



THE STATE BAR OF CALIFORNIA

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Program #21

When "Boilerplate" Leads to Disaster

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***WHEN BOILERPLATE  
LEADS TO DISASTER***

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and  
David W. Baer, Esq. of John A. Hartog, Inc.**

# Sample Boilerplate #1

## Trusts

Husband and Wife established a joint trust, and after the wife's death the trust divides into a revocable Survivor's Trust and irrevocable Bypass Trust.

### The Bypass Trust:

- Allows discretionary principal invasions if the value of the Survivor's Trust is below \$500,000.
- Provides that upon the survivor's death, the Bypass Trust is distributed to Husband's beneficiaries and Wife's beneficiaries in proportion to the assets contributed to the trust.
- Suppose that after Wife's death, Husband revokes the Survivor's Trust.

# *Issues Presented*

- Are discretionary distributions to the Husband from the Bypass Trust authorized?
- Who are the remainder beneficiaries of the Bypass Trust?  
Both sets of issue?

# Sample Boilerplate #2-A

## Additional Trust Provisions

A married couple, Jane and Ted, execute a Living Trust with a revocability provision that reads as follows:

*“We reserve unto ourselves during the lifetime of either Trustor the power and right to amend or revoke in whole or in part the trust hereby created.”*

Jane and Ted then transfer all of their property to the Trust, including:

- A vacation home in Tahoe purchased during their marriage and shares in Jane’s family business running small grocery stores throughout California.
- Jane acquired the shares in her family’s business prior to the marriage.

# *Issues Presented*

Jane and Ted separate, and Jane wants to revoke the Trust and withdraw her shares in the family business and her interest in the Tahoe house from the Trust.

➤ Can Jane do this?

Jane doesn't revoke the Trust right away. Ted, overcome with grief, passes away the following month.

- Can Jane revoke the Trust and withdraw all property?
  - Does Jane have control over all Trust assets?
  - *Suppose that after **Jane's** death, **Ted** revokes the *Survivor's Trust*.*

# Sample Boilerplate #2-B

## Additional Trust Provisions

Recall: Jane and Ted, execute a Living Trust with a revocability provision that reads as follows:

*“We reserve unto ourselves during the lifetime of either Trustor the power and right to amend or revoke in whole or in part the trust hereby created.”*

How (if at all) does the result change if the Trust contains the following provision:

*“We reserve unto ourselves **during our joint lifetime** the power and right to amend or revoke in whole or in part the trust hereby created.”*

# Sample Boilerplate #2-C

## Additional Trust Provisions

How (if at all) does the result change if the Trust contains the following provision:

*“I, the undersigned legal spouse of one of the above Trustors, hereby waive all community property rights that I may have in the above-described property and give my assent to the provisions of the trust and to the inclusion in it of the said property.”*

- After Ted’s death, does Jane have control of all Trust assets?
- Does the result depend on which revocation provision in #2-B is used?

# Sample Boilerplate #3

## Trust Provisions

The settlor, a lifelong California resident, creates a trust providing that it is to be governed by California law. The settlor has 3 children: a son living in Florida whom she disinherits and two daughters whom she names as her successor cotrustees. The identified trust assets consist of a residence in California and brokerage and bank accounts in California with national financial institutions.

Suppose that one daughter lives in California, the other in Florida, and after the settlor's death the son brings a trust contest in Florida.

# *Issues Presented*

- Does the Florida court have jurisdiction over the trust contest?
- Will this question turn on the division of responsibility between the cotrustees?
- When would a Florida court have jurisdiction to compel the trustee who lives in Florida to account?
- Could a California court still assert jurisdiction over the successor cotrustees if the daughter who had been a California resident moved to Oregon before her mother's death?

# Sample Boilerplate #4

## Trust Provisions

A trust includes typical boilerplate authorizing the trustee to retain any property received from the settlor and to operate at the risk of the trust estate any business received from the settlor in the trustee's sole and absolute discretion.

The settlor, an experienced investor, primarily funds the trust with his interest in an LLC that he formed 25 years ago, which LLC specializes in making loans secured by second deeds of trust. The other 25% of the trust assets consist of leveraged real estate and hedge fund positions. The successor trustee is the settlor's business partner and the LLC's co-owner. Having previously shared in outstanding returns, the successor trustee, who was not a lawyer, retains these investments. Their value declines by 90% in the year after the settlor's death.

# *Issues Presented*

- Is it clear that under California law the prudent investor rule applies despite the boilerplate?
- Was it clear to the successor trustee?
- Could the successor trustee defend an action for breach of fiduciary duty on the grounds that he acted in good faith reliance on the trust's express provisions?

# Sample Boilerplate #5

## No-Contest Clause

“In the event any beneficiary under this trust shall, singly or in conjunction with any other person or persons, contest in any Court the validity of this trust or of the Settlor’s last Will or shall seek to obtain an adjudication in any proceeding in any Court that this trust or any of its provisions or that such Will or any of its provisions is void, or seek otherwise to void, nullify or set aside this trust or any of its provisions, then the right of that person to take any interest given to him or her by this trust shall be determined as it would have been determined had the person predeceased the execution of this Declaration of Trust.”

--See *Estate of Rossi* (2006) 138 Cal.App.4<sup>th</sup> 1325, 42 Cal.Rptr.3d 244

# *Issues Presented*

- Does the clause encompass every legal proceeding to change the estate's disposition?
- Should funeral expenses and last illness expenses be exempted?
- How do you document that the client understood the no contest clause in case of future disputes?

# Sample Boilerplate #6

## Partnership Agreements

9.1 *Assignment of Interest.* A Limited Partner may not without the prior written consent of all Partners assign (including by encumbrance), whether voluntarily or involuntarily, all or part of his or her Interest in the Partnership, except as permitted by this Agreement.

9.2 *Permitted Assignments.* A Limited Partner may assign all or any portion of his or her Interest in the Partnership to a revocable trust the entire beneficial interest of which is owned by the Partner. In addition, a Limited Partner may assign all or any portion of his or her Interest in the Partnership, at any time or from time to time, during lifetime or upon death, to a Family member; to a custodian for a Family member under an applicable Uniform Transfers to Minor Act; to another Partner; or to trustees, *inter vivos*, or testamentary, holding property in trust for Family members (notwithstanding that someone who is not a Family member may also be a beneficiary of such trust).

9.3 *Acquisition of Partnership Interest in Event of Non-Permitted Assignment.* [Provision for Option and Right of First Refusal for Fair Market Value of Partnership Interest, determined by independent appraisal.]

--See *Holman v Commissioner.*, 130 T.C. No 12 (2008)

# *Issues Presented*

- What about a joint trust (does the transferor partner retain the entire beneficial interest)?
- If a trust is the limited partner, are transfers to beneficiaries or sub-trusts permitted?
- Do the other partners want family members to be part of the business?
- How do these provisions impact valuations for purposes of gift or estate taxes?
- Who is a “family member”?

# Sample Boilerplate #7

## Health, education, maintenance, and support (HEMS)

“Trustee may distribute as much of the principal to or for the benefit of the beneficiary for his or her health, education, maintenance, and support, as the trustee deems appropriate in its discretion.”

# *Issues Presented*

- To what extent must/can the trustee consider other resources?
  - If the beneficiary refuses to provide information to the trustee, what do you advise the trustee to do?
- How does the trustee balance the current beneficiary's desires and needs against the remainder beneficiaries'?
- What do "health" or "support" mean?

# Sample Boilerplate #8

## Will: Tax Allocation Provision

A wealthy testator makes \$5 million in specific and pecuniary gifts to various friends and family members, leaving the residue of her \$25 million estate to her children. The will provides that all estate taxes shall be borne from the residuary estate, without apportionment. Both children predecease the testator, so she executes a codicil leaving the residue to her three favorite charities.

# *Issues Presented*

- Will the three charities bear a portion of the estate taxes even if this will increase the estate's total tax burden? (See *Estate of Silveira* (1983) 149 Cal. App.3d 604.)
- Will the three charities bear any income taxes attributable to the estate's assets? (See *In re Estate of Deghani-Fard* (2006) 141 Cal. App. 4<sup>th</sup> 797.)
- What if the testator's taxable estate included a \$5 million life insurance policy payable to family members that the testator failed to disclose to the drafting attorney?

## **DAVID W. BAER -- specializing in Trust and Estate Litigation**

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Bringing almost three decades of experience in complex litigation, in July 2010 David W. Baer joined John A. Hartog, Inc. as the firm's trial counsel. David represents charities and non-profit entities, individuals and financial institutions in a broad array of matters, such as will and trust contests, fiduciary litigation, spousal property claims, no contest clause disputes, financial elder abuse complaints, and estate planning malpractice. While David has focused almost exclusively on litigation in Probate Court since the 1990s, he has a wealth of experience in other substantive areas frequently at the heart of trust and estate matters including real estate, tax, corporate, and partnership law. David is particularly skilled in negotiating and drafting complex multi-party settlements. Drawing on that strength, he recently expanded his practice to serving as a mediator.

When appropriate, David has the tenacity to litigate a matter to conclusion through trial or appeal, where he has a proven track record of success. Two years ago he prevailed in overturning the trial court judgment in *Murphy v. Murphy* (2008) 164 Cal. App. 4<sup>th</sup> 376, the first case in the nation to hold that a substituted judgment order approving a conservatee's estate plan bars any beneficiary from contesting the plan after the conservatee's death.

David is one of the authors of *California Trust and Probate Litigation*, the California Continuing Education of the Bar's two-volume practice guide. He was a 2003 recipient of the Widely W. Manual Award for Pro Bono service.

### **Press**

- *In an appellate first, attacks on wills barred after estate owner dies*, The National Law Journal (July 2008)
- *Contesting the No Contest Clause*, San Francisco Daily Journal (March 2008)

### **Publications**

- *Wake-Up Call*, Trust & Estates Magazine (August 2008)
- *Speak Now or Forever Hold Your Peace: A Legislative Proposal for Collateral Estoppel of Substituted Judgment Orders*, Trusts and Estates Quarterly (Summer 2006)
- *When Is the Estate Planning Attorney Subject to a Malpractice Claim by a Nonclient Beneficiary?*, Trusts and Estates Quarterly (Spring 2006)
- *A Practitioner's View on the Proposal to Abolish No-Contest Clauses in California*, Trusts and Estates Quarterly (Fall 2004)

### **Professional Affiliations**

State Bar of California -- Member, Trusts and Estates Executive Committee (2006-), Chair, Litigation Subcommittee (2008-), Chair, California Law Revision Commission Committee (2008-)

Bar Association of San Francisco -- Member, Probate and Trust Law and Alternative Dispute Resolution Litigation sections

Marin County Bar Association (Probate Law Section)

San Francisco Superior Court (Probate Mediation Panelist)

### **Presentations**

- Whether, When and How to Litigate, Northern California Planned Giving Counsel (June 10, 2010)
- Probate Code Section 21350: What Does It All Mean?, The 32nd Annual UCLA/CEB Estate Planning Institute (May 15, 2010)
- The Demise of the No Contest Clause in California Is Not Greatly Exaggerated, Marin County Bar Association (October 2008)
- Financial Elder Abuse, Continuing Education of the Bar (July-August 2008)
- Avoiding Pitfalls in the Probate Code, 80th Annual Meeting of the State Bar of California (September 27, 2007)
- Management of Fiduciary Real Estate: Taming an Unruly Asset Class, East Bay State Planning Council (September 10, 2007)
- Residents' Charitable Requests: Can They Hold up in Court?, Teaching Services of California (May 2007)

### **Honors**

- Northern California SuperLawyers, *San Francisco Magazine* (2006-2008, 2010)

### **Education**

- J.D., University of California, Hastings College of Law, Magna cum laude, Order of the Coif, Thurston Honor Society (1981)
- B.A., Honors Thesis, Reed College (1978)

### **Admissions and Courts**

State of California -- all trial and appellate courts

United States District Courts for California: Northern, Eastern and Central Districts

United States Court of Appeals for the Ninth Circuit

United States Tax Court

**MICHAEL C. GERSON**  
**Allen & Kimbell, LLP**

Michael C. Gerson has practiced in the field of estate planning, taxation, and postmortem administration of trusts and estates since 1999. Mr. Gerson is certified as a specialist in Estate Planning, Trusts, and Probate Law and in Taxation Law by the State Bar of California, Board of Legal Specialization.

Mr. Gerson has been practicing in Santa Barbara at Allen & Kimbell, LLP since 2005, after years of practicing law in San Diego, California and in Miami, Florida. Allen & Kimbell, LLP focuses its practice on estate planning, trusts, probate, taxation, business entities, real estate, land use, and related civil litigation. Mr. Gerson currently is a member of the Executive Committee of the Trusts and Estate Section of the State Bar of California.

Mr. Gerson has published articles on estate taxation, how economic and political conditions affect estate planning, and other issues. He has presented seminars to attorneys, accountants, and other professionals on topics of interest. Mr. Gerson is active in philanthropic organizations, and has been volunteering in his local community for many years.

Mr. Gerson graduated from the University of California, Davis King Hall School of Law in 1995, and received his LL.M. in Estate Planning from the University of Miami, Florida in 1999.