McGeorge Law Review

Volume 42 | Issue 3 Article 11

1-1-2011

Chapter 106: In Hearsay We Trust

Abigail Maurer
University of the Pacific; McGeorge School of Law

Chapter 106: In Hearsay We "Trust"

Abigail Maurer

Code Section Affected
Evidence Code § 1260 (amended).
SB 1041 (Harman); 2010 STAT. Ch. 106.

I. INTRODUCTION

Revocable trusts[1] are one of the most common testamentary devices used in estate planning,[2] and they have "been around longer than gunpowder."[3] Noblemen in fifteenth century England used the revocable trust to protect their assets from seizure by the King.[4] By placing their assets in a revocable trust, noblemen could prevent the King from confiscating their land by manufacturing charges against them.[5] "[E]ven if they lost their freedom, or . . . their lives, the King couldn't legally get to their property."[6]

While revocable trusts have been around for centuries, they have only recently gained popularity among the general public.[7] This is primarily because trusts, unlike wills, do not go through probate.[8] Thus, revocable trusts save parties the costs, time, and publicity often associated with the probate process.[9]

Despite the growing popularity of revocable trusts, Evidence Code section 1260[10]—which makes it easier to interpret the provisions of a will by allowing hearsay statements[11]—previously did not apply to trusts.[12] Chapter 106 remedies

---

1. BLACK'S LAW DICTIONARY 1550 (9th ed. 2009) (Revocable trusts are also known as living trusts and are defined as "[a] trust in which the settlor reserves the right to terminate the trust and recover the trust property and any undistributed income.").

2. SaveWealth Estates, Living Trusts, http://www.savewealth.com/planning/estate/livingtrusts/ (last visited Mar. 7, 2011) (on file with the *McGeorge Law Review*).

3. Jeffrey G. Marsocci, *A Quick History of Revocable Living Trusts*, THE L. OFF. OF JEFFREY G. MARSOCCI L. BLOG (Apr. 14, 2010), http://www. livingtrustlawfirm.com/a-quick-history-of-revocable-living-trusts/ (on file with the *McGeorge Law Review*).

4. *Id.*

5. *Id.*

6. *Id.*

7. *See* SaveWealth Estates, *supra* note 2 (indicating that revocable trusts became popular with the general public during the last twenty years).

8. Earl C. Gottschalk, Jr., *Revocable Living Trusts Become Popular Option in Estate Planning*, WALL ST. J., Feb. 4, 1987, *available at* http://www.hwestlaw.com/trust_article.doc (on file with the *McGeorge Law Review*).

9. *Id.*

10. 1967 Cal. Stat. ch. 299, § 2 (enacting CAL. EVID. CODE § 1260); *see also infra* Part III (explaining that section 1260 is a hearsay exception for statements regarding the creation, amendment, or revocation of a will).

11. *See* FED R. EVID. 803(3) advisory committee's note (suggesting that section 1260 and the

this omission by expanding section 1260 to include statements by an unavailable witness regarding the creation, amendment, or revocation of a revocable trust,[13] thus responding to the increased use of trusts as an estate planning tool.[14]

II. LEGAL BACKGROUND

Hearsay evidence is defined as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter asserted."[15] Hearsay evidence is generally inadmissible, although there are multiple exceptions to this rule.[16]

Evidence Code section 1260 provides one such exception[17]: evidence of an unavailable[18] declarant's[19] statement that he or she "has or has not made a will, or has or has not revoked his will, or that identifies his will, is not made inadmissible by the hearsay rule."[20] However, evidence of an unavailable declarant's statement is not made admissible when "the statement was made under circumstances such as to indicate its lack of trustworthiness."[21] Therefore, existing hearsay law does not allow admission of out-of-court statements regarding the creation, revocation, or identification of a trust.[22]

---

comparable federal rule were enacted "on practical grounds of necessity and expediency rather than logic.").

12. *See* 1967 Cal. Stat. ch. 299, § 2 (enacting CAL. EVID. CODE § 1260) (providing an exception to the hearsay rule only for statements concerning a declarant's will, and not for statements regarding a declarant's trust).

13. CAL. EVID. CODE § 1260(a) (amended by Chapter 106).

14. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1041, at 3 (May 4, 2010).

15. CAL. EVID. CODE § 1200(a) (West 2010).

16. *Id.* § 1200(a)-(b).

17. *See* 1967 Cal. Stat. ch. 299, § 2 (enacting CAL. EVID. CODE § 1260) (providing an exception to the hearsay rule for statements concerning a declarant's will).

18. CAL. EVID. CODE § 240(a). This section defines, "unavailable as a witness," as a witness who is:

> (1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant.
>
> (2) Disqualified from testifying to the matter.
>
> (3) Dead or unable to attend or to testify because of then existing physical or mental illness or infirmity.
>
> (4) Absent from the hearing and the court is unable to compel his or her attendance by its process.
>
> (5) Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process.

Id.

19. *See* CAL. EVID. CODE § 135 ("'Declarant' is a person who makes a statement.").

20. 1967 Cal. Stat. ch. 299, § 2 (enacting CAL. EVID. CODE § 1260) (explaining the hearsay exception contained in section 1260 prior to Chapter 106).

21. *Id.*

22. *Id.*

III. CHAPTER 106

Chapter 106 extends the application of Evidence Code section 1260 to revocable trusts.[23] Thus, an unavailable declarant's out-of-court statement regarding the creation,[24] revocation,[25] or identification[26] of a will or revocable trust "is not made inadmissible by the hearsay rule."[27]

IV. ANALYSIS

A. Aye: Arguments in Support of Chapter 106

Chapter 106 was relatively noncontroversial—the Senate Judiciary Committee,[28] the Senate,[29] the Assembly Judiciary Committee,[30] and the Assembly[31] all passed Chapter 106 unanimously. Subsequently, Governor Schwarzenegger signed the measure into law.[32]

Three organizations registered support for the bill: the Conference of California Bar Associations, the Judicial Council of California, and the Executive Committee of the Trusts and Estates Section of the State Bar.[33] There are three primary arguments in support of Chapter 106.

First, supporters argue "the same policy justifications supporting [the] hearsay exception for wills apply to revocable trusts."[34] The hearsay exception for

---

23. CAL. EVID. CODE § 1260(a) (amended by Chapter 106).

24. *Id.* § 1260(a)(1) (amended by Chapter 106).

25. *Id.* § 1260(a)(2) (amended by Chapter 106) (providing that statements regarding revocation of a revocable trust may be regarding the trust as a whole, or an amendment).

26. *Id.* § 1260(a)(3) (amended by Chapter 106).

27. *Id.* § 1260(a) (amended by Chapter 106).

28. Senate Committee Vote of SB 1041, Unofficial Ballot, May 4, 2010, http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1001-1050/sb_1041_vote_20100504_000001_sen_comm.html (on file with the *McGeorge Law Review*).

29. Senate Floor Vote of SB 1041, Unofficial Ballot, May 17, 2010, http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1001-1050/sb_1041_vote_20100517 _0130PM_sen_floor.html (on file with the *McGeorge Law Review*).

30. Assembly Committee Vote of SB 1041, Unofficial Ballot, June 22, 2010, http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1001-1050/sb_1041_vote_20100622_000002_asm_comm.html (on file with the *McGeorge Law Review*).

31. Assembly Floor Vote of SB 1041, Unofficial Ballot, June 28, 2010, http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_1001-1050/sb_1041_vote_20100628_0143PM_asm_floor.html (on file with the *McGeorge Law Review*).

32. *See* Press Release, Office of the Governor, Legislative Update (July 15, 2010) (on file with the *McGeorge Law Review*) (announcing Governor Schwarzenegger's signature on SB 1041).

33. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1041, at 6 (June 21, 2010).

34. Letter from the Executive Comm. of the Trusts & Estates Section of the State Bar of Cal., to Ellen Corbett, Senator, Cal. State Senate (Mar. 22, 2010) [hereinafter Executive Comm. of the Trusts & Estates Section of the State Bar of Cal. Letter] (on file with the *McGeorge Law Review*).

wills is justified by expediency and practicality, and expediency and practicality are equally necessary in matters involving revocable trusts.[35]

Second, supporters advance that Chapter 106 "properly conform[s] treatment of revocable trusts and wills."[36] In other words, expanding the exception to revocable trusts assures that the two primary testamentary devices are treated similarly in court proceedings.[37] This will "enhance [courts'] overall ability to resolve disputes involving revocable trusts and better protect the rights of the trust beneficiaries."[38]

Third, supporters maintain that "it is important to extend this hearsay exception to revocable trusts given their present widespread use."[39] The use of trusts as a testamentary device has increased over the last twenty years,[40] and trusts are now widely recognized as a valid substitute for a will.[41] Further, "the standards applicable to wills are also applicable in determining whether a revocable trust is valid or fails when later challenged by persons who would otherwise be the settlor's successors in interest."[42] Because the standards for determining the validity of a will or a trust are identical, the same type of evidence should be available for determining their legitimacy.[43]

B. Nay: Arguments in Opposition to Chapter 106

No organizations registered opposition to Chapter 106.[44] Nonetheless, there is an argument to be made against increasing the use of hearsay evidence.[45] Hearsay is often viewed as inherently unreliable because "the statements are not made under oath, the adverse party has no opportunity to cross-examine the declarant, and the jury cannot observe the declarant's demeanor while making the statements."[46] Exceptions to the hearsay rule typically arise because of a belief that a statement is inherently trustworthy, despite the fact that the declarant is not testifying in court, or because the need for the statement outweighs the risk of unreliability.[47]

---

35. *See* FED R. EVID. 803(3) advisory committee's note (suggesting that section 1260 and the comparable federal rule were enacted "on practical grounds of necessity and expediency rather than logic").

36. Letter from Executive Comm. of the Trusts & Estates Section of the State Bar of Cal., *supra* note 34.

37. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1041, at 3 (May 4, 2010).

38. Letter from Daniel Pone, Senior Attorney, Judicial Council of Cal., to Tom Harman, Senator, Cal. State Senate (Mar. 18, 2010) (on file with the *McGeorge Law Review*).

39. Letter from Executive Comm. of the Trusts & Estates Section of the State Bar of Cal., *supra* note 34.

40. SaveWealth Estates, *supra* note 2.

41. RESTATEMENT (THIRD) OF TRUSTS § 11 cmt. b (2003).

42. *Id.*

43. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1041, at 4 (May 4, 2010).

44. *Id.*

45. E-mail from Robert Sweetin, Legislative Aide, Office of Senator Tom Harman, to Abigail S. Maurer, Staff Writer, McGeorge Law Review (July 15, 2010) (on file with the *McGeorge Law Review*).

46. People v. Duarte, 24 Cal.4th 603, 610, 12 P.3d 1110, 1117 (2000).

47. Donna Meredith Matthews, *Making the Crucial Connection: A Proposed Threat Hearsay Exception,*

There is no assurance that a declarant's out-of-court statements regarding a revocable trust are either inherently reliable or that the need for them inherently outweighs the risks.[48] Prior to Chapter 106, the justification for section 1260 was simple practicality and necessity; however, practicality and necessity do not justify relying on untrustworthy statements.[49]

C. The Effect of Chapter 106

It is not likely that Chapter 106 will have a significant impact on evidentiary rulings regarding hearsay statements.[50] Prior to amendment, section 1260 only applied to statements regarding the creation, amendment, or revocation of a will.[51] However, in the limited case law applying section 1260, courts appear to have presumed that section 1260 applied to statements regarding the creation, amendment, or revocation of revocable trusts as well as to wills.[52]

For example, in the unpublished case of *Black v. Nopuente,* the decedent executed a revocable trust in 1984.[53] The original trust provided appellant Black with a cash gift of $10,000 and did not mention respondent Nopuente.[54] Several months before the decedent's death, an amendment was executed in the hospital reducing Black's gift to $1,000, making Nopuente the successor trustee and the primary beneficiary of the decedent's estate.[55] Black argued that the amendment was executed with undue influence and attempted to introduce several witnesses to testify that the decedent had intended "that the original 1984 Trust was and would be her operative estate plan."[56] The trial court excluded the testimony as hearsay.[57]

In addressing the trial court's ruling on hearsay evidence, the Court of Appeals mentioned that "it is undisputed that Evidence Code section 1260 is applicable to the instant case, even though the testamentary instrument is a trust and not a will."[58]

---

27 GOLDEN GATE U. L. REV. 117, 137 (1997).

48. *See* SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF SB 1041, at 3 (May 4, 2010) (stating that the basis for the rule is that the declarant is dead and therefore unavailable to testify, and not mentioning the inherent reliability of, or overwhelming need for, the statement).

49. *See* FED R. EVID. 803(3) advisory committee's note (suggesting that section 1260 and the comparable federal rule were enacted "on practical grounds of necessity and expediency rather than logic").

50. *See* Black v. Nopuente, 2004 WL 2830880 (1st Dist. 2004) (finding that section 1260 applied to hearsay statements regarding trusts even though the text of section 1260 only referred to wills).

51. 1967 Cal. Stat. ch. 299, § 2 (enacting CAL. EVID. CODE § 1260).

52. *See Black*, 2004 WL 2830880 at *3 n.6 ("[I]t is undisputed that Evidence Code section 1260 is applicable to the instant case, even though the testamentary instrument is a trust and not a will.").

53. *Id.* at 1.

54. *Id.*

55. *Id.* at 2.

56. *Id.* at 3.

57. *Id.*

58. *Id.* at 3 n.6.

Prior to amendment by Chapter 106, section 1260 simply codified the common law rule that statements regarding the creation, amendment, or revocation of a person's will were admissible despite the rule against hearsay.[59] Chapter 106 merely codifies an expansion of section 1260 to revocable trusts, which courts have already implemented.[60]

V. CONCLUSION

While estate planners have utilized revocable trusts for hundreds of years, it is only recently that their popularity has flourished.[61] By enacting Chapter 106, the Legislature is recognizing the prevalence of revocable trusts by expanding the hearsay exception contained in section 1260 to include statements regarding trusts.[62] Thus, the same type of evidence is now available in determining the validity of a revocable trust as has already been available in determining the validity of a will.[63]

59. 1967 Cal. Stat. ch. 299, § 2 (enacting CAL. EVID. CODE § 1260) ("Section 1260 codifies an exception recognized in California case law. Estate of Morrison, 198 Cal. 1, 242 Pac. 939 (1926); Estate of Thompson, 44 Cal. App. 2d 774, 112 P.2d 937 (1941)").

60. *See Black*, 2004 WL 2830880 at 3-4 (applying section 1260 to hearsay statements regarding a revocable trust).

61. SaveWealth Estates, *supra* note 2; Marsocci, *supra* note 3.

62. CAL. EVID. CODE § 1260(a) (amended by Chapter 106).

63. SENATE COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF SB 1041, at 4 (May 4, 2010).