



## REMARKS FROM THE PRESIDENT'S DESK - *By: Fernando D. Vargas*

### Self-Driving Technology Gives Drivers a False Sense of Security

Given that many car accidents are caused by human error, self-driving technology is often touted as a smart path to safer streets. This may be true if and when cars become totally autonomous. But as long as so-called driverless cars actually need a fully attentive driver behind the wheel as a failsafe, the technology can be dangerous.

Why?

Because humans tend to overestimate the capabilities of the technology that controls driverless vehicles, and this can cause accidents.

Research from numerous sources has shown that when drivers have self-driving technology to rely on, they pay less attention to the road. They are particularly prone to becoming distracted by their smartphones, or even falling asleep. This can be extremely dangerous, because it means that the driver will not be able to respond appropriately if and when the car encounters a situation where human judgment is required. Carmakers are adding features such as eye tracking to detect lapses of attention, but these warnings can be ignored by distracted drivers.

### Driver Ignored Safety Warnings in Tesla Autopilot Crash

A recent fatal accident involving a self-driving car took place on March 23, when a Tesla Model X driven by Wei Huang crashed into a concrete divider on Highway 101 in Mountain View, California. The vehicle was using Tesla's Autopilot technology, which is capable of maintaining speed, changing lanes, and self-parking, among other things. Drivers are expected to remain fully alert and attentive while using the system in order to be able to take control when necessary to prevent accidents. However, in

this particular case it seems the driver was not able to do so.

It is not clear why the vehicle veered towards the divider, but, according to Tesla, Huang should have had a chance to avoid the collision. He would have had about five seconds and 150 meters of unobstructed view of the divider, yet according to the vehicle logs he did not take any action. It seems likely he was distracted. He had received several visual warnings and one audible hands-on warning during his trip, and his hands were not detected on the wheel in the six seconds before the accident.

### Uber Driver Failed to Prevent Pedestrian Death

Tesla's Autopilot system is not the only self-driving technology that has caused fatal accidents. On March 18, a vehicle using sensing and drive technology developed by Uber struck and killed a pedestrian in Tempe, Arizona. The victim, Elaine Herzberg, was walking her bicycle across the street when the autonomous Uber hit her at 40 miles per hour.

Dashcam footage from the vehicle shows that Herzberg was clearly illuminated by the headlights in the moments before the crash. Footage from inside the vehicle shows that the driver's eyes were not on the road in the seconds before the accident.

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**Maria Elena Castillo, Esq.**

## Inns of Court

### A Second Look at Multiple Second Chances Under the Probate Code

by *Mark H. McGuire, President*

In this series of articles we have examined second changes in the appeals process, in small claims court, under the Family Law Code, and in the Code of Civil Procedure. My goal was to take a second look at some difficult issues and procedures in the law that perhaps are frustrating to many but necessary given the due process and justice requires of our common law system. For this article I would like to take a look at the “second” chances we are afforded, or burdened with, as opposing party under the Probate Code.

The seemingly endless process that is Probate was laid out in all its demoralizing glory in Dickens classic novel “*Bleak House*”. Dickens, who studied law at Middle Temple in London, wrote the book in part as a treatise on the need for reform in the English legal system. Indeed that novel is credited with motivating reforms to the Court of Chancery. If you are interested, the Joseph B. Campbell Inn will be hosting a presentation, moderated by Judge Teresa M. Bennett, on a reboot of the issues presented in *Bleak House*, at our May meeting.

To truly understand the nature of how a simple case involving “...a will and the trusts under a will,” dragged on so long and eventually drained the entire estate, one must first take a step back and have a second look at the essential distinction between courts of equity and courts of law. The distinction comes from the common law idea that if you were seeking remedies other than damages, the suit should be brought as a petition to the Lord Chancellor of England, thus the creation of the Chancery Courts. Courts of Law involve matters such as breach of contract and criminal charges. Courts of Equity involve parties seeking remedies other than damages. These necessarily involve issue were the court must balance the interests of the parties, such as in Probate, Guardianship and Conservatorship cases. Eventually England unified all the courts under one system, but the distinctions are visible even today in our Constitution, which guarantees the right to a trial by jury under law (civil and criminal cases) but not at

Equity, Probate Cases. Of course the Probate Code affords the proposed conservatee a right to a trial by jury on the petition for conservatorship. See *Probate Code* §1823. This being more a result of the overlap connection between the deprivation of liberty rights under a petition for conservatorship and the rights afforded a criminal defendant under the constitution.

The first thing a civil attorney will notice about the probate practice is of course the sheer lack of attention to deadlines for the filing of objections. Many a civil attorney has been shocked at the realization that the court will allow oral objections at the hearing, late of the Code of Civil Procedure, and often not even set a deadline for the filing of written objections. There is your first second chance in Probate Court. The second thing they see is that the Probate Examiners working for the court will review the pleading and publish notes for the parties to follow. File your supplement to “clear” the notes prior to the subsequent hearing and *TA-DA*, petition granted! It is like getting the answers to the questions ahead of time. An interesting connection here is to Federal Court and the Bankruptcy Code, another court having its origins in equity. The Bankruptcy Court allows only a limited right to a jury trial, and, like Probate, does publish examiner notes prior to hearings allowing petitioners time to file supplements to clear the notes. The connection is that courts of equity, more than a strictly adversarial court of law, are seeking an equitable resolution of the petition before the court rather than truth and justice through the conflict of advocates at law.

Of course this probate notes equitable process can lead to frustration and delay. Continuances are extraordinarily common in Probate Court, perhaps not to the painful level of the *Bleak House*, but at times far longer than would be tolerated by a civil or criminal court. Part of the necessity of these delays in probate relates to the nature of the administration of an estate. The court must take its time to get the administration correct not only for the parties before the court, but for the subsequent generations to come who have contingent interests in the issues at hand. All assets of the estate must be marshalled and all

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## PROBATE 101: WHERE THERE IS A WILL , THERE IS A WAY

*By Thomas W. Dominick*



In my many years of practice in the areas of estate planning, administration and litigation I have seen the failure to properly plan for death or incapacity lead to unfortunate, and sometimes disastrous, consequences. In this and a series of articles to follow, I will discuss the mechanisms available to prevent unintended results and avoid litigation. If you regularly practice in this area, you may see this as basic information and a form of “preaching to the choir” and you might consider skipping this article. My intended audience is (are) those practitioners who may not be familiar with this area of the law.

In this article, I will discuss the most basic estate planning device, the last will and testament. In my next article, I will discuss the revocable living trust, now the gold standard in estate planning primarily designed to avoid probate altogether. In future articles, I will address incapacity planning, the probate process, the administration of trusts, and conservatorships and guardianships. Where appropriate, “war stories” will be shared of situations where even proper estate planning has led to litigation.

In my experience, roughly one-third of estate litigation arises where there is no estate plan in place. Regardless of the size of the estate, having a will avoids feuds over who controls the assets after death and how the estate will be distributed.

A will is a legal instrument in which a person gives certain instructions to be carried out after death. For example, a person may direct the distribution of assets (money and property), and, of equal importance, choose a guardian for minor children. The choices become irrevocable upon death. A will can name:

(1) Beneficiaries (family members, friends, spouse, domestic partner or charitable organizations) to receive assets according to the instructions in the will. It may list specific gifts, such as jewelry or a sum of money, to certain beneficiaries, and should direct what should be done with all remaining assets (any

assets that not disposed of by specific gifts).

(2) A guardian for minor children, who would be responsible for your child’s personal care if you and your child’s other parent die before the child turns 18. It may also name a guardian of the child’s estate (who may or may not be the same person) to be responsible for managing any assets given to that child until he or she is 18 years old.

(3) An executor, who is the person or institution nominated to collect and manage your assets, pay your debts, expenses and taxes that might be due, and then, with the court’s approval, distribute the estate to the beneficiaries according to the will.

Family dynamics can be complex and often disputes arise over who is going to handle the decedent’s assets. As a practical matter, the decedent’s money can be gasoline poured over long-simmering familial disputes and the first flame after death is who will be in control. In the absence of a will naming an executor, that choice often has to be made by a judge in an expensive litigation.

Every year, I have at least one case where there is a contest over who will be appointed as the administrator of an estate. Probate Code section 8461 (all further section references are to the California Probate Code) governs the priority of persons who may serve in that capacity, with the spouse being given first priority, then children (each of whom have equal priority), then grandchildren, then other issue, then parents, then siblings, the nieces/nephews, then grandparents, and so on.

*(Continued on page 5)*

### **May 2018 Calendar**

**May 1 - May Day**

**May 5 - Cinco De Mayo**

**May 13 - Mother’s Day**

**May 19 - Armed Forces Day**

**May 28 - Memorial Day**

(Continued from page 2)

claims reviewed. Given the strange nature of some assets and claims, this could take a while.

Another frustrating aspect of this claims process for civil litigators is that although the Probate Code sets hard deadlines for the filing of claims against the estate (see *Probate Code* §9000 et seq.), no timeline is required to reject a claim. The administrator could theoretically have until the petition for accounting and distribution of the estate to reject a timely filed claim. Once rejected, however, the claimant has 90 days in which to file the civil complaint to enforce the claim. (See *Probate Code* §9353.) And yes, that means the party seeking to enforce their claim against an estate must start the process all over again, in civil court. Yet another second chance under the Probate Code. All of these second chances can confuse and frustrate a civil attorney practicing in probate court. Perhaps that is why they publish notes for us to follow.

The areas in which this idea of continuance second chances comes most into play in probate court is in the areas of Conservatorship and Guardianships. I have seen (several times) parties seek to have a conservatorship or guardianship petition dismissed *with prejudice*. A fine request regarding a suit at law, but wholly inapplicable for a petition in probate court – especially one involving the changing life of an elderly person, developmentally disabled adult or a minor. Generally we do not dismiss petitions in probate, especially petitions for guardianship or conservatorship with prejudice. Grandma may be able to meet the burden now and prove that she can still provide for her own care, but does that mean we can bar her son from bringing the petition again two years

down the line when her capacity inevitably declines more? Likewise, we do not bar the parent recovering from yet another bought with addition from petitioning to terminate a guardianship, even after several unsuccessful attempts to do the same. These kinds of petitions can be brought again, and again and again.

I suppose there is some point at which a party could be declared a vexatious litigate and barred from filing the same petition again, but it is so far off on the legal horizon as to not be given any worry. Think of it this way, in an LPS Conservatorship, the court orders, which could deprive a party of liberty, in a manner similar to criminal law, that LPS Conservatorship must be re-established annually. Why? Because *conflicting equities* are at issue – not *conflicting claims regarding damages*. In the end, a court of equity will take its time to get it right, again and again and again.

One can become frustrated by the sometimes burdensome and seemingly conflicting rules of the Probate Code, or embrace the fact that the court is doing more problem-solving than litigation. What courts of equity are trying to do more than bring a complaint for damages to an end is to find a fair resolution to the issues at hand, balancing the requirements of the law with the facts of the case and the lives of the parties before it. There is a place for advocacy of your client's position regarding the petition in probate court, but it does mean you should understand the equitable stage on which your play is set.



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A recurring scenario involves a person who has remarried, dies without a will, and the children from the first marriage have no use for the second wife. For example, in *Estate of Garrett* (2008) 159 Cal. App. 4<sup>th</sup> 831, the decedent's wife had filed for divorce and was living apart from him at the time of death. His children felt she was a poor choice to be administrator and attempted to block her appointment. They failed, largely because the court relied on the spouse's statutory priority for appointment (Sections 8462 and 8463) over the decedent's children. The wife had dismissed the divorce action prior to decedent's death and was able to use this technicality to obtain the appointment.

Failure to have a will naming an executor becomes even more problematic (and emotionally charged) where the competing potential administrators have equal priority, such as when the children battle for control of the estate. I have tried a number of cases where children battled over their appointment as administrator for a parent's estate. Section 8467 provides that where persons have equal priority, the court may appoint one of them, both of them if they agree, or neither of them if they do not agree. If they do not agree, the court has the option under this statute to appoint the county public administrator or a disinterested person in the same or next lower class of priority as the persons unable to agree. The court also has discretion to appoint the person nominated by those who take a majority interest in the estate. A will nominating one of the children would have prevented a messy litigation.

It is sometimes said that the State of California has made a will for those who do not make one for themselves. This is true — the intestacy statutes determine distribution of assets. (Contrary to popular myth, the State of California's will does not distribute property to the state in all instances. Escheat only occurs if there are no known next of kin.) A married person's surviving spouse receives all the community property and a portion of the separate property. Relatives are in line to receive the rest of the separate property. An unmarried decedent's property is distributed to his relatives under the intestacy statutes found at Sections 6400, *et seq.* Generally, assets are distributed "down the line" to children, grandchildren, great-grandchildren. If there is no one down the line, then the assets go to

parents, then to siblings, then to nieces and nephews, then to grandparents, then to first cousins, and so on, until there is no next of kin found. If a spouse or domestic partner dies before the decedent, his or her relatives may be entitled to some or all of the decedent's estate. Friends, a non-registered domestic partner or your favorite charities will receive nothing from a person who dies without a will.

Another problem can arise if the decedent is married at the time of death, but was involved in a proceeding for dissolution of the marriage. If he or she dies without having made a new will, the spouse takes his or her statutory share, even though the decedent may not have wanted that. Word to the wise — draft a new will at the start of the divorce proceeding, not the end.

California recognizes three types of wills: (1) A handwritten or holographic will, which is valid provided the signature and material provisions are in your handwriting. It need not be witnessed as with formal or attested wills. (2) A statutory will, which is a pre-printed "fill-in-the-blanks" will form. This is designed for people with relatively small estates. However, it must be formally attested to by at least two subscribing witnesses. (3) Formal or lawyer-prepared wills. Like statutory wills, these also need to be witnessed.

Despite the attestation requirement, in 2009, the Legislature relaxed the formalities by incorporating the substantial compliance doctrine into the will statute. Section 6110(c)(2) now provides that if a will is not properly attested (for example only one witness signed or even if there are no witnesses at all), the will shall be valid provided "the proponent of the will establishes by clear and convincing evidence that at the time the testator signed the will, the testator intended it to constitute the testator's will."

Recently, I successfully argued that a will which the decedent had purchased online from LegalZoom was a valid will, despite the failure to have anyone witness its execution. Clear and convincing evidence was established by evidence that: (1) the decedent had told family members that he intended to make a new will following his recent divorce, (2) he stated that he was going to make the will online

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*(Continued from page 1)*

It is not clear whether the vehicle's radar technology did not detect Herzberg, or whether the car failed to stop for some other reason. But had the human driver been paying attention, it is possible the accident could have been avoided.

### **Who is Liable for Self-Driving Vehicle Accidents?**

Depending on the root cause of the accident, the victim of a self-driving vehicle accident could raise a range of legal complaints against the car manufacturer, the manufacturer of specific technologies used by the automaker, the driver, or, in the case of an Uber accident, Uber itself.

Though the details of the case were not made public, it seems that in the recent Uber pedestrian accident case, Uber accepted responsibility. The case was settled at the end of March, with the victim's daughter and husband receiving an undisclosed amount.

This ended what could have become a legal battle with unprecedented liability challenges. However, the fallout for Uber and other companies currently testing self-driving vehicle technologies is far from over.

Uber has temporarily put their self-driving car testing programs on hold, as has Nvidia Corp, the developer of microchips used by Uber's technology.

### **Is This the End of Self-Driving Cars?**

Most experts agree that we are currently in a dangerous phase of self-driving car testing and development, where the technology is good enough to work most of the time, but still needs human oversight—oversight that distracted drivers, lulled into a false sense of security by the technology, are sometimes unable to provide.

But that does not mean we should give up on the dream of self-driving cars. Perhaps all self-driving car companies should follow the lead of Google's Waymo. During testing, Waymo observed drivers texting, sleeping, and applying makeup while their self-driving cars raced along the freeway. Recognizing that these drivers would not be able to take control of the vehicle in an emergency, Waymo determined that the safest course was to stop testing limited self-driving technologies and focus on full automation instead. Only when self-driving cars fully eliminate human control can they deliver on the promise to protect us from driver error.

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through LegalZoom, (3) he printed the will on his personal computer, dated it, signed it and initialed each page (my expert was able to positively identify the handwriting as that of the decedent), (4) the document clearly says it was a will, it named an executor and disposed of decedent's assets to the same beneficiary he told family members he intended to benefit, (5) he paid LegalZoom for the will using his personal credit card, and (6) he told friends he made a new will and showed it to one of them.

Personally, I would caution anyone from doing self-help or homemade wills because of the opportunity for mistakes in drafting or, worse yet, fraud in its creation. The small amount saved by doing it yourself is not simply worth the risk of expensive litigation.

Having a will also avoids the proverbial "tug of war" over the right to receive a decedent's assets. It is not uncommon for an heir to claim the decedent promised to leave him or her a special asset or forgave an indebtedness. Litigation may also arise from disputes over the characterization of estate assets as separate or community property. A testator may leave his or her separate property and his or her interest in any community property to whomever he or she wishes. However, assets which pass to a surviving spouse, whether community property or separate property of decedent, pass outside of probate unless that spouse elects to have that property

administered in the probate proceeding. The characterization of property is not always an easy determination to make, as many who have been involved in divorce proceedings can testify. The testator's wishes as expressed in the will can control the disposition of their assets.

Wills affect only those assets that are titled in decedent's name at death and for which there is no designated beneficiary. The assets that are not affected by your will typically include life insurance, retirement plans, assets held in joint tenancy with right of survivorship, and assets held in a revocable living trust.

Wills are not irrevocable until death and can be changed easily through a codicil or simply be redrawn. Never attempt to change your will (or any other estate planning document for that matter) by simply crossing out words or sentences, or by making any notes or written corrections on it. These changes will likely not be enforceable.

In conclusion, making a will can avoid disputes over who is in charge of your estate, who is to be guardian of your minor children, and how and to whom your estate is to be distributed.

*Thomas W. Dominick is certified as a specialist in Probate, Estate Planning & Trust Law by the State Bar of California Board of Legal Specialization.*



We are sad to report that attorney Doug Welebir passed away on May 8, 2018. We lost not just a friend and not just a highly respected and regarded trial lawyer; we lost a true gentleman of the profession and an example for over 50 years of how law should be practiced.

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# NEWS BULLETIN

## Save the Date

### Bar Bench Gathering

### “A Night of Magic”

Friday, September 14, 2018

6:00 P.M.

Bonanno-Flynn Home

Rancho Cucamonga

### Installation Awards Ceremony & Dinner

Thursday, October 4, 2018

5:30 P.M.

DoubleTree by Hilton

Ontario