



# Trusts and Estates Quarterly

Volume 8, Issue 1 • Spring 2002

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## THE JURY IS BACK: WHERE THERE'S A WILL, FINDING NEW WAYS

by Adam F. Streisand, Esq.\*

The appellate courts beseeched the Legislature to do away with juries in will contests. Time and again, the courts had to overturn jury verdicts that were based on what *the jury* thought was right, with no regard for the decedent's last wishes. The Legislature heard the cry for help. By enacting Cal. Probate Code § 8252(b) in 1988, the Legislature eliminated jury trials in will contests once and for all. At least the Legislature thought it had. Increasingly, clever lawyers, through crafty pleading, are managing to empanel juries with the power to award punitive damages in cases that look and feel an awful lot like will contests. How do they do it? And in the absence of legislative relief, what can we do to keep will contests away from runaway juries?

### I. THE LEGISLATURE ELIMINATED JURIES IN WILL CONTESTS

Cal. Probate Code § 8252(b) eliminated jury trials in will contests in order to address important policy concerns. The Law Revision Commission explains:

"Section 8252 eliminated the jury trial in will contests. A jury trial is not constitutionally required. Under former law, there was a high percentage of reversals on appeal of jury verdicts, with the net result that the whole jury and appeal process served mainly to postpone enjoyment of the estate, enabling contestants as a practical matter to force compromise settlements to which they would not otherwise be entitled." See *Cal. Law Revision Com.*, 5A West's Ann. Prob. Code (1991 ed.) § 8252.

The Legislature was within its rights to eliminate juries in will contests. The right to trial by jury is guaranteed by the California Constitution (Cal. Const., art. I, § 16), but it is not an absolute right in every case. *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8. The right guaranteed under the Constitution is the same right as it existed under common law in 1850, when the California Constitution was adopted. *Id.* In other words, there is a right to a jury trial only in those cases that were guaranteed a right to a trial by jury in 1850. *Id.* The Constitution does not require jury trials in will contests because the ecclesiastical courts, which probated wills historically, did not use jury trials. *Cal. Law Revision Com.*, 54A West's Ann. Prob. Code (1991 ed.) § 825.

### II. PLEADING THE CONTEST AS A CIVIL ACTION FOR FRAUD

But if the Probate Code eliminated jury trials in will contests, how can a contestant pursue a will contest as a civil action for damages (and punitive damages)? Let us first consider the possible theories of recovery. Under Probate Code sections 8252 and 16061.8, the ordinary statutory grounds for a contest are lack of testamentary capacity, fraud, undue influence or mistake. Of course, fraud can also form the basis of a civil complaint. However, there is ordinarily a fundamental difference between a contest and a civil complaint based on fraud. In a will contest, the contestant is not alleging that she was defrauded. She alleges that the testator was defrauded. Unlike the civil plaintiff, the contestant sues for fraud as a third-party victim.

The general rule is that a third person has no standing to sue for fraud. There are two exceptions recognized under common law. The first exception is sometimes referred to as the doctrine of "indirect reliance." Under that doctrine, a fraudulent misrepresentation may be actionable if made to the plaintiff's agent and acted on by the agent to the plaintiff's detriment. For instance, in *Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 441, a hospital patient sued a drug manufacturer for false representations made to the patient's doctor. The Court concluded that the jury properly found the drug manufacturer liable, on the theory that the doctor, as the patient's agent, relied on the misrepresentations in administering the drug to the patient. *Id.* The "indirect reliance" doctrine would not seem applicable to the usual will contest. Strictly speaking, the decedent is not the agent of the injured beneficiary.

The second exception to the rule that a third person cannot sue for fraud is more adaptable to an ordinary will contest. The second exception is applicable when the defendant affirmatively conceals wrongdoing from the plaintiff. *Lovejoy v. AT&T Corp.* (2001) 92 Cal.App.4th 85, 97; *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-13. The elements of a claim for fraudulent concealment are:

- "(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." *Marketing West*, 6 Cal.App.4th at 612-13.



In *Lovejoy*, the trial court dismissed the action on the theory that the plaintiff could not sue AT&T as a third-party victim of fraud. 92 Cal.App.4th at 97. AT&T falsely represented that it was authorized to take over Lovejoy's 800 service. In reliance, PacBell disconnected Lovejoy's service. While agreeing that Lovejoy could not sue AT&T for misrepresentations it made to PacBell, the Court of Appeal reversed nonetheless. It concluded that AT&T could be liable for fraudulent concealment when it manipulated the format of its bills so that Lovejoy would be unaware that its 800 service carrier was changed. When plaintiff disputed its AT&T bill for other reasons, AT&T disconnected plaintiff's 800 service. By the time plaintiff discovered that its 800 service was disconnected, its business had dried up and it was in bankruptcy. The Court of Appeal explained that AT&T was under a duty to disclose to plaintiff, as a customer, the change in plaintiff's 800 service. *Id.* The Court found that plaintiff would have acted differently had it known of AT&T's conduct; plaintiff would have taken action to ensure continuity of its 800 service. *Id.*

One can imagine ways in which a contestant might be able to plead that an unscrupulous beneficiary defrauded the decedent, and concealed his wrongdoing from contestant, so that contestant had no chance of rectifying the problem while the testator was alive.

### III. THE CONTEST AS A BUSINESS TORT

California has not recognized a tort of interference with a beneficiary's gift or inheritance. The only case to address the possibility of such a claim notes that it has never been validated in this State, but the case never reaches a conclusion about the validity of such a cause of action. *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 173. In *Hagen*, the Court of Appeal, in its discussion of the procedural background of the case, made the following comment: "The second count suggested a theory—recognized in several states *but not previously validated in California* — of intentional interference with an expected inheritance or gift." *Id.* (emphasis added). The Court of Appeal reversed an order granting summary judgment as to all claims on the basis of a defense having nothing to do with the validity of the claim for interference with inheritance. *Id.*

Notwithstanding, the ordinary business tort of interference with prospective economic advantage may still do the trick. The elements of the tort are: (1) the existence of an economic relationship between plaintiffs and another, containing a probable economic benefit or advantage to plaintiffs; (2) the defendant's knowledge of the existence of the relationship; (3) the defendant's intentionally wrongful acts or conduct designed to interfere with or disrupt the relationship; (4) actual disruption; and (5) damage as a proximate result of that interference. *Della Penna v. Toyota Motor Sales, USA, Inc.* (1995) 11 Cal.4th 376, 393; *Stolz v. Wong*

*Communications Limited Partnership* (1994) 25 Cal.App.4th 1811, 1825. The case authorities do not purport to limit the definition of an "economic relationship," and one might find courts willing to accept that the relationship between decedent and beneficiary is among the types of relationships that fall within the rubric of this tort. Thus, even though the tort was intended to prevent unfair competition among business competitors, it may be broad enough to encompass allegations one might ordinarily find in a will contest.

### IV. ELDER ABUSE – INDEPENDENT TORT OR ENHANCED REMEDY

Finally, in recognition of the increasing occurrences of financial abuse of elders by the persons most responsible for helping them and the inadequacies of pre-existing statutory and common-law protections, the Legislature enacted the Elder Abuse and Dependent Adult Civil Protection Act (the "Elder Abuse Law" or "EAL"). See Welf. & Inst. Code § 15600, et seq. It is unclear whether the Legislature intended to create an independent tort for financial abuse or merely to add remedies to encourage these important cases to be brought to court. The Elder Abuse Law prohibits "financial abuse" of elders and dependent adults. Welf. & Inst. Code § 15610.07(a). The EAL defines "elders" as persons who are 65 years of age or older. Welf. & Inst. Code § 15610.27. Under the Elder Abuse Law, "financial abuse" is prohibited as follows:

- "(a) 'Financial abuse' of an elder or dependent adult occurs when a person or entity does any of the following:
  - "(1) Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.
  - "(2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.
- "(b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith." Welf. & Inst. Code § 15610.30.

The case law has not squarely addressed the question, but some commentators have suggested that the Legislature intended to create an actual cause of action for financial abuse:

"Plaintiff may also elect to plead the conduct of the abuser prohibited by [the Elder Law] as the statutory tort of financial abuse of an elder or dependent adult...."



"Similarly, with the enactment of [the Elder Law], the legislature has stated an intent to protect an articulated class of persons and has proscribed certain conduct with respect to that class. Violation of the statutory prohibitions is the tort of financial abuse of an elder/dependent adult." 2 *California Elder Law: An Advocate's Guide* (CEB May 2000) § 14.31.

In at least one case under the EAL, the trial court empaneled a jury, and the Court of Appeal reviewed the jury instructions for sufficiency. *Conservatorship of Gregory* (2000) 80 Cal.App.4th 514, 519-20. It might be inferred from this case that the courts will tend to decide that the Elder Abuse Law creates an independent cause of action. Thus, by crafty pleading, the attorney for the would-be petitioner in a will contest might find a way to civil court by virtue of the EAL. The elements of a claim under the EAL appear to be easily established. If, either by *inter vivos* transfer or testamentary gift, the respondent takes, secretes or appropriates property with the intent to defraud, the respondent may be liable under the EAL.

## V. THE GIST IS IN THE FORM OF RELIEF

The case has been filed in civil court. The trial judge is quick to confess her ignorance of our strange world of probate. The judge is accustomed to liberal pleading rules. She enjoys the reverence from the twelve men and women in the jury box. So how can the defense lawyer keep the civil trial judge from empanelling a jury in what is really a will contest in disguise?

The first rule is to know the rule of when. It is critical to heed California Rule of Court 377, which compels the defense to move to strike a jury within five (5) days of receiving notice from the clerk that the court has set the case for a jury trial.

On the merits, argue that the "gist" of the action – which is nothing more than a will contest dressed up as a civil case for damages – is equitable in nature. As discussed above, the right to a jury trial is guaranteed under the Constitution only if a jury was guaranteed by common law in effect at the time of the Constitution's adoption. *C & K Engineering*, 23 Cal.3d at 8. In general, the common law distinguished between actions at law, which were tried to a jury, and equitable actions, which were not.

*Id.* The distinction between an action at law and one in equity depends upon the nature of the relief sought. *Id.* But the plaintiff's prayer or the label attached to his cause of action is not determinative. *Id.* Indeed, even when money damages are an available remedy, the court must nonetheless determine on the pleadings whether "the gist" of the action sounds in equity or law:

"In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved

and the facts of the particular case – the gist of the action. A jury trial must be granted where the gist of the action is legal, where the action is in reality cognizable at law.' [Citation.] On the other hand, if the action is essentially one in equity and the relief sought 'depends upon the application of equitable doctrines,' the parties are not entitled to a jury trial. [Citations.] [T]he prayer for relief in a particular case is not conclusive (citations). Thus, 'The fact that damages is one of a full range of possible remedies does not guarantee ... the right to a jury ....' [Citations.]" *Id.* At 9.

In *C & K Engineering*, the Supreme Court held that the plaintiff had no right to a jury trial, even though the plaintiff prayed for damages based on breach of contract, in addition to enforcement of defendant's promise under the doctrine of promissory estoppel. *Id.* at 10-11 ("a prayer for damages does not convert what is essentially an equitable action into a legal one for which a jury trial would be available.") The court explained that the "gist" of the action was equitable in nature in that it required a weighing of equitable considerations, which are usually the province of the trial court. *Id.* at 11.

Moreover, the fact that the plaintiff pleads fraud as the basis for recovery is not determinative of whether a right to a jury exists. The courts have been clear that fraud claims may be legal or equitable depending on the nature of the remedy involved. *See, e.g., Tibbitts v. Fife* (1958) 162 Cal.App.2d 568, 572. In *Tibbitts*, the Court rejected the argument that the plaintiff was entitled to a jury in a case alleging that defendant fraudulently induced the decedent to transfer property on the false promise that he would convey that property to the plaintiff on decedent's death. *Id.* The Court explained:

"Both courts of law and equity in proper cases have jurisdiction in cases of fraud, and when the facts constituting the fraud and the relief sought are such as are cognizable in a court of law, the parties are entitled to a jury trial; but where the case as made by the pleadings involves the application of the doctrines of equity and the granting of relief, which can be obtained in a court of equity, and not elsewhere, the parties are not entitled to a jury trial." *Id.* at 573 (citing *Holt v. Parmer* (1951) 106 Cal.App. 329, 332).

Thus, the Court held that the nature of the relief sought by plaintiff, despite his prayer for damages based on fraud, sounded in equity for imposition of a constructive trust. *Id.*

In a case closely on point, the Court of Appeal concluded that the plaintiff had no right to a jury trial in an action praying for money damages based on alleged fraud and breach of fiduciary



duty in the making of an *inter vivos* trust. *Getty v. Getty* (1986) 187 Cal.App.3d 1159, 1176-77. Plaintiff Ronald Getty ("Ronald") alleged that his father, J. Paul Getty ("J. Paul"), made false and fraudulent promises to Ronald and to Ronald's mother that J. Paul would rectify an inequality in the trust and provide for his four children in equal shares. *Id.* at 1169. After a bench trial, the court concluded that there was no fraud upon which Ronald or Ronald's mother relied. *Id.* In his appeal, Ronald argued among other things that he was improperly denied his right to a jury trial because his claim was for damages based on fraud: "Ronald contends that his cause of action is for 'legal fraud with money damages.'" *Id.* at 1175. The Court of Appeal disagreed. Following *C & K Engineering*, the Court reviewed Ronald's complaint and concluded that despite its prayer for money damages for fraud, "relief of the type that Ronald has requested is equitable in nature." *Id.* The Court explained that "the gist" of the action was equitable; that in reality, Ronald sought to impose a constructive trust over trust assets and over gifts to his siblings during the settlor's life. The Court also relied on *Hartman v. Burford* (1966) 242 Cal.App.2d 268, 270. In that case, plaintiff alleged that defendant induced the decedent to make a will based on false representations and fraudulent promises. The Court of Appeal held that the action was equitable in nature and that plaintiff was not entitled to a jury. *Id.*

In order to support your argument that the "gist" of plaintiff's case is equitable, focus on the central purpose of his case. Is plaintiff alleging that your client obtained a share of the estate by fraud? If so, the action sounds in equity, because the appropriate remedy is the imposition of a constructive trust. In support of this conclusion is Civil Code Section 2224, which provides: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Is the plaintiff seeking to invalidate the fraudulently procured instrument? If so, Probate Code Section 8252 provides that the court decides issues of fact concerning the validity of a will: "The court shall try and determine any contested issue of fact that affects the validity of the will."

In a recent case in the Los Angeles Superior Court, the plaintiff successfully avoided a motion to strike the jury by expressly waiving any right to invalidate the trust or to seek recovery from trust assets. The court relied on the fact that the plaintiff affirmed the trust and limited its prayer to money damages from the defendants. Fortunately for plaintiff, defendants were independently wealthy. At first blush, it would seem odd that after a plaintiff proves an instrument was procured by fraud, it could still remain operative. But relevant case law provides that a

plaintiff can elect to affirm the validity of the fraudulently procured instrument and sue, instead, for damages. *Storage Servs. v. Oosterbaan* (1989) 214 Cal.App.3d 498, 511. Nevertheless, when the object of plaintiff's lawsuit is to prevent the defendant from obtaining his undue share of the estate, it seems illogical that the "gist" of the action depends on whether the money comes from one pocket or the other. Money is fungible and whether defendant will have to satisfy a judgment from assets from a will or trust, or his pre-existing bank account, seems to elevate form over substance. Isn't this precisely what the court is supposed to ignore in order to determine the real "gist" of the action?

## VI. CONCLUSION

Is it inherently unfair that some will contests may be reformulated as civil actions and be tried to juries? Or should litigants be free to elect to pursue whatever theories of recovery or remedies that may be viable, and whomever he or she chooses to be the trier of fact? These are questions the Legislature must at least consider. But in any event, trust and estate lawyers must be armed to deal with a growing trend that is bringing juries back to sit in judgment of will contests.

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