

## From the Law Office of AMBER RODRIGUEZ

### STATE OF THE PROBATE COURT: 2014 ANNUAL PRESENTATION BY JUDGE GLEN M. REISER

Recently, Judge Glen M. Reiser, our sitting probate judge, honored our section by attending our monthly lunch and giving us his annual update on Probate Court matters. Here is some of what he had to share:

#### **LOCAL RULES:**

Judge Reiser continues to “slowly tweak” our Local Rules. His goal is to bring them all up to date and, in particular, more in tune with the technological advances available in the Probate Court. He highly recommends that you review the Local Rules annually to keep abreast of these subtle changes.

This year, some of the technological items include video conferencing, submitting orders via email, testimony at trial. Teleconferencing rules now explicitly apply to video conferencing and parties can request that testimony at trial be allowed remotely when the witness is physically unable to attend the proceeding or lives more than 50 miles from the courthouse. Finally, Judge Reiser reminded us that the court’s email address ([courtroomJ6@ventura.courts.ca.gov](mailto:courtroomJ6@ventura.courts.ca.gov)) is only to be used to submit proposed orders or supplements requested by the court. The email address should not be used to submit any unsolicited materials. If in doubt about whether you have been authorized to use the court’s email address, you may want to verify the court’s instructions with the judge’s secretary.

In addition to the technological changes, the Local Rules have been significantly revised in regards to Fee Waivers. The change is to 10.02.D.2. and, in summary, allows an order granting a request for a fee waiver to be valid for the duration of the conservatorship, unless otherwise ordered by the court. In addition, there is a pro-active duty imposed upon parties and their attorneys to report any material change in circumstance to the court. If no material change occurs, the orders remain valid for the entire length of the conservatorship.

#### **PROBATE CODE CHANGES:**

Judge Reiser discussed in detail the 2014 changes to Probate Code section 86. Probate Code section 86 is the statutory definition of “Undue Influence.” That definition has now been expanded to include the statutory definition found under the Welfare and Institutions Code. Judge Reiser expressed his opinion that these changes significantly effects the prior definition. He reviewed in detail the items a court must now consider as part of its determination of whether undue influence occurred. Both drafting and litigating attorneys in this area of law would be wise to carefully review those changes.

His Honor also highlighted the new requirements in cases where a Professional Fiduciary is involved. A Professional Fiduciary Fee Schedule must now be included at the time a Petition for Conservatorship is filed, as well as at the time of filing the Inventory and Appraisal, if a Professional Fiduciary has been nominated to serve as Conservator. Practitioners should further note the requirements for a Professional Fiduciary to report any increase in their hourly fee to the court.

Finally, Judge Reiser discussed the changes to Probate Code section 859 (as well as the sister codes under the Durable Power of Attorney code sections). The Code now allows for attorney fees to be awarded in addition to double damages. This is a litigation tool many practitioners are sure to use as they advocate for their clients.

## **COMMON LAW:**

A few cases in particular caught Judge Reiser's eye over the past year. He spoke about those cases and gave some helpful insight. Three cases in particular were discussed.

First, his Honor discussed *Conservatorship of Gregory D.* a limited conservatorship case out of Los Angeles. In this case, the mother of the conservatee formed her arguments from the perspective of the conservatee's rights. The Court of Appeal narrowed in on the standing issue and found that the mother had no standing to assert the rights of the conservatee. As noted by Judge Reiser, the case could have significant implications in contested conservatorship matters.

Next, Judge Reiser discussed *Donkin v. Donkin*. *Donkin* involves no-contest matters. His Honor shared with the audience that *Donkin* provides a "road map" a helpful for trial judges and drafting attorneys to assist in unraveling the mysteries and confusion surrounding no-contest clauses and the litigation involving those clauses. If Judge Reiser is looking to this case as a "road map" for these type of issues, certainly counsel will want to do the same.

Finally, his Honor reviewed *Lintz v. Lintz*. *Lintz* addresses the capacity necessary to draft a Trust. Should it be testamentary capacity, such as with a Will? Or should it be contractual, based upon the idea that a Trust is essentially a contract? In *Lintz*, the Monterey County trial court applied a basic testamentary capacity standard. The Court of Appeal found this to be the incorrect standard. Instead, the Court of Appeal held that a sliding scale should be used. Thus, if a Trust (or an Amendment) is primarily a testamentary document, the Will standard should apply. However, if it has other purposes (tax issues, for example), a contractual standard may be more appropriate.

## **MISCELLANEOUS ISSUES RAISED:**

Judge Reiser also reminded the audience of two statutory requirements which are not always being followed by counsel. Those requirements involve the timely filing of an Inventory and Appraisal (Probate Code section 8800) and One-Year Status Reports (Probate Code section 12200). To avoid the issuance of an OSC by the court, counsel should be certain to timely file by items, where applicable.

Lastly, the audience had two questions for his Honor which counsel may find helpful. First, actuarial values should be used when determining the value of an annuity. Second, if statement values do not match the values assigned by the Probate Referee, an adjustment should be made in the First Account which explains the difference. Although somewhat isolated in their application to our practices, this information can help us avoid delays and questions by the court if we address them as suggested.

The Estate Planning and Probate Section is fortunate to have Judge Reiser make himself available, year after year, for these annual updates. On behalf of our Section, I would like to thank him for his time. We look forward to hearing from him again next year.

*Amber Rodriguez is the Chair of the Executive Committee for the Estate Planning and Probate section of the VCBA. Her practice focuses on Probate and Trust Litigation and Administration, Estate Planning and Conservatorships. She can be reached at [arodriguez@estateattorneycalifornia.com](mailto:arodriguez@estateattorneycalifornia.com) or you can visit her website at [estateattorneycalifornia.com](http://estateattorneycalifornia.com).*