TRUST & ESTATE LITIGATION:

A Guide for Beneficiaries & Heirs

From the Law Offices of
Daniel A. Hunt

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How & Why to Sue a Trustee

Litigation is the process of taking legal action against someone else. Trust and estate litigation usually involves trust beneficiaries taking legal action against a trustee. If you're a beneficiary wondering if you should invest time and money to pursue legal action against a "bad trustee", you probably want to know if you have a case. Understanding why and how to sue a trustee can help you make the best decision for your unique personal circumstances.

Why Sue a Trustee?

Generally, suits against trustees tend to be brought by trust beneficiaries who want to accomplish one or more of these objectives:

1. Remove a trustee and replace them with a more appropriate person.
2. Prompt a trustee to distribute trust assets and complete the trust administration.
3. Recover trust funds that the trustee has misappropriated.
4. Obtain a copy of the trust or other trust-related information that has been withheld (like tax returns, an accounting of trust assets, etc.).
5. Obtain an interpretation of an ambiguous trust term and establish the Settlor's intent.
6. Propose that the trust instrument was a product of fraud, duress, or undue influence.

Potentially Legitimate Reasons to Sue a Trustee

Before you secure legal representation, you may be wondering, "Do I have a legitimate case?" Here are some common reasons lawsuits can be successfully brought against a trustee.

1. **Breach of trust:** This means the trustee is administering the trust in a manner that violates the terms of the trust instrument. For example, if the trust directed that a beneficiary's distribution was to be paid outright, but the trustee is attempting to hold those funds "in trust" (meaning to manage them on behalf of the beneficiary), that would be a breach of trust.

2. **Breach of Fiduciary Duty**: A trustee has numerous duties in their role under the California Probate Code. A violation of these duties is called a "Breach of Fiduciary Duty". For example, a trustee who favors one beneficiary (or themself, if they're also a beneficiary) over another has violated their Duty to Deal Impartially with Beneficiaries.
3. **Misappropriation of trust funds**: This means the trustee has been paying for things that don't directly benefit the trust. For example, if the trustee has been using trust funds to purchase themself designer handbags or a new Lexus, that would be a misappropriation of trust funds.
4. **Mismanagement of trust funds:** This means the trustee is failing to make trust property productive or incurring economic waste. If the trustee fails to address poorly performing trust investments, that is an example of mismanaging trust funds.
5. **Malfeasance:** This means the trustee has acted "in bad faith", or done something that is purposely injurious to the beneficiary. An example of malfeasance could be a trustee who donates trust assets in a beneficiary's name to a political organization they oppose. (Yes, we've seen this happen in real life.)
6. **Fraud**: Fraud means that the trustee has misrepresented a material fact intending to mislead or deprive. For example, a trustee is committing fraud if they lie to a trust beneficiary and tell them that no trust exists.

Illegitimate Reasons to Sue a Trustee

While there are many legally valid reasons to sue a trustee, your case probably won't get very far in the following situations:

- The Settlor disinherited you from their estate or left you less than other beneficiaries in a properly executed estate plan. While it may not feel fair to be disinherited or get less than others, you can't sue anyone over this decision unless the trust was a product of fraud, duress, or undue influence.
- The trustee took a reasonable trustee's fee which decreased the amount of your inheritance. Trustees are entitled to reasonable compensation for the work they perform in this role.

Two Key Questions to Consider

Think you have a strong legal case? Here are two important questions to consider before taking legal action:

1. **Do you have sufficient evidence?** The person suing a trustee bears the "burden of proof" to prove that the trustee has behaved unethically and should be removed. If you present insufficient evidence, the judge will likely dismiss your suit.
2. **Does the trust contain a "no-contest clause"?** This common trust clause is intended to discourage frivolous attempts to overthrow estate plans. You may find yourself disinherited if you bring a suit. Be sure to have an attorney review the trust instrument (if you have a copy) before bringing a suit and discuss with them the ramifications of legal action on your inheritance.

How to Sue a Trustee

If you decide that suing a trustee is the right choice for you, here are the basic steps of a typical trust litigation case:

1. **Seek legal representation.** Trust and estate litigation is a highly specialized niche. Most estate planning law firms either don't handle litigation matters at all or have very little experience doing so. For optimal results, find an attorney who is experienced in trust and estate litigation specifically.
2. **File a petition with the court.** California Probate Code §17200 is the most common code section used to petition the court for relief in matters like these. But other code sections may apply more accurately to your case. An experienced trust litigator can help you select the right one and maximize your chances of success.
3. **Serve the petition** on the trustee or the attorney/law firm representing them.
4. **Appear at a court hearing** with your attorney to present your case to the judge.
5. **The judge's ruling dictates what comes next.** The judge may grant your petition, deny it, or set an evidentiary hearing to collect more information. Alternatively, both parties may schedule a settlement conference or use a professional mediator to try to work out a solution.

Who Pays the Legal Fees?

If you're a beneficiary considering suing a trustee, you will need to find assets to fund the suit on your own. Eventually, you may be able to ask the court for reimbursement of your legal fees. But you will need to pay out of pocket to retain legal counsel and start the litigation process.

Mediation vs. Arbitration

Mediation vs. arbitration: what are they and which option is right for you? When conflict arises in a trust administration, some trustees and beneficiaries try mediation or arbitration before or instead of filing a formal lawsuit. Mediation and arbitration are two forms of alternative dispute resolution (ADR). Both provide a way to privately resolve the conflict outside of a public court proceeding. ADRs can be quicker and less expensive alternatives to an expensive formal lawsuit.

What is Mediation?

Mediation is an informal arrangement in which a neutral third party acts as a mediator between the two (or more) conflicting parties. Each party attends a scheduled mediation with their attorney (if they have retained one) and presents their side. The mediator offers suggestions to help resolve the dispute.

While most mediators are attorneys or retired judges, they are not supposed to give legal advice. Mediators do not issue orders, find fault, or make determinations. They do not have the authority to make legally-binding decisions for the parties, but rather serve as a guide for the negotiations.

Common Steps of Mediation

Mediation doesn't follow a formal process like arbitration or a court proceeding. But mediations often follow these basic steps:

1. The mediator introduces themself and explains the rules and goals of mediation.
2. Each party gets the chance to explain the conflict as they see it without interruption from the other party.
3. The mediator often meets individually with each party, going back and forth to work out the issues.
4. If an agreement is reached, the mediator writes it down and all parties sign the agreement, including attorneys if they've retained legal counsel.
5. If an agreement is not reached, the mediator may conclude by summarizing the points on which the parties did agree and advise them of their next steps.

Pros and Cons of Mediation

Mediation is usually the most cost-effective approach to dispute resolution. In California, the cost for mediation is around $3,000- $5,000 for a full day, while trust litigation in the form of a trial can cost many times more than that amount. The mediation process tends to be relatively quick, often lasting only a day or two.

Mediation invites both parties to actively participate in finding a solution they find acceptable. This offers the parties more control over the outcome than arbitration or a court proceeding, where an arbitrator or judge makes the final decision.

The downside to mediation is that it does not always yield a resolution to the conflict. Typically in mediation, there is no winner or loser. If the parties fail to reach a mutually-agreed-upon solution, then the matter may proceed to litigation.

What is Arbitration?

Compared with the informality of mediation, arbitration follows more formal rules of procedure. Both parties should agree on the chosen arbitrator, who should have some degree of experience with trust and estate law.

Like a mediator, an arbitrator is a neutral third party who listens to both parties present their side. Unlike a mediator, an arbitrator makes a decision that is typically legally binding to both parties.

Commons Steps of Arbitration

The arbitration process generally follows the following steps:

1. One party sends a document called “Request for Arbitration” or “Notice to Arbitrate” to the other party. This document sets forth the nature of the conflict in writing.
2. The other party has a period of time to respond in writing and indicate if they agree to resolve the dispute via arbitration. If so, the arbitration process begins.
3. Both parties should select a mutually agreeable arbitrator.
4. The arbitration will involve one or more hearings before an arbitrator. Both parties’ lawyers may present their arguments and have the chance to question the other party’s witnesses and experts.
5. After the hearing, the arbitrator offers a legally binding decision (assuming binding arbitration has been selected) that determines the rights and obligations of the parties.

Pros and Cons of Arbitration

Because the arbitrator's decision is final, arbitration eliminates the risk of a formal court proceeding. But the arbitrator may make a decision that is disagreeable to one or both parties. In our experience, both parties often walk away feeling that the decision made was unfair. The decision is often arbitrary, as the name indicates.

Arbitration is typically more expensive than mediation. Depending on the length of the arbitration, the cost could be tens of thousands of dollars. An arbitration may last anywhere from one day to a week or more.

Both mediation and arbitration offer benefits and risks to those experiencing conflict in a trust or estate administration. Our office typically recommends mediation as a superior option over arbitration, although individual circumstances may vary.

If you need a referral to an experienced mediator for a trust/estate matter, check out our Referral Hub or try the American Arbitration Association's Find a Mediator tool.


Let's compare
Mediation & Arbitration
Mediation
Arbitration
A neutral third party listens to both sides and helps the parties negotiate a compromise.
A neutral third party listens to both sides and makes a final, legally binding decision.
Cost: Around $3,000-5,000 in California.
Cost: Varies by length; could be tens of thousands of dollars.
Length: Usually 1-2 days.
Length: From 1 day to a week or more.
Risk: If no agreement is reached, the dispute may result in litigation.
Risk: The arbitrator's final decision may be disagreeable to one or both parties.
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What is Discovery?

When a trust or estate conflict evolves into litigation, one of the first steps in preparing for a trial is formal discovery. Discovery is a legal procedure in which both sides of a lawsuit discover relevant facts of the case in order to prepare for trial. Whether you're the trustee who is being sued or a trust beneficiary suing a trustee, you'll need to understand what facts can and can't be discovered and how to best approach the discovery process.

Common Forms of Discovery in Trust Litigation

The basic rule of discovery is: You can request any information that is even remotely relevant to the issues within the lawsuit, so long as that information isn't "privileged" or otherwise legally protected.

Here are some of the common tools used in a formal discovery, divided into two categories of written and oral:

I. Written Discovery

- **Interrogatories:** Written questions directed to the other side. The other party must provide written answers under oath which can be used at trial.
- **Requests for production of documents:** Written requests for a specific document or a class of documents likely to be relevant to your case.
- **Requests for Admissions:** Written requests to the other party to admit that a statement is true so the case can focus on the main issues being disputed. Responses can be used at trial.
- **Subpoenas**: Written court orders requiring one side or a third party to testify or produce physical evidence for inspection, such as medical, bank, or business records.

II. Oral Discovery

- **Depositions:** Oral, in-person interviews with a party in the case or a third party directly involved in the case. The person being deposed must answer under oath. A court reporter typically writes down everything that is said and produces a written transcript.

What Is Excluded from Discovery?

Some "privileged" information remains off-limits during the discovery process. Generally, this includes:

- Attorney-client communication
- The attorney's work product in preparing their legal case
- Trial preparation materials
- Information that is irrelevant to the specific case at hand

California Attorneys are bound by the California State Bar's Rules of Professional Conduct to engage in ethical discovery methods.

Discovery Time Frame

The total length of the discovery process can vary widely. The following requirements must be met before the discovery process can begin:

1. One of the parties must file an action with the court.
2. That party must personally serve the court papers to the opposing party.
3. Ten (10) days must pass after personal service has occurred before discovery can begin.

For written discovery, the other party has 30 days to respond, plus 5 days to allow for mailing.

For subpoenas to third parties (like medical or bank records), the Petitioner must issue a document to the person whose documents are requested called "Notice to the Consumer". That person will have 15 days to object to the request. After that time period has passed, assuming no objections were made, most institutions typically respond within 15-20 days.

Cost of Discovery in Trust Litigation

All parties pay the cost of their own discovery. If a party later files a Motion to Compel (asking the court to enforce a request for information relevant to a case) and the court grants that motion, then the prevailing party may be entitled to attorney's fees.

For both parties, it's best to be forthcoming and provide the requested information; otherwise, you risk paying the opposition's attorney fees.

Discovery Can Save Money Later On

A full-blown court trial is often long and expensive. Discovery can be cost-effective in the big picture, especially if it leads to the parties settling. While discovery can be expensive, it can actually save money by leading the parties to settle the case either before the trial starts or before the end of a full trial.

If you think of the trial as a poker game, discovery is like getting to peek at the opposing player's cards before the game begins. Through discovery, both sides get a sense of the

strength of their side's position. If you clearly have a winning hand, the opposition may opt to fold before the game even begins.

Discovery Tips for Trust Beneficiaries

If you are a trust beneficiary involved in discovery, you will "bear the burden of proof". This means that you carry the responsibility to show evidence that the trustee has mishandled the trust administration.

Because of this, you will likely be the party making the bulk of the discovery requests. As you approach discovery, think through exactly what information you want to request and what questions you would like answered. Communicate all of this to your trust litigation lawyer.

Remember that discovery often requires knowledge of evidence rules and other technical legal strategies. If discovery becomes necessary, you will want to hire an experienced trust and estate litigator to represent you and build your case.

What is a Mandatory Settlement Conference (MSC)?

If you're involved in a trust litigation matter, you may be surprised to discover that before a trial, you must first attend a court-ordered Mandatory Settlement Conference (MSC). Rest assured that an MSC is a normal part of the trust and estate litigation process. Before your MSC, you should understand the purpose of a Mandatory Settlement Conference, what to expect, and how it can help both parties.

What is the Purpose of a Mandatory Settlement Conference?

A Mandatory Settlement Conference is an opportunity for all the parties involved in a dispute to come together to try to resolve the issue without a trial. Trials are long, expensive, and emotionally taxing. It's in the best interest of everyone involved to avoid a trial if possible. An MSC is one last chance to try to find a solution without a trial.

California Rules for Mandatory Settlement Conferences

Not all states require an MSC prior to trial, but California is one state that does. This helps to reduce the strain on the overburdened court system in our state. California Rule of Court 3.1380 lays out the requirements for an MSC. Here's a summary:

Who Sets the Conference

The rule allows for the court to order one or more MSCs. Any party can also request one or more MSCs.

Who Attends the Conference

The attorneys, both parties, and any person with full authority to settle the case must personally attend the conference, "unless excused by the court for good cause."

Restrictions on MSCs

The rule prohibits the court from appointing a person serving as a mediator in the same action to conduct the MSC or to appoint a person to conduct mediation.

Settlement Conference Statement

No less than 5 days before the initial date for the settlement conference, both parties must submit a Settlement Conference Statement. This statement must include these 4 components at a minimum:

1. **Demand:** A "good faith" (honest or sincere) settlement demand.
2. **List of Damages:** An itemized list of damages, both economic and non-economic (such as emotional anguish, health issues due to stress, and so on).
3. **Offer:** A good faith offer by each defendant.
4. **Facts + Law:** A statement identifying and discussing in detail all facts and law pertaining to the issues of liability and damages involved in the case as seen by that party.

Local rules may impose additional requirements on the Settlement Conference Statement; these will vary by county.

Mandatory Settlement Conference Hearing

On the day of your Mandatory Settlement Conference, both parties will attend a hearing at the courthouse presided over by a judge. It may be the judge managing the case to this point or a temporary judge. The conference is generally shorter than mediation and less likely to produce an agreement. A judge will be less forceful than a mediator at attempting to resolve the case. But if the parties were already close to an agreement, it may still be possible to reach one at this stage.

Each judge will have their own method of conducting the conference, but most will discuss:

1. The facts on which all parties agree.
2. Any facts on which they disagree.
3. What each party needs and wants to settle the case.

Then the judge and the parties will try to find a solution that will be acceptable to both sides. The judge does not have the authority to make binding judgments but rather serves as a facilitator of the negotiation.

If the parties are able to find a solution, then a settlement agreement can be written (a court reporter is always handy to have ready) and signed by both parties, then submitted to the judge who can enter it as an order. If the parties do not reach an agreement, the case will proceed to a trial.

Cost

There is no cost for the settlement conference itself, but both parties will need to pay their attorneys for their time in preparing for and attending the conference.

What to Expect at your Trust & Estate Litigation Trial

If you're a trustee or a beneficiary involved in a trust or estate conflict that is heading towards trial, you may be wondering what to expect in a trust & estate litigation trial. Will it be like an episode of "Law & Order"? Some aspects of your trial may be similar to what you've seen in movies or tv shows. But trust and estate cases are unique in some important

ways from the criminal and civil cases often depicted in legal dramas. Before your trial begins, you should understand the format and stages of a trust and estate litigation trial.

Trust & Estate Litigation = Court Trial

Most legal dramas focus on criminal or civil legal cases. Both of these often utilize a "jury trial" format in which a group of peers hears the evidence and makes a decision at the end of the trial. By contrast, trust and estate cases are heard in probate court, which uses "court trials" or "bench trials". In a court trial, a judge hears the evidence and makes a ruling. (The exception is elder abuse cases, which can use a jury.)

Decoding Trial Terminology

Before we explain what happens in a trust & estate litigation trial, it will be helpful to learn the correct terminology for both parties. The plaintiff (person bringing the case) is called "the Petitioner" since they are petitioning the court for assistance. The defendant (person being sued or accused of wrongdoing) is called "the Respondent".

For example, in a trust or will contest, the Petitioner is usually the party challenging the validity of the document and the Respondent is defending the document's validity.

4 Stages of a Trust & Estate Litigation Trial

A typical court trial contains 4 main elements: opening statements, witness testimonies and introduction of evidence, and finally closing arguments.

Step 1: Opening Statements

The trial starts with each side offering an opening statement. Each opening statement presents an overview of the case facts as that party sees them. Your opening statement should stick to the case facts and your theory of the case. The goal is to depict your position as reasonable, logical, and legally sound so that the judge will side with you.

Step 2: Presenting Your Case

After opening statements, the Petitioner will present their case first. This may include evidence collected during the discovery process, such as written answers to questions they've asked the opposition; relevant documents they've obtained, written admissions from the opposition that certain facts are true; physical evidence obtained via subpoena; and deposition transcripts from interviews with the other party or a third party. These are all typically presented through the use of witnesses.

The Petitioner starts by calling their first witness for direct examination. The Petitioner's attorney will ask the witness questions designed to draw out relevant case facts. Once the direct examination ends, the Respondent's attorney can cross-examine the witness, challenging parts of their testimony or trying to elicit additional facts previously omitted. After the cross examination, the opposing party's attorney can question their witnesses again, allowing them to explain themselves more thoroughly.

Once the Petitioner has called their last witness and finished presenting evidence, the Petitioner will rest their case. If the court decides that the Petitioner hasn't met "their burden of proof" (meaning they presented insufficient supporting evidence), the judge in rare cases may decide in favor of the Respondent without requiring them to present a defense. But if the Petitioner has presented sufficient evidence to make a case, then the Respondent must now present their case and call their own witnesses.

Rest assured that attorney-client privilege protects any communications you have had with your attorney regarding the case. That information cannot be presented as evidence in a court trial.

Step 3: Closing Arguments

After both parties have finished presenting their cases, the trial concludes with closing arguments. A closing statement should be very persuasive, as this is your last chance to convince the judge that your side should win.

Step 4: Judge's Decision

Finally, the judge will make their ruling on the case issues. The judge may give a verbal ruling on the spot, or will "take the case under submission" and issue a decision within 90 days. The next chapter will explain what comes after trial.

What Happens Post-Trial?

What happens post-trial in trust and estate litigation? What happens next will depend on whether the judge sided with you or with the opposing party. If the judge sided with you, your attorney needs to file a Notice of Entry of Order and serve it on all parties. If the judge sided with the opposing party and you wish to appeal the decision, you need to understand the process and time frame for appeals.

Judge's Post-Trial Decision

If the judge didn't provide a verbal decision at the conclusion of your trust & estate litigation trial, they likely took the matter under submission. The procedure for communicating the judge's decision varies somewhat from county to county. In general, within 90 days, the judge will post their ruling on the court record. This is usually available online in most counties. After an order of the court has been issued, a courtroom clerk will also mail a copy to all parties.

Filing a Notice of Entry of Order in Trust & Estate Litigation

If the judge sided with you in their decision, your party should file a Notice of Entry of Order and serve it upon all parties within 60 days. This document informs all parties of the court's order or judgment and triggers important deadlines for post-ruling procedures, including filing an appeal.

When Will Changes Occur?

If the judge sided with the Petitioner, when will the changes they requested take place? This will depend on what changes they requested in their petition.

If the Petitioner requested that the trustee be removed and replaced, that will happen immediately, if granted. Collecting assets is usually more complicated, such as when a trustee or beneficiary stole trust assets that now must be returned to the trust. In order to do this, the Petitioner may need to:

- Seek for the trustee to turn over trust accounts to the new trustee or beneficiaries.
- Arrange for deeds to be drafted and recorded to transfer real property.
- Create a plan to collect money judgment against the personal assets of a trustee or beneficiary (for example, wage garnishments or seizing bank accounts).

Requirements to Appeal the Decision

What happens if the judge didn't side with you? Can you appeal that decision? If the judge didn't side with you in the trial, you may be able to appeal successfully if you meet two specific requirements:

1. **A court reporter was present for the whole hearing.** This means there is a written record of the court proceedings that can be referenced. If there is no record to appeal from, then your appeal is likely doomed before it even gets started.
2. **There is an appealable issue.** Appealable issues include an error in the stated law during the hearing, a procedural issue during the trial, or "overreaching" in the judge's discretion. Note that the latter is the most difficult to prove.

Steps to Appeal the Decision

In order to appeal a judge's decision post-trial, you should do the following things:

- Hire an attorney who handles appeals.
- File a Notice of Appeal within 60 days of the prevailing party filing a Notice of Entry of Order.

- Obtain a copy of the court records.
- Meet multiple deadlines to submit paperwork to the court and serve on the other party.

While it may be possible to appeal a judge's decision post-trial if you meet the requirements, should you? Our professional experience has shown that appealing a judge's decision after a trust & estate litigation trial is a difficult process, expensive, and carries a low probability of success.

This is why it's crucial to hire an experienced litigator who can guide you through the litigation process and help you achieve the best possible outcome in your situation. A good litigator will advise you to take actions that will benefit YOU, rather than encouraging you to spend the most money possible on attorney's fees.

Timing of a Trust & Estate Litigation Trial

Understanding the timing of a trust & estate litigation case can be challenging. But before your trial begins, it will be useful to establish realistic time frames for each step of the process, including court hearings, discovery, potential delays that may occur, and when you can expect to actually have your case heard. This will help you see the big picture when it comes to your trust & estate litigation case.

Before the Trial

All trust & estate litigation trials are preceded by several preliminary court hearings. After the Petitioner files their petition with the court, the court will give a hearing date for the matter to be heard. This date must be at least 30 days after the date the petition was filed but is often set for 45-90 days later (depending on court availability).

All interested parties have the right to appear at that hearing and object to the petition. If a party does come to the initial hearing and orally objects to the petition, then the court usually grants additional time (usually 60 days or so) for them to prepare and file a written objection.

Next, the court allows time for the parties to conduct discovery. This process can take another 3-6 months or more, depending on the complexity of the case.

Once it becomes clear that the parties will be unable to reach a resolution on their own, the court will either set a date for the trial or hold a "trial setting conference" where a trial date is selected. In total, it can take from 6-12 months before you receive a trial date. In the time of COVID, this can actually take much longer, depending on the county's criminal proceedings which take precedence over civil matters.

Finally, in almost every county in California, you will be required to participate in a mandatory settlement conference prior to your trial.

Timing of Your Trust & Estate Litigation Trial

In a previous chapter, we explained the difference between a jury trial and a court/bench trial. As we explained, trust and estate litigation trials are bench trials with the trier of fact being a judge, not a jury.

Jury trials tend to proceed nonstop from start to finish, out of sensitivity to the time constraints on the jurors involved. Court trials operate a little differently, and you may experience less continuity due to the court's schedule. Court trials are frequently broken up into multiple shorter court sessions over the course of several days or even weeks. If a department only hears trials on Friday afternoons, for example, it may take several weeks to complete your trial.

Potential Delays from the Court

Many more issues may arise during your case to cause delays. As mentioned, courts will give preference to a criminal trial. That's because the accused in criminal cases have a constitutional right to a speedy trial, while civil litigants do not have the same right.

The court will want to have a narrow scope of what issues are being tried, so this results in multiple hearings and motions typically before a matter is ready for trial. With so many litigants requesting trial dates, but many fewer actually using them, it results in a trial calendar that is constantly in flux.

The court procedures can seem taxing and the whole process can feel frustratingly slow to the parties involved. Keep in mind that the California Rules of Court exist to create a fair playing field for both sides. Both the Petitioner and Respondent receive equal opportunity to present their evidence and argue their points on the issues at hand. That way, when the judge makes a final decision, no one can claim that the ruling was hasty or unfair.

Potential Delays from the Parties + Witnesses

Besides the court system, the involved parties and third-party witnesses may cause the process to be delayed. For example, if one party refuses to answer discovery properly, then the other party must file discovery motions in order to ask the court to compel the other party to divulge the requested information.

Typically, parties are required to resolve any discovery motions before trial. All discovery needs to be completed 30 days before the original trial date. Even if the trial is moved, discovery is to be completed 30 days before the original date set for trial.

Taking depositions from third-party witnesses can also cause delays. Take, for example, a witness who is hiding out and trying to avoid being served a subpoena, or a witness who lacks a permanent address. It takes extra time to track down and serve these kinds of witnesses.

If a witness or a party lives outside of California, then you'll need to take extra steps to arrange to take their deposition. Travel, lodging, transportation, and scheduling a court reporter from another jurisdiction to attend the deposition all require extra time and planning.

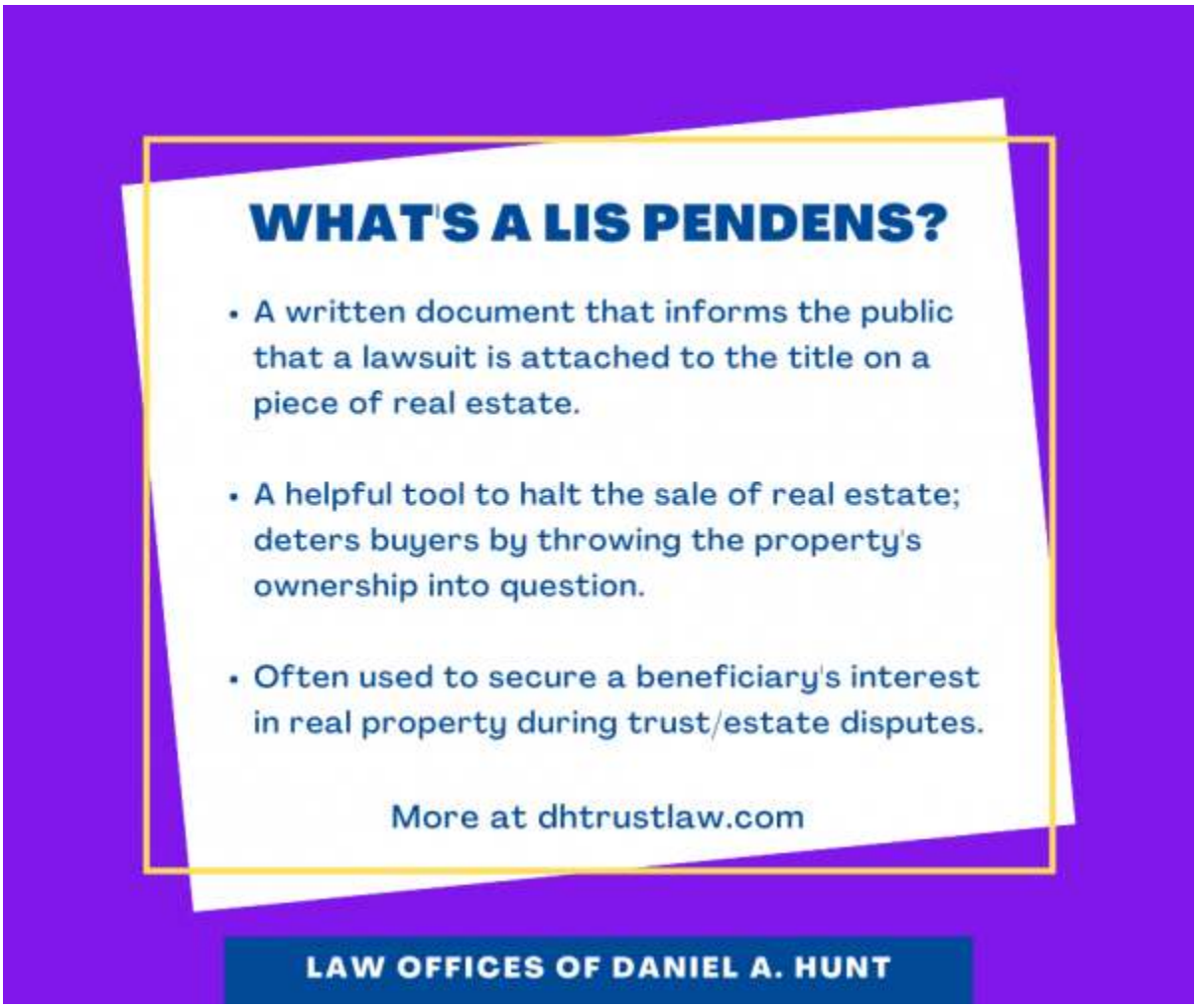
Total Timing of a Trust & Estate Litigation Case

If you were thinking that your California trust & estate litigation case would be resolved in a few months, you may want to reconsider that notion. From start to finish, a more realistic time frame would be a minimum of a year and possibly 1.5-3 years before a resolution is reached if a trial is required.

It's easy to understand why many clients use mediation as a quicker alternative to a trial. While mediation involves a great deal of compromise, mediation follows a more predictable time frame compared with a trial which could drag on for years.

When a settlement between two parties does not prove to be possible and a case does go to trial, mindset is everything. The best advice we can offer is to cultivate patience and flexibility and let the process unfold.

How to Stop the Sale of Real Property



In estate and trust administrations, the conflict often involves or centers on real estate. Many beneficiaries want to know how to stop the sale of California real property. In order to temporarily stop the sale of real property, you may wish to file a Lis Pendens, or Notice of Pendency of Action. Attorneys use a Lis Pendens to secure a beneficiary's interest in a piece of real estate during a trust or estate dispute.

What is a Lis Pendens?

In Latin, Lis Pendens translates to "suit pending". A Lis Pendens, or Notice of Pendency of Action, is a written document that informs the public that a lawsuit is attached to the title on that property.

A Lis Pendens isn't a lien and cannot technically prevent the sale of real property. But it's an effective deterrent to potential buyers because it throws that property's ownership rights into question.

How to File a Lis Pendens

The California Code of Civil Procedure outlines the legal requirements to file a Lis Pendens in California. Here are some of the main requirements.

- In order to file a Lis Pendens, there must be an active lawsuit in which you have made a real estate claim. You cannot file a Lis Pendens as a stand-alone document. This must be recorded in the county where the real property is located.
- Before it can be recorded, a Lis Pendens must be mailed by Certified mail to the required parties (anyone with an adverse claim to the property you are seeking). You'll need to attach proper proof of service to your notice, demonstrating that this has been done.
- After the Lis Pendens is recorded with the County Recorder, you must send a Notice of Lis Pendens to the parties and file this with the court where your lawsuit is pending.

How to Expunge a Lis Pendens

Under California Code of Civil Procedures, any party (or nonparty with an interest in the real estate in question) can bring a Motion to Expunge Lis Pendens before the court. The claimant has the burden of proof.

Why would a court choose to expunge a Lis Pendens? Here are 3 common reasons:

1. The claimant has not made a real property claim in an underlying lawsuit.
2. The court decides that the claimant's real property interest can be adequately protected by posting a bond or undertaking.
3. Errors were made in serving and filing the Lis Pendens.

Never File a Frivolous Lis Pendens

A Lis Pendens should never be filed frivolously. If you file a Notice that is later expunged, you may be liable for the costs associated with having it expunged and any losses that were experienced due to the cloud on the title.

The California Civil Code of Civil Procedures states that the court shall award the prevailing party with reasonable attorney fees and costs of making or opposing the motion, "unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney fees and costs unjust."

Alternatively, the property owner may be able to force you to post a bond in order to keep the Lis Pendens recorded.

Case Study: How We Stopped a Real Property Sale

Here's a case study showing how our firm used a Lis Pendens to protect one client. A mother died, leaving behind two daughters. Daughter #1 had financially lived off of her mother for her entire adult life. She personally drafted a series of amendments disinheriting her sister, Daughter #2, and had her mother sign them.

After the mother died, Daughter #1 told her sister that nothing was left to her, refusing to even provide a copy of the trust. Daughter #2 was frustrated, but not too concerned – until Daughter #1 listed her mother's house, the trust's main asset, for sale. At that point, Daughter #2 hired our firm to represent her interests.

Our legal team immediately filed a Petition with the court. We filed and served a Lis Pendens on Daughter #1. Upon recording the Lis Pendens, we discovered that the property had been days away from closing on a sale.

Thanks to the efficient action we took, we successfully preserved our client's claim to the property. We reached a settlement with Daughter #1, permitting the sale to go through and the proceeds to be divided between the sisters.

If you think a Lis Pendens might be appropriate for your situation, we recommend you seek the advice of an experienced trust/estate litigation attorney to assist you.

How to Contest an Estate Plan

If your loved one recently died and you feel concerned about the way their estate plan was executed or amended, you may be wondering how to contest a trust in California. A trust contest is a form of trust litigation that centers on the validity of the document itself or the manner in which it was created or altered.

Who Can Contest a California Trust?

In order to contest an estate plan, you must have the legal standing to do so. California law holds that only an interested party may challenge a trust or will. An interested party is someone who stands to inherit from the estate, including:

- Beneficiaries listed in the distribution section of the trust or will OR
- The Settlor's "heirs at law" (meaning relatives who stand to inherit under California intestacy laws)

Valid Reasons to Contest a Trust

The contesting party typically bears the burden of proof in a trust contest. This means that they must effectively demonstrate to a judge in a court trial that the trust instrument was created in an illegitimate manner. The exception to this rule would be if they are able to shift the burden of proof.

Here are 5 valid reasons to contest a trust in California:

1. Mental Incompetence. The settlor was mentally incompetent at the time they created or updated their trust. The bar for mental competence in estate planning is fairly low. As long as a settlor understands the nature of their assets and who will receive those assets upon their death, they can legally create or update their estate plan.

Proving the settlor lacked mental capacity at the time they executed their trust often requires medical doctors to testify that the settlor lacked the most basic level of mental capacity at the time they signed the document. The incapacity may be due to severe mental illness, dementia, or serious substance abuse.

2. Undue influence. Sometimes an elderly person will decide to leave a significant portion or all of their estate to a professional or family caregiver or a new romantic interest. In situations like these, you may be able to contest a trust on the basis of "undue influence".

The California Welfare and Institutions Code defines undue influence as "excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity."

According to the Code, evidence of a victim's vulnerability "may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency where the influencer knew of, or should have known of, the alleged victim's vulnerability."

In order to win a trust contest, a beneficiary would need to prove that someone took advantage of the settlor's vulnerability by inducing them to change their estate plan to profit themself.

3. Forgery. The signature on the trust document must belong to the settlor. It cannot be signed by a third party on behalf of the settlor. In order to win a forgery accusation, you would need to prove that the signature on the document did not belong to the settlor. This would likely involve handwriting analysis and testimony from a handwriting expert witness.

4. Defect in the document. California trusts must meet certain requirements in order to be considered legally executed. If there was something unlawful about the way in which the document was drafted or executed, you may be able to successfully contest it. For example, the trust should be signed and dated by the settlor(s). Also, two unrelated, disinterested witnesses (who don't stand to inherit) should have been present and signed the will.

5. Multiple documents. If the settlor created multiple versions of a trust and/or amendments, you may be able to contest an older document if you know a newer document exists.

When to Contest a Trust

After the death of the settlor, the successor trustee must send out a notice to the trust beneficiaries within 60 days of the date of death. This notice provides basic details concerning the trust administration process and how to request a copy of the trust.

This notice also triggers a statute of limitations, or deadline to contest the trust, under the California Probate Code. Beneficiaries have 120 days after the date this notice was mailed

out, or 60 days from the date a copy of the trust is delivered to them, to contest the trust (whichever date is later).

What About the No-Contest Clause?

Many revocable trusts have a "no-contest clause", a section of the trust document intended to prohibit anyone from challenging or overturning the trust in court after the settlor's death. A no-contest clause generally states that anyone who contests the trust will be disinherited.

Should you still contest a trust if it contains a no-contest clause? If the trust or amendment you are contesting disinherited you anyway, then you may not have much to lose by contesting the trust as far as losing an inheritance. If you have a strong case and stand to inherit a large sum if you can overturn the trust, it may be worth the cost of the legal battle.

Also, if you have "probable cause", meaning a valid reason to contest the trust, the no-contest clause will probably not be enforced against you. Consult with an experienced trust litigator for counsel on your personal circumstances.

How to Contest a Trust in California

To contest a trust, your first step will be to find an experienced trust litigation lawyer to represent you. In your initial consultation, the attorney will likely want to review the trust document if you have it and any evidence you may have to support your claim. They can then offer their opinion on your likelihood of success and lay out options going forward.

If you don't have access to all of the evidence yet, that's ok. The attorney you hire can likely obtain a copy of the decedent's estate planning documents and subpoena supporting evidence such as financial or medical records.

Overturning a trust can be challenging, but it is possible if you possess solid evidence that the document was created or updated in an illegitimate manner.

How to Stop Financial Elder Abuse

As older people begin to lose mental and/or physical capacity, they often need help from family or friends to manage their finances. This can leave them vulnerable to financial elder abuse. If you know an elderly person who is receiving help with their finances, it's important to learn the signs of financial elder abuse and how to stop it.

What is Financial Elder Abuse?

Discerning financial elder abuse can be tricky, with ample grey area. Is your 80-year-old father's new 40-year-old girlfriend just trying to help by paying his bills? Or might she be taking advantage of his vulnerability? Is it ok for your mother to make large monetary gifts to her caregiver who complains about financial challenges? Or is your mother's altruism draining her own financial resources?

The legal definition of financial abuse of an elder or dependent adult is found in the California Welfare and Institutions Code Section 15610.30. This section defines abuse as occurring when a person or entity "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." If an individual assists another person in taking these actions, they are also committing elder abuse.

In order to be considered elder abuse, the perpetrator must act "in bad faith". Bad faith means they knew or should have known that what they were doing was wrong.

Elder Abuse & Trust Law

Financial elder abuse can overlap in a number of ways with trust & estate law. Some caregivers exert undue influence on the older person to amend their estate plan to benefit themself. Usually, the caregiver's goal is to gain greater power and control over finances by being named a financial power of attorney agent and/or trustee of their trust.

Financial elder abuse may also occur when a trustee breaches their fiduciary duties in certain ways. Examples include fraud, embezzlement, self-dealing, making improper gifts, or commingling trust assets with personal funds.

Warning Signs

Whether you've noticed recent negative changes in an older adult's wellbeing or financial situation or just feel concerned that someone may be taking advantage of them, here are some warning signs to identify elder financial abuse:

- Unusual activity in their bank account, like unexplained large withdrawals/transfers/wires of funds.
- Sudden changes in banking practices. For example: adding new signatories to their bank signature card or ATM withdrawals by an older person who doesn't use an ATM card.
- Abrupt changes to a trust, will, power of attorney, or other estate planning or financial documents, especially if initiated by a caregiver.
- A caregiver who seems to be asserting excessive control over an older person's finances.

  Suspicious checks, especially if the signature appears to be forged or the check description is something like "loan" or "gift".
- New "best friends" accompanying an older person to the bank.
- Mysterious disappearance of cash or valuables.

- Lowered standard of care (like malnutrition or unsuitable housing), unpaid bills, overdrafts on bank accounts, or an eviction notice.
- Appearance of new, expensive, unnecessary items or services.
- The older person exhibits confusion or a lack of understanding concerning their financial situation.
- The older person exhibits shame or reticence to discuss the concerning situation with others.

If you notice any of these warning signs, there are actions you can take to protect the at-risk older person.

How to Stop Financial Elder Abuse

If you suspect that an elder is being financially abused, here are some suggested steps you can take to address the situation.

1. **Talk to the elderly person.** Discuss the concerning signs you've noticed with the person you wish to protect. Give them an opportunity to explain their perspective on what is happening with their finances. There may be a valid reason behind their choices. Explain the concerns you have and express care for them.
2. **Report the elder financial abuse to their bank.** Bankers can sometimes help stop or prevent abuse.

3. **Contact Adult Protective Services for assistance.** Every California county has an APS agency to help elderly and dependent adults who are victims of abuse, neglect or exploitation. APS also provides information and referrals to other agencies and educates the public about reporting requirements and responsibilities under the Elder and Dependent Adult Abuse Reporting laws.
4. **Seek professional counsel.** If the abuse involves an estate plan or trust funds, you may wish to schedule a consultation with a trust & estate litigator who has experience protecting seniors from financial elder abuse. They may be able to help you regain control over the situation and help protect the abused elderly person.

Finding Legal Solutions

If you decide to take legal action to stop financial elder abuse involving a trust, there are two main legal remedies or solutions you can seek:

#1 Breach of Trust Action: A breach of trust action is a request for compensatory relief when a trustee is found to have breached one or more of their fiduciary duties in a way that caused financial loss to the beneficiaries. If granted, the judge will order the trustee to personally reimburse the trust for any damages and potentially lost interest as well.

#2 Trustee Removal: An interested party may petition the court to remove the current trustee if a breach of fiduciary duty has occurred. If a judge rules in a court trial that a significant breach of fiduciary duty has occurred, they will remove the current trustee and install a new, more suitable person to act in this role.

Conclusion

As you can tell, trust & estate litigation is a detailed, complex niche, rich with nuance. Most situations are more gray than black and white, with room for a wide range of legal interpretations.

If you've found this eBook informative, check out all of the free educational resources on our website: dhtrustlaw.com.

If you have any questions about trust litigation or would like to schedule a no-cost consultation with one of our trust litigators, feel free to contact the Law Offices of Daniel A. Hunt.

A graduate of McGeorge School of Law, Daniel A. Hunt is lead attorney and owner of the Law Offices of Daniel A. Hunt. He is a State Bar of California Certified Legal Specialist in Estate Planning, Trust & Probate Law. He has been named Best of the Bar by Sacramento Business Journal and a Northern California Rising Star by Super Lawyers.

Mr. Hunt is a member of the National Academy of Elder Law Attorneys and the Sacramento Estate Planning Council. He has served as President, Vice President, and Secretary of the Probate and Estates section of the Sacramento County Bar Association. He has also served on the Board of Directors for the Sacramento County Bar Association.

Mr. Hunt serves in the Estate Planning Clinic run by the Voluntary Legal Services Program of Northern California. He also serves as court-appointed counsel for the Sacramento County Probate Court.

Outside of work, he loves spending time with his family, golfing, skiing, hiking, and traveling.