

MILLER, MONSON, PESHEL, POLACEK & HOSHAW

A PARTNERSHIP OF PROFESSIONAL LAW CORPORATIONS

NEWSLETTER



501 WEST BROADWAY, SUITE 700
SAN DIEGO, CALIFORNIA 92101-3563
TELEPHONE: (619) 239-7777
FAX NUMBER (619) 238-8808

March 2012

FIRM NEWS:

Our senior partner, Tom Monson, served as the 2012 Farmers Insurance Open General Chairman and President of the Century Club of San Diego, a 501(c)(3) non-profit organization. The Century Club celebrated its 50th year of serving as the host organization for the PGATOUR at the spectacular Torrey Pines Golf Course. Over the past fifty years the Century Club has raised over \$22,169,055 for local charities. Tom Monson presented this year's winner, Brandt Snedeker, with the trophy and winner's surfboard. The 2012 Farmers Insurance Open is expected to raise over \$1 Million for local charities.



2012 Farmers Insurance Open Winner Brandt Snedeker and Tom Monson, President of The Century Club of San Diego

Farewell to Ray Ridlon: Attorney Ray Ridlon has left the firm to enjoy more time with family and friends. Ray, who was with the firm for 11 years, will be greatly missed. Ray intends to continue practicing law, but on a reduced schedule and at a location closer to his home in East County.

In this Issue:

LICENSING REQUIREMENTS FOR TRUSTEES

Mary J. Peshel

IS IT A DIAMOND OR A CUBIC ZIRCONIA?

Judy S. Bae

LEGISLATIVE UPDATE



LICENSING REQUIREMENTS FOR TRUSTEES

Mary J. Peshel

Many issues must be considered when creating or amending a trust. Selecting the initial trustee, and successor trustees, is one of the most important decisions to be made. The trustee will manage the trust in the event of the

incapacity of the trustor (the individual who creates the trust). The trustee may manage the assets at the death of the trustor, and/or on a continuing basis for young or disabled beneficiaries.

The initial trustee of a living trust is usually the trustor or trustors. Successor trustees are often the children or other relatives of the trustor(s). Sometimes the trustor selects friends as successor trustees – preferably friends with business experience. Other choices include licensed fiduciaries and institutions like banks and trust companies.

California's licensing requirements must be considered when an individual is selected as trustee. Any individual serving as a fiduciary for more than three individuals at one time, who are not his/her relatives, must be licensed as a fiduciary by the California Department of Consumer Affairs.

The Professional Fiduciaries Act, effective in 2009, regulates non-family member professional fiduciaries. The licensing requirements cover trustees, conservators, guardians and agents under powers of attorney (Business and Professions Code Sections 6500-6592).

Your neighbor Fran, a retired business executive, may be a great choice as trustee due to her business skills and knowledge of your family. When discussing this with her you need to determine whether she is serving as trustee of other trusts and, if so, whether she must be licensed as a professional fiduciary in order to serve as trustee for you.

Recently this issue came up when a client chose a Realtor friend as successor trustee. We discussed the need to determine if the Realtor is serving as trustee for any other trusts.

Licensing requirements include passing an exam and completing thirty hours of approved education courses. In addition, to renew his/her license a professional fiduciary must earn fifteen hours of continuing education credit each year. To be licensed an individual must be over age 21 years, a U. S. citizen (or legally admitted to the U.S.), have not committed any acts that are grounds for denial of the license, submit fingerprints, and meet the education or work requirements.

Certain professionals are not required to be licensed. The requirements do not apply to (1) attorneys licensed in California, (2) certified public accountants licensed in California and acting within their scope of practice, and (3) enrolled agents acting within their scope of practice. Therefore the selection of your CPA or an attorney friend is probably a safe choice.

Another consideration when selecting a trustee is whether a bond should be required. A bond protects the trust from bad acts by the trustee such as theft or misappropriation of trust assets. The cost of the bond is paid from trust funds.

When selecting a non-family member to serve as trustee, the trustor (or possibly another

person with the power to make that choice) must be sure to consider whether the individual proposed as trustee must be licensed and/or bonded.



IS IT A DIAMOND OR A CUBIC ZIRCONIA?

Judy S. Bae

We last discussed how to prevent unnecessary trust litigation. We will now explore what to do if you suspect that a trust does not express the last wishes of the deceased. Despite good intentions and planning, there are instances when a trust does not contain the wishes of the deceased individual. But how do you know whether the trust is a diamond or only a cubic zirconia?

The common scenario is where there is a significant unequal distribution of the trust's assets. Often one child will receive more than the other children or the children are surprised to discover that only one of them will inherit their parents' assets. This is despite the fact that they had heard over the years that everyone would get an equal share of the assets. Keep in mind that people have the right to change their minds and their trusts. There is no requirement that a parent has to give each child an equal share. Further, there is no requirement that only children can inherit from a parent's trust.

However, there are instances when one may suspect that the trust does not accurately reflect the wishes of the deceased. The most common situations arise from lack of capacity and/or undue influence. However, there are other reasons to set aside a trust or trust amendment such as mistake or fraud.

Lack of Capacity

A person lacks capacity to change his or her estate plan when s/he does not fully understand the consequences of the change. For example, what if Dad, who suffered from Alzheimer's or progressive dementia (or confusion from a new medication) changed his trust a few months before he passed away. Your sister is now the sole trustee of the trust (as opposed to being a co-trustee with you) and she has just informed you that she will be getting the family home and the majority of Dad's assets. You are surprised that Dad did not leave an equal share to each of

his children, especially since you and Dad never had a falling out and he always seemed to look forward to your weekly visits. This sudden change to his trust does not make any sense to you.

In this scenario, Dad may have lacked capacity to make changes to his trust. Although individuals suffering from Alzheimer's/dementia have lucid periods and can therefore be capable of changing their trusts, there are instances when the individual may no longer be able to make such decisions.

In order to validly amend to his trust, California law required Dad to have been able to understand and appreciate the following:

1. The rights, duties and responsibilities created by, or affected by the decision;
2. The probable consequences for the decision maker, and where appropriate, the persons affected by the decision; and
3. The significant risks, benefits, and reasonable alternatives involved in the decision.

A person suffering from Alzheimer's/dementia might not be able to appreciate and understand the consequences of disinheriting a child. Dad may not have been able to understand the effect and consequences of leaving the house and most of the assets to your sister and how his decision to name your sister as trustee would affect his trust. If Dad did not appreciate these things, the trust could be invalid due to lack of capacity.

Undue Influence

Undue influence can also invalidate a trust. A person who exercises too much control over the will of another may be unduly influencing him or her. For example, assume that Mom, who is no longer able (or willing) to live alone moves in with your brother. He agrees to take care of her and look out for her interests. Over the years, you notice that Mom is becoming more and more reliant on your brother. She is no longer interested in spending time with her other children. In addition, you notice that your brother is acting as a gatekeeper and will not let people visit Mom unless he is at home. Your brother is now managing all of Mom's finances and takes her to all her appointments. Mom will no longer leave the house unless your brother is with her; she no longer comes over to your home for dinner. After Mom passes away, the family learns that they have all been excluded from Mom's trust except for your brother. You now suspect that

your brother was keeping Mom away from the rest of the family on purpose and that he was convincing Mom that he deserved to receive her entire estate.

What To Do

Before you run out and file a lawsuit to have the trust/trust amendment set aside, there are a few steps you can first take to evaluate your potential claim:

1. Find your parent's date of birth and social security number. This information will be necessary to obtain copies of the death certificate and medical records.

2. Contact friends. Call the people that your parent socialized with. These individuals may have spent time with your parent. During their visits, they probably talked about their children and how they felt about their children. These individuals may know about your parent's feelings and wishes for their trust and assets. These friends may have had concerns about the influence that one of your siblings had over your parent. They also likely observed changes in your parent's mental and physical health and if your parent was having problems with memory and other cognitive abilities. They are potential witnesses that can be of great help.

3. Make a list of the medical providers that treated your parent. These doctors will have information in their records about your parent's physical and mental health. They may have specific recollections about your parent and any changes that they personally observed.

4. Obtain the medical records. Once you have your parent's date of birth, social security number and the names and addresses of their medical providers, you will be able to obtain their medical records pursuant to California law. Medical records are often a great source of information concerning a person's physical and mental health. The medical records will likely have documentation concerning any mental defects or concerns about mental status, dementia and decision-making ability. These medical records will be invaluable if it turns out that your parent had health and medical problems that would have made them susceptible to undue influence or unable to understand decisions concerning the trust. You may learn through the medical records that your parent was completely competent and did not have any health problems that would have contributed to undue influence or a lack of capacity. The medical records will be an

important component in deciding whether or not you should make a claim that the trust/trust amendment is invalid.

5. Look for prior estate planning documents. It will be important to see what the prior estate planning documents provided. You may learn that the most recent trust or trust amendment may not differ from your parent's trust 12 years ago. You may learn that your parent went to the same attorney for 30 years and suddenly went to a brand-new attorney to have the last trust amendment prepared. If the latest trust/trust amendment is invalid, the Court will have to go back to the last "good" document so it will be important to locate and obtain copies of those prior documents. The prior estate planning documents may also show how your parent consistently provided for an equal distribution of assets. This will be important in showing undue influence and/or lack of capacity.

6. Retain the services of a well qualified probate litigation attorney to assist you in evaluating your potential claim. An attorney that specializes in probate litigation will be able to review the evidence and information and help you determine whether you should make a claim to dispute the trust/trust amendment. An experienced probate litigator will be able to discuss your options and the realistic costs of filing a lawsuit over your parent's trust/trust amendment.

When it comes to litigation over your parent's trust, it is important to recognize and understand that filing a lawsuit will change your family relationship. Before filing a lawsuit over your parent's trust, you will need to understand and think about the fact that this will forever change your relationship with your sibling(s). If your sibling is accused of unduly influencing your parent to change the trust or you claim that your sibling was instrumental in having your parent sign a trust amendment when your parent lacked capacity, it will likely be impossible to have a relationship in the future with that sibling regardless of the outcome of the lawsuit. Keep in mind that not all of your siblings may agree with you and that other family members may take sides about whether it's a diamond or a cubic zirconia.

LEGISLATIVE UPDATE: Are Sales to IGDTs at Risk?

A entirely new proposal in the President's fiscal year 2013 budget would change to the tax treatment of Intentionally Defective Grantor Trusts (IDGTs) and trusts for which a non-grantor is considered to be an owner. IDGTs are irrevocable trusts over which the grantor has retained certain powers that make the *income* of the trust taxable to the grantor (instead of to the trust or its beneficiaries). The grantor may have a right to relinquish these powers at a later date and so convert to a regular irrevocable trust. The retained powers are considered a "defect" for income tax purposes that can be very useful; the trust is a completed transfer for gift and estate tax purposes. The defective status allows the transferor to engage in certain transactions that benefit the trust beneficiaries and do not trigger tax. *For example*, a grantor can engage in transactions (i.e. sales) with the IDGT without triggering recognition of income tax, and can increase the value of a gift made to the IDGT for the benefit of third parties (usually children or grandchildren) because the grantor must pay taxes on the income generated by the IDGT after the gift is complete for gift tax purposes (rather than requiring the trust to pay such taxes). The proposed new law would eliminate those benefits by imposing a gift tax *whenever assets are distributed from the trust, and/or at such time as the trust ceases to be a grantor trust*. In addition, assets remaining in an IDGT would be included in the grantor's taxable estate at death. The new law would apply to IDGT's created after enactment, as well as to gifts made to existing IDGTs after enactment.

If you would like to receive further information regarding the topics in this or past newsletter, or if you would like to let us know any issues or topics you would like to see addressed in future newsletters, please contact us at (619) 239-7777 or newsletter@mmpmh.com.

Disclaimer: This newsletter is provided to share knowledge and expertise with our colleagues with the goal that all may benefit. The content of this newsletter is for general informational purposes only.

The information contained within this newsletter is not intended to serve as legal advice or as a guarantee, warranty or prediction

regarding the out-come of any particular legal or tax matter. Nothing contained within this newsletter should be used as a substitute for legal advice and does not create an attorney-client relationship between the reader and Miller, Monson, Peshel, Polacek & Hoshaw. Legal advice depends on the specific facts and circumstances of each individual's situation. You should not rely on this newsletter without first consulting with a qualified, licensed attorney.

federal tax advice contained in this communication, including any attachments and enclosures, is not intended or written to be used, and may not be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

IRS Circular 230 Notice: Any



MILLER, MONSON, PESHEL, POLACEK & HOSHAW

A PARTNERSHIP OF PROFESSIONAL LAW CORPORATIONS
Providing quality legal services since 1959

RALPH GANO MILLER, RETIRED

THOMAS M. MONSON

MARY J. PESHEL

TIMOTHY C. POLACEK

WILLIAM D. HOSHAW[†]

SUSAN L. HORNER

RAY W. RIDLON

BRADFORD N. DEWAN

PHILIP R. FREDRICKSEN[†]

DeETTE L. LOEFFLER

JUDY S. BAE

[†]OF COUNSEL

<http://www.mmpph.com>