



Call for free initial consultation.

916-229-6991

We speak Spanish and Russian.

Main Menu

Practice Areas

The Top 10 Most Common Probate, Trust and Estate Battles

By **Mike Hackard** of Hackard Law posted in **Trust Litigation** on Monday, November 23, 2015.

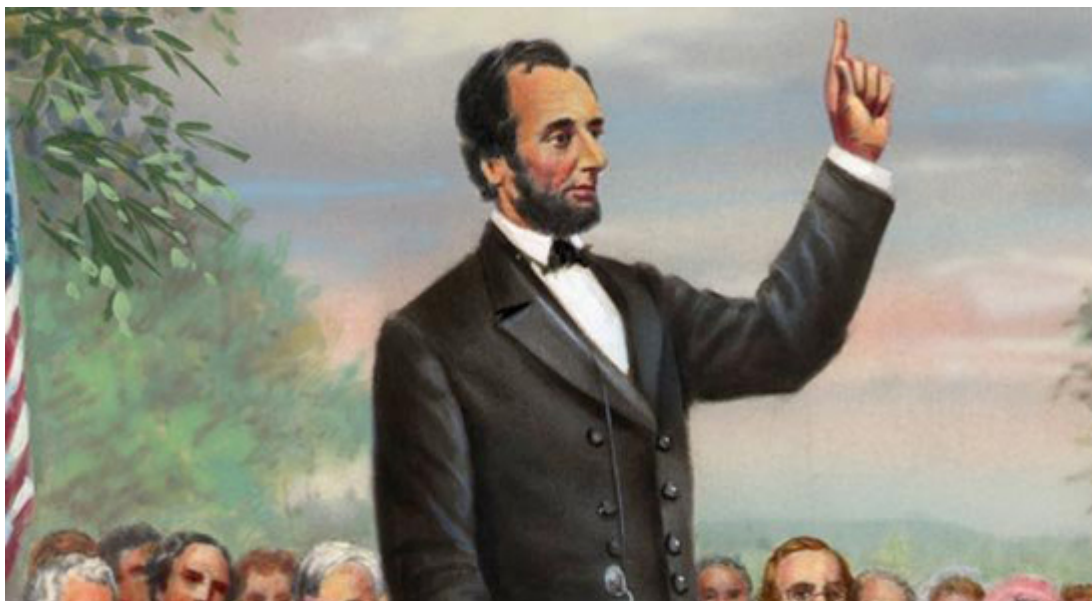


Over years of litigating **probate, trust and estate battles**, our clients frequently ask the question: Do many families go through estate battles like the one we are experiencing?

What first comes to our mind, as a response to the inquiry is Leo Tolstoy's observation from *Anna Karenina*: "All happy families are alike; each unhappy family is unhappy in its own way." Estate litigation battles, often outgrowths of unhappy families, have their own distinctive troubles. That said, the more estate battles we see, the more certain prevalent patterns become evident.

We represent people who challenge the wrongdoing of others in estate-related matters. Familiar grounds of challenge often arise from undue influence and financial elder abuse allegations. Some matters are wrapped up through early efforts at resolution. Other matters defy early resolution. Seemingly intractable matters soon become courthouse proceedings.

Abraham Lincoln **admonished lawyers** to "Never stir up litigation." This is good advice for lawyers and for everyone. If estate disputes can be resolved without litigation, they definitely should be. It is that simple.



"Never stir up litigation. A worse man can scarcely be found than one who does this." --Abraham Lincoln

When estate disputes cannot be resolved by decent compromise, then disputes become cases - cases with court numbers and court timelines. When those who unduly influence estate dispositions and commit financial elder abuse seek to preserve their unjust advantages, we take the estate battle to them. Wrongdoing is not defeated by acquiescence.

In the strategy classic *The Art of War*, Sun Tzu remarked:

It is only one who is thoroughly acquainted with the evils of war that can thoroughly understand the profitable way of carrying it on.

The same principle applies for litigation: only experienced, battle-hardened lawyers can marshal legal resources and seize the initiative without wasting a client's valuable time. Like war, litigation can be a nasty and expensive undertaking - a balance of risks and rewards, where success never comes with a 100% guarantee. An efficient economy of force is necessary to protect and advance client interests, and that's a system best managed by veterans with years in the field.

What, then, are the main actions in litigation - hearkening back to Sun Tzu, we might call them campaigns and operations - that characterize a probate, trust and estate contest? Our own experience and that of other estate litigators provides some useful insights. Our insights are simply taken from our experience with every-day life - they are observations, the spotting of patterns within a sea of facts.

We've identified 10 of the most common probate, trust and estate battles. This is not an exclusive list - others might suggest additions or deletions, and that's according to their good judgment. We hope that this list helps those who may be facing trust or estate battles. This may help to answer the question often posed - Are we the only family that is facing this kind of problem?

1) Petitions against Former Trustees Alleging Wrongful Acquisition and Misappropriation of Trust Assets

These cases can be quite messy. Successor trustees to original settlors or makers of trusts are often family members. Putting together a priority list for designation of successor trustees isn't an easy task for the makers of the trust, and the disclosure of the list to children or other beneficiaries is not always met with ready acceptance.

What can happen when successor trustees take charge of the trust? At the death of the trust maker, the first successor in interest is appointed. This can be a readily accepted choice among heirs, or it can be an object of criticism and disagreement. New purchases of cars, boats, houses and exotic vacations taken by the successor trustee are an invitation to suspicion. We often see the suspicion that trust assets are not being fairly administered - and maybe even wrongfully taken by the successor trustee.

In those cases where family members decide to challenge the actions of the successor trustee, the successor trustee might resign or otherwise be removed from his or her position. Under such circumstances, the new trustee gets to look at accounts and make a determination whether assets were transferred - and if transferred - whether the transfers were the result of undue influence or fraud.

The battleground is then set. Were the asset transfers valid gifts? Were signatures forged? What was the mental capacity of the transferor? What was the health of the transferor? Were the gifts made consistent with long solidified estate plans? The fight is on.

2) Petition for Court Order for Authorization for the Settlement of an Action on Decedent's Behalf

The good news is that cases do settle. Sometimes they settle early, and sometimes late. Sometimes an agreement is reached on the day of trial. When cases settle, the settlements must be memorialized, and a court order effectuating the settlement is the wisest course of action to verify the settlement. Such court orders reserve the power of the court to address any disputes over the settlement.

Disputes can occur over the terms of a settlement agreement. Unforeseen circumstances may arise that are not directly addressed in the agreement. In these cases, if the parties cannot resolve the dispute between themselves, they can return to the Court for the Court's interpretation of the settlement or its enforcement.

3) Petition by Beneficiaries For Instructions Regarding Interpretation of Trust Terms

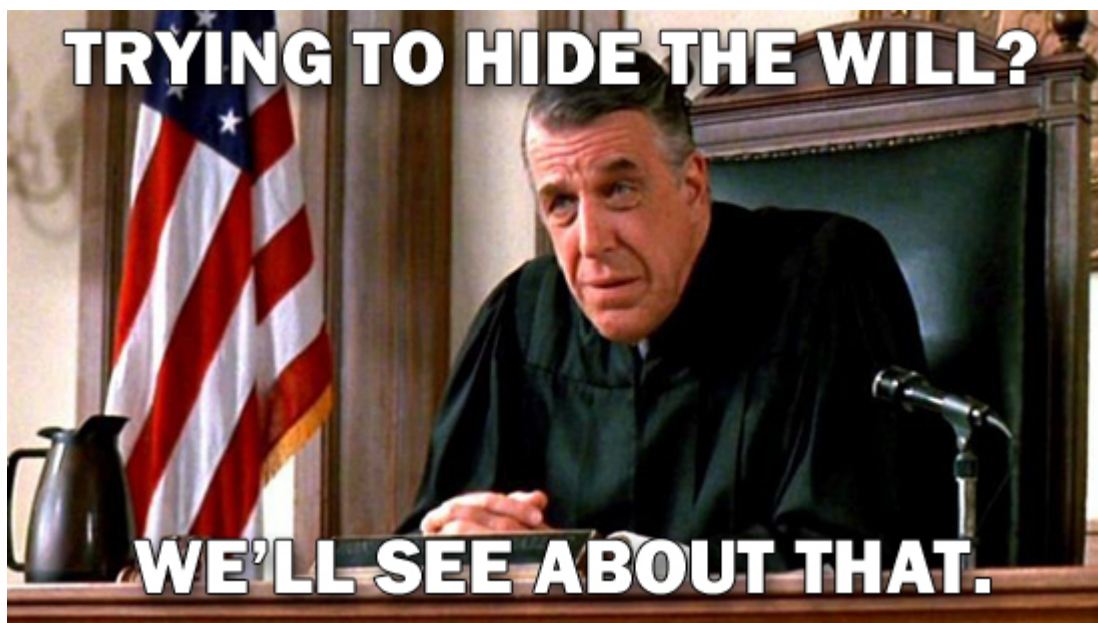
Trust terms are not always clear. There may be a reference to property that is unclear. The distribution of assets to beneficiaries may also be unclear. The arithmetic indicated as to estate divisions may not add up. Life estates can present particular problems. If there is a life estate, who is to pay for maintenance? Taxes? Insurance? The mortgage? Other common issues are whether the value of gifts made prior to death are to be deducted from a beneficiary's share of an estate.

4) Petition To Compel Return of Real Property To Trust, For Breach of Fiduciary Duty, Financial Elder Abuse, Conversion and Imposition of Constructive Trust

This handful of serious allegations can evolve into protracted litigation. These types of petitions generally arise when the trust maker - or his or her appointed trustee - transferred real property to a new owner prior to the trust maker's death. Whether the trustee breached fiduciary duties or took unfair advantage of the trust maker to make a secret profit is part and parcel of these claims. The trustee's duties of reasonable care, undivided loyalty, avoidance of conflict of interest, and preservation of trust property all become points of contention.

5) Notice of Proposed Action (personal representative to take without court supervision)

These provisions of the Probate Code allow for certain actions to be taken without a Court hearing. Such Probate Code provisions allow for more expedited decision-making, when all beneficiaries agree to a course of action.



6) Citation To Appear At Hearing to Answer Interrogatories (to be examined under oath or both)

This is what I've colloquially referenced as a scenario of "**We'll see about that.**" We often encounter trustees, executors or family members who think they can suppress the existence of a trust or will. I suppose that they might think that possession is nine-tenths of the law - it isn't. We can bring people into Court who have estate planning documents. We can have them examined under oath or ordered to answer questions that are posed to them. The availability of this remedy usually cures the document possessor's overconfidence, and the documents are relinquished to our clients.

7) Petition For Order Removing Co-Trustee and Appointing Fiduciary as Successor Trustee and Bringing Trust Under Court Supervision

We use this process when there are cotrustees that don't get along - for whatever reason. Once you're a trustee or cotrustee, it is not a good idea "to hide the ball." Yet this happens. When we represent an active cotrustee who cannot get information or performance from the other cotrustee, this step comes into consideration. Another part of the process is the appointment of a licensed California fiduciary as the replacement for the errant cotrustee. Probate Courts generally like this approach as an alternative resolution to the paralysis induced when cotrustees **cannot cooperate.**

8) Ex Parte Petition for Order Suspending the Powers of Cotrustee (and appointing fiduciary as temporary successor trustee and bringing trust under court supervision)

This has all the attributes of the above Petition for Removal, but it reflects an urgency to act. Court rules require a demonstration of urgency for ex parte petitions. In most cases, suspension can occur because of misuse of assets or the danger of the loss of assets. An interim trustee - a licensed fiduciary - can come in and help protect assets during the time period between the fiduciary's appointment and the Court hearing on the appointment of a permanent cotrustee.

9) Petition for Order Suspending Trustee's Powers (appointing temporary trustee, compelling a forensic accounting, instructing trustee on real property)

This is similar to the Ex Parte Petition referenced above, but it is generally scheduled for a Court hearing two or three months after filing. The unique part of this is the appointment of a forensic accountant to review trust records and account for receipts and disbursements.

10) Petition to invalidate a trust amendment on forgery and **undue influence.** No trust funds for legal defense.

It's a nightmare when trust assets are spent defending what ultimately turns out to be wrongful conduct. This type of petition asks the Court (and it will require follow up Orders) to prevent the expenditure of trust funds to defend an action to set aside a trust amendment based on forgery and undue influence. The concept is clear - its implementation is not. There can be skirmishes and all-out battles to stop the payment of trust money for a defense that benefits only the trustee (usually as a beneficiary) and not the trust itself.

Our experience is that once the decision is made to litigate, it is critical to be organized, focused and aware that litigation itself is not a middle ground or a halfway solution. It is a **path to victory** - a path that may result in resolution before trial - but resolution is possible only because a competent legal team is forging that path to victory.



Tough Chicago cop Jimmy Malone took zero nonsense from gangsters in *The Untouchables*. The same philosophy applies to bad actors in estate cases.

In cases of egregious wrongdoing, it is worthwhile to consider Sean Connery's character, Irish-American policeman Jimmy Malone, in *The Untouchables*. In speaking about the 20th Century's biggest gangster, Malone reflected:

You wanna know how to get Capone? They pull a knife, you pull a gun. He sends one of yours to the hospital, you send one of his to the morgue.

Similar statements are currently being made about how the Western world should deal with terror groups like the Islamic State. Yet estate wrongdoers are not Al Capone, and they're not the Islamic State. Remedies against estate wrongdoers will not involve guns or knives, but the availability of punitive damages against bad actors is the litigation equivalent of bringing a gun to a knife fight.

Litigation is not violent, but its repercussions can change lives - repercussions that should have first been considered by the perpetrator at the time of the wrongdoing, yet only later considered during the process of litigation. We are civilized because we have rules, and we endeavor to follow those rules. Innocent people cheated by the wrongdoing of estate predators deserve justice. Punitive damages can punish wrongdoers who have been guilty of oppression, fraud, or malice.

Punitive damage awards are used to both punish a defendant (wrongdoer) and make an example of him - an example that the community at large can see. Findings by clear and convincing evidence of malice, oppression or fraud are necessary triggers to ensure the Court's imposition of punitive damages.



California law defines these terms as:

- (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
- (2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
- (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

If perpetrators of estate fraud are planning to get away with their dirty deeds, they should think twice. All it takes is a skilled veteran litigator to stop them cold, returning assets to the rightful heirs.



Top 5 Probate Battles in California Estate Litigation

from Hackard Law

03:16

Top 5 Probate Battles in California Estate Litigation from Hackard Law on Vimeo.

Tags: [Estate & Probate Administration](#), [Estate Law](#), [Estate Litigation](#), [Trust Litigation](#)

Related Posts: [LA Trust Beneficiaries | Lawsuits Against Bad Trustees, Trust Disputes | Elderly Parents and the Power of Benevolence](#), [ABCs of California Trust, Probate & Estate Disputes | 2018, 2018 Predictions | California Estate & Trust Litigation](#)

Share on:

2 Comments

Lori Abbott-Secrest

December 10, 2015 at 8:31 PM

My husband and I are literally living this nightmare as we speak. And we can't find an attorney to save our lives. We live in a small town and are being abused by our court system.

If you can help then please please get ahold of me ASAP

THANK YOU Kindly, Lori Abbott-Secrest

Jade Brunet

September 16, 2016 at 4:10 PM

Thank you for this information about common probate, trust, and estate battles. I did not know that so many petitions existed to complicate these cases. I think a lawyer would be a beneficial choice in these situations to make sure that everyone is represented and that things turn out as correct as possible.

Leave a comment

Name (required)

E-mail Address (required)

Website

Comment here

Submit Comment

CATEGORIES

[Alzheimers \(12\)](#)

[Business & Commercial Law \(1\)](#)

[Dependent Adult Financial Abuse \(2\)](#)

[Elder Abuse \(41\)](#)

[Elder Financial Abuse \(88\)](#)

[Estate & Probate Litigation \(124\)](#)

[Estate Administration \(25\)](#)

[Guarantor Defense Litigation \(5\)](#)

[Legal Advocacy \(10\)](#)

[Legal Update \(58\)](#)

[Litigation & Appeals \(2\)](#)

[Personal Injury \(64\)](#)

[Probate & Estate Administration \(19\)](#)

[Trust Litigation \(117\)](#)

[Wrongful Death \(17\)](#)

ARCHIVES

[February 2018 \(3\)](#)

[January 2018 \(14\)](#)

[December 2017 \(11\)](#)

[November 2017 \(10\)](#)

[October 2017 \(16\)](#)

[September 2017 \(17\)](#)

[August 2017 \(25\)](#)

[July 2017 \(10\)](#)

[June 2017 \(13\)](#)

[May 2017 \(15\)](#)

[April 2017 \(11\)](#)

March 2017 (13)

Complete Archives

RECENT POSTS

Too Good to Be True | Estate Delusions of Grandeur

Interview with Steve Pomeranz | How to Detect Elder Financial Abuse

Michael Hackard on MarketWatch | Elder Financial Abuse

Humor from on High | U.S. Supreme Court Musings

How can we help? Contact Us.

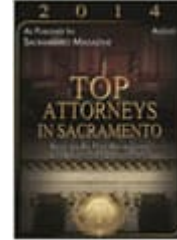
Bold labels are required.

☐ **I have read the** disclaimer Privacy Policy

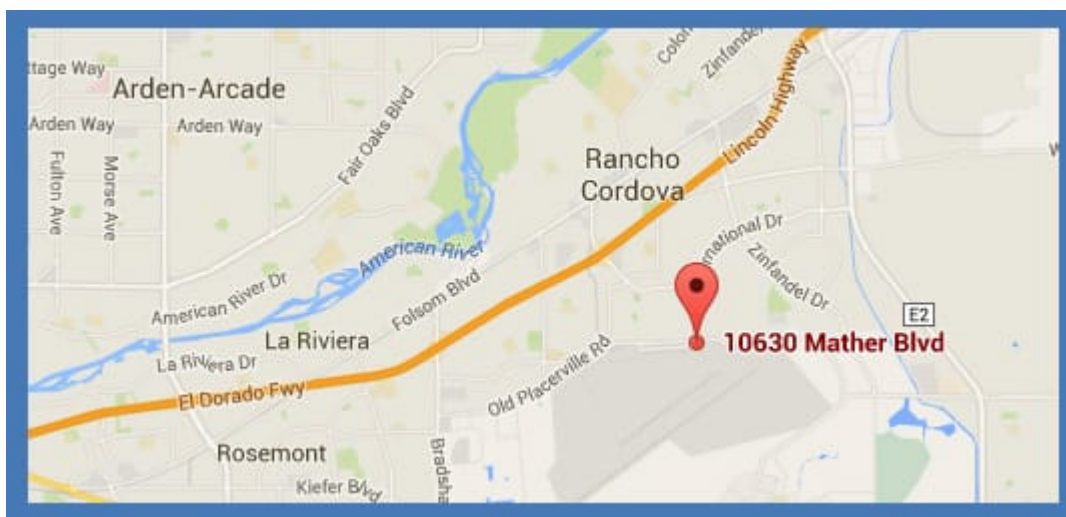
Request free initial consultation

Subscribe to This Blog's Feed

FindLaw. Network



*AV Preeminent is a certification mark of Reed Elsevier Properties Inc., used in accordance with the Martindale-Hubbell certification procedures, standards and policies. Martindale-Hubbell is the facilitator of a peer review rating process. Ratings reflect the confidential opinions of members of the Bar and the judiciary. Martindale-Hubbell ratings fall into two categories - legal ability and general ethical standards.



Hackard Law
A Professional Law Corporation

10630 Mather Boulevard
Mather, CA 95655

Phone: 916-229-6991

Fax: 916-226-5177

Mather Law Office Map

Available weekends and evenings by appointment

© 2018 by [Hackard Law](#). All rights reserved. [Disclaimer](#) [Privacy Policy](#) | [Business Development Solutions](#)
by [FindLaw](#), part of Thomson Reuters.

