WEAPONIZING THE LITIGATION PROCESS – WHEN LITIGATION RESULTS IN THE TAKING OF HOSTAGES

*By Hon. Reva Goetz (Ret.)**

MCLE Article

I. INTRODUCTION

Trusts and estates cases can be in existence for years or even decades. Given the myriad of issues raised in each case, one can very easily keep litigation going, which makes them ripe for litigation abuse. However, the remedies preventing a party from "weaponizing" litigation are sorely lacking, except in very limited, specific circumstances.

Having the honor and privilege to serve in a judicial capacity, I became a witness to, and unwilling participant in, litigation where parties were held hostage by litigation. Often the hostage-takers are those whose malfeasance is what caused the litigation in the first place. Working in the justice system is very rewarding. But when it is used as a weapon, the damage done financially and emotionally is more than a mere byproduct of the actual wrath being meted out by the aggressor. It makes the legal system a complicit partner.

More recently, as a neutral assisting families and others to resolve their differences and avoid litigation, I have been involved in these situations both at the outset (before litigation ramps up) and during the litigation.

I hear from people with whom I have mediated and attorneys who litigated cases in front of me years after I was involved with their cases. Some of these cases have been ongoing for over a decade.

In some instances, the hostage-taking litigant's chances of prevailing are remote at best and they may not have a scintilla of a chance of recovering their attorney's fees and costs. It seems like they are only in the litigation for the purpose of further damaging, engaging with, or punishing the opposing side for seeking assistance from a court or asserting themselves in the legal arena.

There are some circumstances where the only way to get some relief from the constant legal sparring is to take the case to trial. Yet, if the wronged party prevails, the aggressor party can continue the litigation after trial by filing motions for reconsideration, requesting hearings for court processes emanating from the result at trial and demanding additional hearings. After exhausting the trial court processes, the losing party can seek relief by way of the appellate process can prolong the litigation process for years. All of this uses financial and emotional resources, both of which are often in limited supply for those against whom this onslaught is brought.

What can be done to limit or end the damage done by embarking on the legal journey when the opposing side is intent upon using the legal process to further punish the already damaged party? What are the consequences for the parties who want to end the litigation but cannot do so without severe financial or emotional consequences? Is there a way to extricate themselves from litigation?

While protections against abuse of the legal process are built into various areas of law by statute, including vexatious litigants, nowhere in the Probate Code, is there an attorney's fee provision to address a situation where the aggrieved party has limited resources and may not be able to afford to litigate their claims.

In this article, I will survey some of the limited statutory protections that are available and explain why they are insufficient to deal with this problem of hostage-taking litigants in probate litigation matters, including some real-life scenarios I dealt with on the bench. I will conclude by providing some suggestions which may deter some of these actions in the future.

II. LIMITED STATUTORY PROTECTIONS

In certain parts of the litigation system statutory remedies exist to address some abuses of the process.

A. Protections in the Discovery Process

Once a case and response are filed, the discovery process begins. This can provide an opportunity for the opposing side to do one of two things to delay litigation. It can fail to comply with the requested discovery, or it can propound extensive discovery of its own.

Statutory law provides specific rules to follow and remedies that arise from misuse or abuse of the discovery process. The Code of Civil Procedure requires that counsel and/or the parties meet and confer to discuss discovery disputes.[1] The statutes provide redress for misconduct during the discovery process, including evidentiary sanctions and issue sanctions.[2]

Once discovery has been properly served, it is possible for the opposing party to obstruct the process by either not

responding, objecting to the propounded discovery, providing incomplete responses, and/or failing to comply with the code requirements. The reality is that this requires the propounding party to incur attorney fees to pursue the discovery and delays the litigation process as redress is sought.

When the court finds that the response to propounded discovery is lacking, after counsel meet and confer and if a motion to compel is warranted, the discovery statutes mandate the award of attorney fees. However, the applicable statutes are qualified with the following language, "The court shall impose a monetary sanction…against any party, person, or attorney who unsuccessfully opposes a motion to compel…., unless it finds that the one subject to sanction acted with substantial justification or that other circumstances make the imposition of a sanction unjust."[3]

Despite these remedies, time often passes before the abuses may be addressed based on statutory time requirements and any delay getting the matter before a court. The time delay, if one has an elder for a client can be prejudicial because the elder's health or memory may become impaired which works to the advantage of the delaying party.

B. Bad Faith or Frivolous Actions

In civil cases, there are often prevailing party statutes awarding attorney fees and costs to the prevailing party in the event a case without merit is pursued. This acts as a check and balance to deter people from bringing litigation without there being a substantial basis for filing it in the first place. However, the Legislature has provided limited remedies for those who embark on litigation that is solely brought for the purpose of harassing parties or who unnecessarily delay proceedings in a case. Code of Civil Procedure section 128.5 addresses the filing of frivolous actions or causing unnecessary delay. Code of Civil Procedure section 128.7 addresses actions brought for an improper purpose, that are not warranted by law or lacking evidentiary support. In my experience, requests for enforcement pursuant to sections 128.5 or 128.7 in probate cases are virtually non-existent.

Section 128.5 is framed in a permissive posture in that it provides that a trial court *may* order a party or party's attorney or both to pay any reasonable expenses, including attorney fees incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.[4] "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading.[5] "Frivolous" is defined as "totally and completely without merit or for the sole purpose of harassing an opposing party."[6] Liability under section 128.5 is in addition to any other liability imposed by law.[7] for acts or omissions within the purview of this section.

Code of Civil Procedure section 128.7, subdivision (b) provides that by signing, filing or later advocating a pleading, petition, verification or other similar paper, the attorney or unrepresented person is certifying that certain conditions are met.[8] Code of Civil Procedure section 128.7, subdivision (c) requires that before any relief can be sought pursuant to this statute, notice be provided to the opposing side. If the court determines that section 128.7(b) has been violated, it may impose an "appropriate" sanction. Sanctions "shall be limited to what is sufficient to deter repetition of this conduct or comparable conduct by others similarly situated."[9]

If a petition or other action is filed and appears to have no merit, notice pursuant to sections 128.5 or 128.7 can be served on the filing attorney, or party if in pro per. This puts the petitioner and his or her counsel on notice that if they do not withdraw their petition or the applicable action within the statutory time and decide to proceed in court, the party serving the notice and filing the motion shall be seeking that the offending party pay the attorney fees incurred in defending the action.

Notice given pursuant to section 128.5 is different from notice given pursuant to section 128.7. Specifically, section 128.5, subdivision (c) requires that notice of a request under this section must be included in a party's moving or responding papers. It is noteworthy that the statute provides that the court give notice on its own motion with notice and opportunity to be heard.

Furthermore, the statute requires that a separate motion may be filed under this section, and requires that "the motion shall not be filed with the court, unless within 21 days after service of the motion…the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected."[10] Failure to give the required 21-day notice before filing a motion under this section results in an automatic denial of the motion.

While I was still on the bench, objectors to an accounting brought a motion pursuant to section 128.7 against a trustee who was defending her accounting. The tension created by bringing the motion permeated the entire trial. Counsel for the trustee frequently commented that the objectors were seeking to have the trustee personally pay their attorney fees incurred in prosecuting their objections. At the conclusion of the trial, a separate hearing was set on the section 128.7 motion and the objecting beneficiaries sought payment of their attorney fees of

over $100,000. Upon review of the pleadings, it was determined that the objectors did not give the required notice and the motion was denied. This is noteworthy because it illustrates that failure to give the 21-day notice will be fatal to your motion. On a substantive basis, this may not have been what the legislature intended when the statute was enacted.

C. Vexatious Litigants

Code of Civil Procedure section 391 addresses vexatious litigants, people who are self-represented and file cases or other requests for relief for which there is no legal basis or who file legal actions for which the sole purpose is to be a nuisance to the opposing party.[11] A "vexatious litigant" is a person who does any of the following:

> (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.
>
> (2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.
>
> (3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.
>
> (4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.[12]

Probate Code section 1970 addresses conservatorship matters and provides:

> … if a person other than the conservatee files a petition for termination of the conservatorship, or instruction to the conservator, that is unmeritorious or intended to harass or annoy the conservator, and the person has previously filed pleadings in the conservatorship proceedings that were unmeritorious or intended to harass or annoy the conservator, the petition shall be grounds for the court to determine that the person is a vexatious litigant for the purposes of Title 3A (commencing with Section 391) of Part 2 of the Code of Civil Procedure.

If a person is declared a "vexatious litigant," the statute requires that person to obtain the approval of a judge before they may file any further action or motion in any case.[13] While the statute does not provide for attorney fee relief, it provides some control over and limit to the opportunity for a person to file requests for relief.

D. Prejudice Due to the Passage of Time

When an elder is the aggrieved party, there are statutes that address the prejudice they face due to delays in the litigation process. One remedy is that a motion for preference may be brought pursuant to Code of Civil Procedure section 36 at any time during the proceedings.[14] The court will grant the motion if the following requirements are met:

> (a) A party to a civil action who is over 70 years of age may petition the court for a preference, which the court shall grant if the court makes both of the following findings:
>
> (1) The party has a substantial interest in the action as a whole.
>
> (2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation.[15]

The timing of such a request needs to be considered strategically because times for preparation of the case, for example discovery, may be shortened. One option is to defer the motion until discovery is nearly complete.

Code of Civil Procedure section 36 requires that certain conditions be met in order for it to apply, but the court has discretion to grant a motion for preference if the "interests of justice will be served by granting this preference."[16] If the elder falls within the statutory parameters, the court will expedite the

litigation process. While this doesn't address attorney fees, it can facilitate a faster resolution of the issue for the elder.

III. PROBATE – A LACK OF STATUTORY PROTECTIONS

As mentioned earlier, probate cases are ripe for abuse by use of the litigation process. There specific situations where the court may dismiss a petition in proceedings that are not reasonably necessary for the protection of one's interests. In each of these situations, a dismissal of the petition will reduce the costs associated with that litigation.

Probate Code section 4543, related to Powers of Attorney, provides that for a petition that is not reasonably necessary for the protection of the principal or the principal's estate, the court may dismiss that petition. In addition, Probate Code section 4768 provides that the court may dismiss a petition that is filed to address healthcare decisions of a person, or capacity to make healthcare decisions if it finds that the proceeding is not reasonably necessary for the protection of a patient.

Probate Code section 17211(a) may also offer relief. It provides that if a beneficiary contests a Trustee's account and it is deemed by the court that the contest was without reasonable cause and in bad faith, the court may award against the contestant, the compensation and attorney fees and costs of the Trustee. While such an award may be taken from any distribution due to the beneficiary, the statute also provides that for any amounts of the award that are not satisfied by the distribution, the contestant shall be personally liable.[17]

Due to the nature of the subject matter and the continuous nature of matters such as trusts and conservatorships that can be in existence for decades, and the myriad of issues raised in each case, one can very easily keep litigation ongoing. In the author's opinion, the relief in the Probate Code is not enough.

For example, a trustee, personal representative of an estate, and/or conservator of the estate is required to file annual accountings and give notice to all interested parties. This offers an opportunity for any interested person to object, with or without cause, thus engaging the trust in some form of legal proceedings.

Under some circumstances, an executor, trustee or conservator, to prevent being second-guessed by a beneficiary at a later point in time may serve a notice of proposed action to notify all interested persons of a proposed transaction. If one of the interested parties does not think the action is appropriate, necessary or they just don't like it, they may file objections. This may and often does result in additional litigation to resolve the objections raised by the interested party.

Defensively, to preempt later challenges, a trustee may file a petition for instructions pursuant to Probate Code section 17200, seeking court assistance in determining an issue related to the administration of a trust, or approval of a proposed action. This provides additional opportunities for a disgruntled beneficiary or interested person to object, thus engaging the trust in further litigation, resulting in the unintended consequence of extending the administration of a trust or estate, sometimes for years.

If the Welfare and Institutions Code statutes apply (e.g. the wronged party is an elder), the party must first prevail in order to benefit from the protections offered by those statutes. For cases where the parties are not elders or dependent adults, the elder abuse statute protections will not apply.

The methodologies of wrongdoing vary, but the end result is that beneficiaries, conservatees, and/or persons for whom statutory protections are not in place, has or have been denied property rights and/or ownership of their hard-earned property and money.

If the aggrieved party wishes to "recover" what was taken from them, or to redress the wrongs perpetrated by one breaching their fiduciary duty or duties they must affirmatively petition for the desired relief, often against the wrongdoer, and use their now limited resources to pay for the litigation process. While some attorneys will take a case on contingency, if the claim is too small, an attorney may not be willing to take the case. Separate and apart from that, while the elder will be better off recovering a portion of what they lost, the cost in terms of the percentage paid pursuant to the contingency agreement to the elder is high.

A party can bring a petition under Probate Code section 850 to recover property on behalf of an estate, trust, or conservatorship. If the petitioner prevails and the actions rise to the level described in Probate Code section 859, the aggrieved party can seek and, if the standard is met, the court can award double damages and reasonable attorney fees.[18] Still, this requires the petitioner to financially support the litigation.

There is no Probate Code statute to address the lack of resources faced by the aggrieved party and/or a situation where the opponent has unlimited resources. The aggrieved party may walk away from the wrong based solely on the financial limitations they face.

IV. THE TAKING OF HOSTAGES – WAR STORIES

I was involved in a case where a significant amount of commercial real estate was transferred to a trust. After the death of both settlors, it was determined that the older son's wife (the couple's daughter-in-law) had embezzled millions of dollars in rental income from the parents and their trust. After several years of litigation, settlement was reached with the daughter-in-law. Shortly thereafter, the daughter-in-law sought to set aside the settlement agreement.

The daughter-in-law also filed a petition seeking the removal of the trustee, alleging that the trustee breached his fiduciary duties to the trust and beneficiaries by spending millions of dollars to recover the funds she took. She requested that the trustee be surcharged for the attorney fees incurred by the trust and further alleged that her children, grandchildren of the decedents, had separate causes of action against the trustee.

The litigation has been pending for eight years and the daughter-in-law brought many motions seeking affirmative relief, attempting to set aside the settlement, for reconsideration of court rulings, and appeals of many if not all court rulings related to all court proceedings. The daughter-in-law, now without standing based on a court ruling, has filed her third petition under Probate Code section 850.[19] The daughter-in-law who embezzled trust assets is causing the trust to spend money that otherwise should go to the remaining beneficiaries.[20]

Perhaps if the trustee sought a Code of Civil Procedure section 128.5 remedy or section 128.7 notice was given and a motion brought, the daughter-in-law might have pause to think about a consequence of filing any of her Probate Code 850 petitions. Aside for paying her attorney fees, she faces no consequence for filing her petitions.

Another example is a case that is now the subject of law school classes and presents many interesting legal issues.[21] Tragically, millions of dollars have been spent in attorney fees—a large portion of them in response to the litigation tactics of an aggrieved beneficiary.

The oldest of three daughters, Elizabeth, caused their mother to execute a trust amendment that resulted in significantly reducing the bequest to her youngest daughter, Sarah. In doing so, a maelstrom of litigation ensued beginning with Sarah's petition to invalidate their mother's trust amendment on the grounds that the trust amendment was the product of undue influence by Elizabeth. The trial court[22] found that the trust amendment was the product of undue influence and deemed it to be invalid and the ruling was upheld on appeal.

Once the determination concerning the validity of the trust amendment was resolved, Sarah engaged in an unprecedented practice of objecting to every action brought by the trust administrator to liquidate the trust assets for distribution to the beneficiaries. She delayed the sale of every asset for many months by objecting to the sale and the sale price. For each asset sold, in response to her objections, a court hearing was required to address the cost and marketing approach by the Trustee.

However, the objections were based on fiction. For one asset, after looking for a buyer for months, the sale of a unique piece of real property was negotiated and a contract was signed. Sarah insisted that the price was too low by $500,000 but for which there was no one to purchase the property at that price. At one point during the proceedings, Elizabeth offered to sell the property to Sarah at the price Sarah was insisting that the property was worth and should be sold. Sarah declined Elizabeth's offer, and it was sold for the negotiated contract amount, but not until the sale was delayed six months and causing the possible loss of the purchaser. Sarah's objections required the trustee to respond to them and for the court to set and preside over a hearing. All of this cost the trust attorney's fees and costs. In the end, the resulting sale was unchanged from the transaction that could have been completed six months earlier.

Sarah engaged in the same fashion regarding the sale of the family business in a highly specialized industry for which there were few buyers. She filed objections to the sale of the business and required the court to have a hearing as to whether the business had been properly valued and marketed. She asserted that the value of the business was $20,000,000 higher than the price at which the bidding was to start at an auction. In the end, Sarah was unable to establish that the marketing of the business was not proper and/or that the value was not appropriate, but she delayed the sale of the business and related assets for several months. Again, this cost the trust attorney's fees and costs to respond to her objections and conduct the related hearing.

It is possible that if the Code of Civil Procedure section 128.5 remedies were sought and/or section 128.7 notice was given and a motion brought, Sarah might have been deterred from filing her objections based on the possible consequence of filing her objections.[23]

These statues provide effective tools but, again, are rarely used in probate cases.

One circumstance where a Code of Civil Procedure section 36 application would be appropriate and where the delay is

harmful and prejudicial to elders is illustrated by the following scenario. Adult children convinced their parents to transfer all their assets into an irrevocable trust naming the children as trustees. As trustees, the children have had complete control of both the trust and the assets. The trustees have required the parents to justify every expenditure they made so that the trust, now holding all their assets, would provide the distributions to pay for those expenditures.

The parents sought relief by having the trust deemed invalid. One of children, for whom money is no object, threatened to drag the litigation on until the parents either ran out of money or died. The child making the threat is one of the children who initially convinced their parents to agree to put their assets into the irrevocable trust. The litigation, true to the promise made by their child, has been ongoing for years and is draining the limited assets in the trust. The parents are distraught by the hostility exhibited by their child(ren) in whom they had placed the utmost trust.

After three years of trying to settle the case, the parents are exhausted and worried about the cost of going to trial. Yet, it appears that the only way to resolve the case, short of a dismissal, is to take it to trial. No one anticipated that the case would drag on for so long three years ago when they filed their petition to invalidate the trust. A motion under section 36 may have provided resolution much sooner.

V. CONCLUSION

I continue to receive emails and phone calls from the litigants described in the above cases. They are incredulous that their litigation continues unabated. I am unable to provide solace; they are in a vortex for which there is no end in sight.

A possible solution may exist in the Family Code. Family law cases share some things in common with trusts and estates cases. Both can involve very personal issues, as opposed to pure business or financial issues. They also both often extending over periods of many years.

In family law matters, statutes have been enacted that provide the court the ability to order that the other side's attorney fees and related costs be paid by the adverse party. These statutes address the costs related to litigation such that they either or both allocate the costs of litigation between the parties and/or assign the related fees and costs, where appropriate, to a specific party.

The first is when one party has more financial resources and is better able to finance the litigation. Family Code section 2030, et. seq. provides that the court order the side with resources to contribute to the other party's "needs based" litigation fees and costs in an effort to equalize one party's ability to participate in the litigation. This type of order includes not only attorney fees and costs, but accountant and other expert fees and costs as well.[24]

Second, Family Code section 271 is designed to address and encourage two things. First, it is designed to deter the conduct of a party or attorney who frustrates the policy of the law to promote settlement of litigation. Second, the statute is also intended to reduce the cost of litigation by encouraging cooperation between the parties and attorneys where that is possible. When a party or attorney hinders the progress of a case or frustrates the policy of the law to promote settlement, the court may impose sanctions requiring the offending party to pay the attorney fees and costs of the other party.[25]

I raise these question in hopes that this will spur discussion, that some form of relief might be considered and enacted by the legislature. The one thing I can tell you is that there is a need for which there is no current solution.

* *JAMS, Los Angeles, California*

1 Code Civ. Proc., section 2016.040.

2 Code Civ. Proc., section 2023.030.

3 See, Code Civ. Proc., sections 2023.030, subd. (a), 2030.090, subd. (d), 2031.060 subd. (h), and 2033.090, subd. (d).

4 Code Civ. Proc., section 128.5, subd. (a).

5 Code Civ. Proc., section 128.5, subd. (b).

6 *Ibid*.

7 Code Civ. Proc., section 128.5, subd. (e).

8 Code Civ. Proc., section 128.7, subd. (b).

9 Code Civ. Proc., section 128.7, subd. (d)

10 Code Civ. Proc., section 128.7, subd. (c)(1).

11 Code Civ. Proc., section 391.

12 Code Civ. Proc., section 391, subd. (b).

13 Code Civ. Proc., section 391.7.

14 Code Civ. Proc., section 36.

15 Code Civ. Proc., section 36, subd. (a).

16 Code Civ. Proc., section 36, subd. (e).

17 Probate Code section 17211, subdivision (b) correspondingly provides that if a trustee defends an account without reasonable cause or in bad faith, the attorney fees and costs may be awarded to the contestant. The amount awarded shall be a charge against the compensation of the Trustee or any interest he or she may have in the trust, on the bond, and against the trustee personally for any amounts of the award that remain unsatisfied.

18 Prob. Code, section 859.

19 Notably, the relief provided under Probate Code section 859 would not apply to the Petitioner in this case.

20 The settlement approved by the court results in the children's interests being bought out. As a result, the daughter-in-law is not a beneficiary, nor are her children pursuant to the settlement. She has no standing, yet she continues to file petitions.

21 *Key v. Tyler I,* (Cal.Ct.App. June 27, 2016, B258055) mod. June 29, 2016 .

22 Full disclosure, the author presided over this part of the case.

23 Yet today the litigation for this case remains ongoing. The court of appeal recently published an opinion addressing Sarah's anti-SLAPP claims brought by Sarah using the Anti-SLAPP statute to have Elizabeth disinherited for opposing and defending the trust from Sarah's Petition to invalidate the Trust amendment that disinherited her.

24 Fam. Code, section 2030, et. seq.

25 Fam. Code, section 271.