to this effect: In most cases when a case goes to trial, one side or the other miscalculated. That certainly is not to say there are not cases which need to go to trial. A genuine dispute with good arguments on both sides is what the system should be all about.

Finally, a little aside about the American Board of Trial Advocates (ABOTA). I have been repeatedly told in the past few years that it seems the only new folks (without gray hair) who can qualify for the minimum number of civil jury verdicts to trial are staff counsel of insurance companies. Feel free to weigh in on this one.

Now onto some civil verdicts for your entertainment.

Franet v. Tseng, Case No MSC13-02223, was tried in Contra Costa Superior Court before the **Hon. Jill Fannin**. **Larry Cook** of Walnut Creek represented the plaintiff and **Jennifer Kung-Gelini** (CSAA staff counsel) represented the defendant.

Factually, the case had some interesting issues. The plaintiff, an 85-year-old retired teacher, observed a baby left alone in a car seat in a vehicle in a shopping center parking lot. She called the police, wrote down the vehicle license plate number and held a piece of cardboard over the window to block the sun from the infant. The defendant came out of a store, got into her vehicle and backed out of the parking space. As she backed out, the plaintiff walked along beside the defendant's vehicle, and at some point, the vehicle ran over and broke the plaintiff's foot.

The plaintiff had significant medical specials and claimed significant damages related to required caregiver expenditures. The plaintiff, by CCP 998, early in the litigation, demanded the policy limits of \$100,000. The defendant, early in the litigation, offered by CCP 998 \$35,000.

Just before trial, the defendant offered \$75,000. That was rejected by the plaintiff and the case proceeded to trial. The jury, by 9 to 3, returned a defense verdict. Predictable verdict? You tell me!

I stopped into Judge Craddick's court room one day in October and had to wait while she instructed the jury in a "wrongful termination" matter. Turns out, it was the sixth jury trial she had since June. So, there goes my argument that cases are not getting out to trial in Contra Costa Superior Court.

I listened to the instructions and my ears perked up. Among other things, the jury was instructed on "Asperger's syndrome." A couple of days later, I checked in and found that there had been a verdict. The case was entitled *Wasserman v. Costco*, Case No. MSC12-00617. The **Hon. Judith Craddick** presided. **Stephen Murphy** of San Francisco represented the plaintiff and **Mark Grajski** of Sacramento represented the defendant, Costco.

The plaintiff, a nine-year employee of Costco, was terminated from his employment with Costco. He alleged the termination was a result of his Asperger's syndrome. The defense denied the termination had anything to do with Asperger's.

The first question on the verdict form asked: "Did the plaintiff have Asperger's syndrome?" The jury reportedly answered that in the negative. Thus, case over; defense verdict.

Kosich v. Pheasant and the Pear Inc., Case No. MSC13-00017, was tried before the **Hon. Judith Craddick**. **Brad Bowles** of Walnut Creek represented the plaintiff. **Zach Smith** of Oakland represented the defendant restaurant.

The plaintiff alleged significant injuries due to a slip and fall on water on the floor in the restroom of the defendant restaurant. The plaintiff claimed specials of \$113,503. By CCP 998, the plaintiff demanded \$150,000. By CCP 998, the defendant offered \$34,000. At trial, the plaintiff asked the jury to award between \$300,000 and \$600,000. The jury returned a defense verdict.

Solorzano v. Rayana Pitts-Godfrey et al, Case No. MSC13-00675, was tried before the **Hon. Judith Craddick**. **Nicholas J. Mastrangelo** and **Edward Mastrangelo** of Orinda represented the plaintiff. **Peter Hirsig** and **Brandon L.S. Hansen** of Fairfield represented the defendants.

The matter involved a motor vehicle accident. The plaintiff was operating a motorcycle when he was broadsided in an intersection by a vehicle driven by the defendant, Godfrey. The plaintiff sustained serious injuries.

The plaintiff served a CCP 998 offer for the policy limits of \$100,000. By CCP 998, the defendant offered \$25,000. The jury awarded the plaintiff \$59,875.07 in past medical expenses, \$30,000 in future medical expenses, \$170,000 in past non-economic damages and \$202,500 in future non-economic damages. The gross verdict was \$462,325.07.

Weinstein v. Meyer, Case No P11-01223, was heard by the **Hon. John Sugiyama**. (Just to let you readers know, when a “P” appears before a case number, it means it is a probate case). The trial lasted 33 days of half-day hearings and testimony. Goodness! The case was consolidated with civil case No. MSC12-00064. The order is not yet final on the civil aspect of the case, so this report will only be about the probate aspect, so stay tuned. At any rate, here is the report on the probate aspect of the consolidated matter:

Frank Mulberg and **Brett Mulberg** represented the petitioner, Denise Weinstein. **Maria Lawless** represented the respondent Patricia Meyer. **David Ginn** represented the respondents Christina Meyer, Nicole Meyer, Jordan Meyer and Dawn Ward. **Chris Lucas** represented Anne Meyer. Thank you to David Ginn for kindly reporting the case to me.

Denise Yvonne Meyer Weinstein was the oldest daughter among the children of Jay Meyer and his then-wife, Yvonne Meyer. Denise sued Jay Meyer’s second wife of some 30 years, and the children of that second family, alleging Mr. Meyer lacked testamentary capacity and was unduly influenced to execute a trust which called for the surviving spouse to have control over the disposition of the assets of the trust.

Evidence at trial showed that Mr. Meyer was deeply involved in complex business matters at the time he executed the estate planning documents. Medical experts, retained by Denise, relied on autopsy evidence to opine on Mr. Meyer’s mental state some five years before his death.

The court specifically found that Mr. Meyer was competent at the time of the execution of the estate planning documents. The court specifically found there was no undue influence and that the testimony of the two medical experts was not credible.

A wrongful death case entitled *Nguyen et al v. Xu, Well Trucking Inc., et al*, Alameda County Superior Court Case No. RG13-676150, was tried before the **Hon. Frank Roesch**. **Bradley M. Corsiglia** of San Jose and **Andrew Schwartz** of Walnut Creek represented the three plaintiff families.

The three decedents were traveling to work when the vehicle they were riding in was involved in a head-on accident caused by, among other things, the negligent operation of a big rig truck. The decedents left behind their spouses and seven children.

The jury awarded a gross verdict of \$13.7 million. Mr. Corsiglia’s two plaintiff families

received \$8.5 million. Mr. Schwartz's clients received \$5.2 million.

City of Hayward v. Rabani et al, Alameda County Superior Court Case No. HG 13692337, was tried before the **Hon. George C. Hernandez**. **The Law Firm of Goldfarb & Lipman** represented the plaintiff, City of Hayward. **Robin Thornton** of San Ramon represented the defendant property owners.

The trial related to the amount of compensation due to the property owners for the taking of a portion of their property in the City of Hayward. The property had been leased and operated as an auto salvage yard. The City of Hayward wished to take a portion of the property, bisecting the owners' property to create a pathway for a new road.

The city initially appraised the takings, including a temporary construction easement, fee taking, severance damages and benefits at \$181,038. For trial, that appraisal was raised to \$199,319. The defendant property owners' expert's appraisal was \$1,296,000, then decreased at trial to \$1,236,000. The jury returned a total verdict of \$651,174.

Estate of Rose G. McGushin, Plumas County Superior Case No. GN PR13-00028, was reported by **Konstantine "Kosta" Demiris** of Demiris & Moore of Walnut Creek. The case involved a will contest. I will start off by saying Kosta secured a victory for his client Margaret McGushin in the probate matter. No jury trial this time, but a nice verdict. At trial, the court upheld the express language of the will as clear and unambiguous and held the terms would be interpreted under the ordinary meaning under the probate code. Should it be any other way? By the way, where does one stay when trying a case in Plumas County?

Mahan v. Arellano went to trial before the **Hon. Stephan Baker** in Shasta County Superior Court. **Eric Berg** of Redding represented the plaintiff. **Thomas Beatty** of Walnut Creek represented the defendant. Tom obviously had to travel all the way up to Redding just to get a case out to trial. The facts provided perhaps will explain why he traveled that far for a case. The plaintiff, Mahan, was reportedly having a sexual relationship with the wife of the defendant, Arellano. At the time of the "event," the wife was 8 ½ months pregnant. The defendant discovered the "info" during the birth of his child a few weeks later.

The plaintiff was a body builder and a member of a "hot shot" fire crew. Approximately six months after (not sure after the event or after the birth), the defendant, who in his mind was reconciling with his wife, went to the family home and found the plaintiff once again. The plaintiff claimed the defendant attacked him with a knife and stabbed him in the head. Arellano claimed he was acting in self-defense. The plaintiff alleged he suffered a brain injury requiring brain surgery, and caused PTSD and epilepsy, all of which precluded him ever working as a fire fighter and precluded his work as an owner of a CrossFit studio.

The defendant's parents owned the house in question and were named defendants in the matter.

At trial, the plaintiff demanded \$5.75 million. After a 16-day trial, the jury returned a verdict against the Arellano parents, who owned the house, in the sum of \$109,000; less 40 percent comparative fault, and less \$40,000 for a previously purchased medical lien. The net verdict for the plaintiff was \$37,000, plus costs.

Honestly folks, you cannot make this stuff up.

So that is that for this column of Civil Jury Verdicts. Please keep those cards and letters coming to me at mguichard@gtplawyers.com. I have heard this is a popular column, but we cannot regularly write it if we don't hear about your cases. And remember we will report on any interesting cases, whether jury trial, court trial or an interesting settlement.

Inns of Court: Restraining Orders/The Magna Carta

Tuesday, December 01, 2015

Due to all the great articles in the November magazine, we were unable to publish the Inns of Court article about the September meeting. But you know what that means? DOUBLE MEETING ARTICLE! September and October meetings: Two great tastes that taste great together.

First up, the September meeting. On September 17, 2015, the 2015-2016 Inns of Court season opened at the Lafayette Park Hotel ... and what a season it will be! Forget the Golden State Warriors and the Cleveland Cavaliers, the teams for this Inns of Court season are going to be poetry in motion.



First up was Judge Christopher Bowen (guest starring Scott Isherwood, Scott Lantry, Maria Crabtree, Wendy Coats, Renee Haase, Nancy Allard, Jeremy Seymour and me), who provided a presentation on restraining orders in various contexts. I think I speak for all members of humanity when I tell you it was the greatest hour our blue marble has ever experienced.

In the first section of the presentation, Jeremy Seymour, Nancy Allard and Renee Haase discussed restraining orders in the criminal context. There were three characters: Abner Tot (who committed an incident of domestic violence against his wife), Victoria Tot, and their child, Tiny Tot.

First, in regard to this event, they discussed EPOs (emergency protective orders). An EPO is when a peace officer is on a scene of a potential crime and it appears that there is immediate danger to a person. They can phone a judge (at any hour of the night) to obtain such an order. The EPOs last five to seven days. If domestic violence charges are filed, the criminal court will consider whether to issue a criminal protective order during the pendency of proceedings.

However, regardless of whether or when the charges are filed, if a continued protective order is desired, the victim may also use the five-to-seven-day period from the EPO to get a temporary restraining order (TRO) from the family court in place that will remain in effect until a hearing can be held on whether to issue a more permanent order.

In the second section, our family law group presented a court scene on restraining orders in the family law context. Here, Judge Ruth Less (played by Wendy Coats) took testimony from Abner Tot (played by Scott Isherwood and represented by Scott Lantry) and Victoria Tot (played by Maria Crabtree and represented by Judge Christopher Bowen). The hearing was a request by Victoria Tot for a family law restraining order (DVRO) against Abner Tot. Throughout the proceeding, Abner Tot utilized his Fifth Amendment right.

Victoria testified to various violations of the criminal restraining order and how she

needed a DVRO. These violations included multiple text messages, phone calls and Abner Tot purchasing a billboard right next to Victoria's office in a ham-handed attempt to communicate with her. Abner's attorney got an opportunity to cross-examine Victoria to prove that no DVRO should be granted. However, in the end, the court ordered the DVRO and provided for supervised visitation for Abner Tot.

In the third section, our estate planning section tackled restraining orders in the elder law context. Our estate planning section consisted solely of Kirsten Howe and me. In this vignette, Kirsten was playing the character Victoria Tot, who was meeting with her estate planning attorney to see what she could do to protect her assets from her husband. Under her estate plan, she and her husband's assets were held in their joint trust and she wanted to take her assets out. The problem that Ms. Tot had was that family law restraining orders preclude transferring or disposing of assets. This meant that she could not remove her assets.

However, she could revoke her part of the joint trust, so when the family law restraining order was dropped, the assets could immediately be transferred. Victoria could set up a new estate plan with a new trust, will, advance health care directive and power of attorney. Victoria and her attorney discussed whether she was going to bring a divorce proceeding.

When a divorce is filed, additional asset restraining orders are automatically enforced. These automatic restraining orders preclude a party to the divorce from changing beneficiary listings to certain accounts, such as IRAs. A standard family law restraining order does not preclude changing beneficiary listings, so that was another factor for Victoria to consider before filing for divorce.

Moving on to the October meeting. The presentation for the October 8, 2015, meeting was put on by Judge Cope's group, which includes Pam Marraccini, Gregory Abel, Lorrain Butters, Oksana Sakava, Nicholas Jay, Mika Domingo, Angelica Lopez and Ken Strongman. Their presentation was about the Magna Carta, one of the most important legal documents in world history.

They started with a hilarious British video about the source of power. Is it from democratic election? Is it from a birth right? The video had two peasants explaining to the king why his birth right power was meaningless in the face of the people. This was relevant because the Magna Carta was the first instance of the people standing up to the king.

Fundamentally, when I say "the people," I mean the landed gentry. These were not the peasants or the serfs or the plebes. They were just one rung lower on the hierarchy of power in ancient society. However, they were incensed by the British king's consistent taxing of them to pay for his foreign wars. Pam Marraccini and Gregory Abel outlined the initial history of the Magna Carta.

Then, Oksana Sakava discussed the relationship between the Magna Carta and U.S. law. For example, the Magna Carta introduced the concept of due diligence and trial by jury. Translated, it states: "No free man shall be captured and/or imprisoned or disseised of his freehold and/or of his liberties or of his free customs or be outlawed or exiled or in any way destroyed, nor will we proceed against him by force or proceed against him by arms, but by the lawful judgment of his peers and/or by the law of the land." Lorraine Butters discussed the Magna Carta within the context of preemptory challenges.

Nicholas Jay, Mika Domingo, and Angelica Lopez next spoke regarding the tax aspect to the Magna Carta. No taxation without representation was a significant part of the overall thought process behind the Magna Carta. For example, there was frustration with scutage, a tax levied in lieu of military service. As anybody who has obsessively bought the "Hamilton: The Musical" soundtrack and then listened to it repeatedly while also watching every single #Ham4Ham video they put up on YouTube can tell you, the U.S. Revolutionary War was very much based off of the "no taxation without representation" concept.

The discussion turned to various British taxes such as the Stamp Act, Tea Act and Molasses Act, which lead to the awe-inspiring words "Molasses Smuggler" being uttered. They also showed a video about the Boston Tea Party, which was a song sung to the tune of Taylor Swift's "Shake it Off" called "Dump it Off." Ahh ... the wonders of the Internet.

Finally, Ken Strongman compared the Magna Carta to the NFL. As noted, the Magna Carta was really a dispute between the king and his barons. It was not inclusive of the entirety of the British people. Similarly, the NFL often sees disputes between Roger Goodell, the commissioner, and the 32 owners of each individual team. The owners want due process in any sort of action taken by the commissioner.

Ken noted the recent Ball-ghazi situation involving whether New England Patriots quarterback and completely-better-than-you-human Tom Brady knew that some of the footballs were partially deflated in the 2014 AFC Championship game. There, the Patriots felt that there was insufficient due process in levying a punishment against Brady. If it were up to King John of Britain, not only would Brady have been suspended, he probably also would have been beheaded. Bad news for Brady and everybody else not named Jimmy Garappolo.

The next Inns meeting is set for January 14, 2016. If you are interested in applying for RGMAIOC membership, please contact Patricia Kelly at patriciakelly@pacbell.net.

Matthew B. Talbot, Esq., is an elder law attorney in Walnut Creek. His practice specializes in estate planning, trust/probate administration, trust/probate litigation, conservatorships, guardianships, elder abuse and Medi-Cal matters. Matthew is on the Executive Board of the Inns of Court. You can reach him at matthew@matthewbtalbot.com or (925) 322-1763.

Pro Bono Mixer [photos]

Tuesday, December 01, 2015

The CCCBA presented its first Pro Bono Mixer in October 2015. Sponsored by Ferber Law and the Derby Law Firm, attendees had the opportunity to speak with local legal service providers in need of pro bono lawyers.

Interested in more pro bono opportunities? Check out our website for more information.

Below are photos from the event. More photos can be found on our Facebook page.

[gallery ids="11316,11319,11318,11315,11320,11317"]

Are You MCLE Compliant?

Tuesday, December 01, 2015

For MCLE Compliance Group 1 (A-G) lawyers, the deadline is approaching fast. You have until **February 1, 2016**, to submit proof of compliance to the State Bar; failure to do so can result in a fine and possible administrative inactive status.

Every three years, California lawyers are required to take 25 hours of classes in just about anything they want as long as the class is by an MCLE-approved provider. Four of those units must be in legal ethics, one in competence issues and one in the elimination of bias. You can self-study to obtain your units for a maximum of 12.5 units.



The State Bar is continuing to audit regularly and aggressively. The last compliance group had 10 percent of its members audited.

CCCBA Can Help!

Do you need more MCLE hours but can't figure out how to obtain the credits? Are you prepared for an MCLE Compliance Audit? Can't find your attendance certificates?

- **Need more credits?** View our MCLE Self-Study offerings.
- Want to attend an in-person **MCLE program**? View our event calendar.
- Need to access your **Attendance Certificates**? Log into your CCCBA member profile (choose "My Past Events").

For more assistance and information, contact Anne Wolf at awolf@cccba.org or (925) 370-2540.

Resources

- State Bar's MCLE webpage
- MCLE Audit FAQs
- Report compliance

Easy Peasy Membership Renewal

Tuesday, December 01, 2015

Three easy ways to renew your CCCBA membership:

- **1. Renew online today.** Simply review your current profile and update if necessary.
- **2. Renew over the phone.** Call our Membership Coordinator, Jenny Comages, at (925) 370-2543.
- **3. Renew by mail.** Printed statements are mailed the first week of December. Fill out the statement and return with your payment to:
CCCBA
Attn: Jennifer Comages
2300 Clayton Rd., Suite 520
Concord, CA 94520

Renewal Resources

- Membership Dues and Sections Fees
- Detailed Instructions on How to Renew Online
- Communication Preferences
- Join/Rejoin the Lawyer Referral & Information Service (LRIS)
- Directory Photo Shoot Schedule, January 2016
- Restricted Access Court Security Cards

Questions? Contact Jenny Comages at (925) 370-2543 or jcomages@cccba.org. Thank you for your continued membership!

Hello, Goodbye

Tuesday, December 01, 2015

“Great is the art of beginning, but greater is the art of ending.” -
Henry Wadsworth Longfellow



As we publish our last edition for 2015, I am thinking about endings ... and beginnings.

December marks the last edition for my esteemed Co-Editor, **Harvey Sohnen**, who will be stepping down from the editorial board of the Contra Costa Lawyer. Harvey is one of our longest serving board members, having been on this board for over 10 years. During his tenure, he both sat on the editorial board and served as co-editor of the magazine.

It has been my great pleasure to work with Harvey during this time. His sense of humor and his gift for finding just the right title for an article has made the magazine not just fun to work on, but more importantly, a product of which we can all be proud. On behalf of the entire editorial board of the Contra Costa Lawyer, I want to say “thank you” to Harvey. You will be missed.

January will mark the first edition for our new Co-Editor, **David Pearson**. David has also served on the editorial board for many years and has also been a guest editor for many of our more technology-oriented issues. He has written countless articles for the magazine, not just about technology and the law, but also about issues relevant to the solo practitioner. I am looking forward to working with David this year, and on behalf of the editorial board, I would like to welcome David to the role of co-editor!

Coffee Talk: What do you think of the new artwork in front of the F...

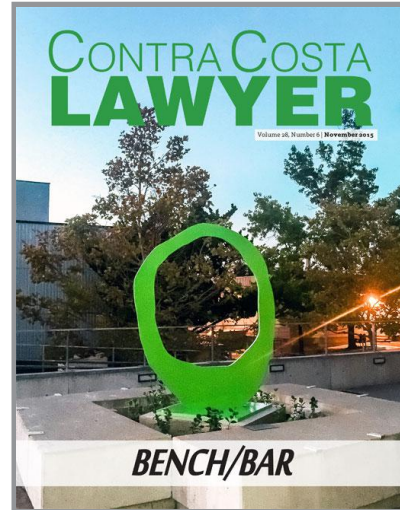
Tuesday, December 01, 2015

Our November Contra Costa Lawyer magazine cover featured the new art sculpture which now sits in front of the Peter L. Spinetta Family Law Center.

There has been quite a buzz about this installation, so we chose this as a coffee talk question for our December issue, and sure enough, we got a number of responses.

Before we go into those, let's hear from Christine Callahan, a key player in this project, about the artwork:

"The Art in the Courthouse Committee (AIC), a non-profit group of public art enthusiasts devoted to displaying fine art in Contra Costa Court facilities, commissioned Napa artist Gordon Huether to create a bright, welcoming public art sculpture for the entrance area of the Peter Spinetta Family Law Center.



"The modest, but elegant, bright chartreuse site-specific sculpture entitled 'The Nature of Life' was designed with the site and mission of this facility in mind. Huether's intent was to activate the space and to create a sculpture that inspires a sense of completion and reflection, inviting visitors to overcome struggles and move forward with their lives. It suggests a sense of wholeness."

Coffee Talk Responses

I think it's pretty cool. Maybe not something I'd want in my living room but pretty nice for outside the courthouse. The thinking behind it is nice too—great to see attention given to minimizing the stress that many family law parties feel. Hooray for public art—let's hope for even more!

Karen Juster Hecht

It reminds me of something I'd see at a Quidditch match.

Neil Holmes

Too soon to tell. I'll let you know when it's finished.

John E. Manoogian, Law Offices of John E. Manoogian

As a Cal fan, I am not super enthused about the Oregon Ducks staking their claim to the Peter L. Spinetta Family Law Center. I realize that Cal football has not beaten Oregon since the monsoon game of 2008, but perhaps when Cal next beats Oregon, we can take it down and put up a giant blue C instead.

Matthew B. Talbot, Law Offices of Matthew B. Talbot

Not sure what it is or what it represents. I hope it wasn't too expensive.

David S. Pearson, Law Offices of David S. Pearson

It has already succeeded as a piece of art in that it has generated discussions. By the way, am I the only one in this county who is reminded of those Wint-O-Green Life savers that glow in the dark?

Harvey Sohnen, Law Offices of Sohnen & Kelly



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CONTRA COSTA LAWYER

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Mad Tax: Fury Road

Without having a grasp on the pertinent tax laws, attorneys may feel like wanderers in the desert, trying to escape the dangers that may lurk in the mistakes of failed estate plans.



Spotlight



[Professional Fiduciaries to the Rescue!](#)

If a client lacks capacity, a professional fiduciary can be appointed to protect vulnerable and incapacitated clients from abuse, neglect and exploitation.



[Pro Bono Spotlight: Spomie Nasiri](#)

I migrated to the United States in the 1980s as a refugee from Afghanistan. As a result of my childhood experiences, I have always wanted to pay it forward, as the saying goes.

More...



[Civil Jury Verdicts: December 2015](#)

We don't often hear "I told you so" from our judges, but they certainly could say that in most cases in which a civil jury verdict is entered.



[Inns of Court: Restraining Orders/The Masana Carta](#)

Forget the Golden State Warriors and the Cleveland Cavaliers, the teams for this Inns of Court season are going to be poetry in motion.