


### Selected Real Property Issues in Probate and Trust Proceedings



Presented by: Kurt Rifbjerg, Esq.

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### The Holdover Tenant - Example

- Mom and Dad owned a home and rental property in San Diego. They created and funded their Trust which provides for equal distribution among their three children: Abe, Bob, and Cindy. Abe was named as successor trustee.
- Bob fell on hard times after the Great Recession and Mom and Dad agreed to let him live in the Rental temporarily in 2008 rent free. Temporarily gradually became indefinitely. Mom and Dad got sick and both died in early 2018.

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### The Holdover Tenant - Example

- Abe has agreed to serve as Trustee and needs help. Abe is independently wealthy and doesn't care too much about the arrangement, but Cindy is very upset with Bob's apparent freeloading.
- Regardless, all beneficiaries are entitled to 1/3 of the Trust assets
- What must Abe do?

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### Holdover Occupants/Tenants At Death of Owner

- Trustees have an obligation to collect rent *Purdy v Johnson* 174 Cal 521 (1917)
- Personal Representatives can be surcharged for failure to rent
- How to continue to collect rent from tenants/occupants? Should you collect rent?

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### The Holdover Tenant – Types of Tenancies

- Bob's occupancy is a tenancy at will
- Other situations could involve
  - Tenant for fixed term
  - Periodic tenant
  - Tenant at sufferance
- Bob is liable for the fair market rental value during his occupancy after Mom and Dad's death.
- If Bob does not informally agree to vacate, or pay rent, Trustee should weigh various options to recover possession versus goals of trust administration

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## The Rent

- PR and Trustee have similar duties to keep property productive and generate rent.
- The duty is straightforward in an intestate estate, but Will or Trust may give specific direction about management of property or grant of rights to heirs/beneficiaries.
- This does not preclude PR and Trustee from seeking consent from heirs/beneficiaries or judicial instructions on whether to collect rent.
  - Notice of Proposed Action or Petition for Instructions

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## Powers to Lease

- PR may lease real property of the estate without authorization where:
  1. Rental does not exceed \$5,000/month and term does not exceed 1 year.
  2. Month-to-Month, "regardless of the amount of the rental"
- If terms do not meet these requirements, can proceed via NOPA if PR has IAEA powers. PC 10536.
- Commercial space may require greater nuance and expertise, but general duty to keep property productive still applies

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## How Should a Trustee/PR Handle Residential Tenancies?

- In light of these duties, Administrators/Trustees should incorporate policies for how residential property is managed to comply with California law
  - Property Managers
  - 1 or 2 Units
- Notice Occupants that PR/Trustee is now proper person to receive rent (Civil Code §1962)

(c) The information required by this section shall be kept current and this section shall extend to and be enforceable against any successor owner or manager, who shall comply with this section within 15 days of succeeding the previous owner or manager. A successor owner or manager shall not serve a notice pursuant to paragraph (2) of Section 1161 of the Code of Civil Procedure or otherwise evict a tenant for nonpayment of rent that accrued during the period of noncompliance by a successor owner or manager with this subdivision. Nothing in this subdivision shall relieve the tenant of any liability for unpaid rent.

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## Tenancy Outline

Pre-Tenancy

During Tenancy

Termination of Tenancy

Post-Tenancy

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## Pre-Tenancy – Rental Application

- Rental criteria
  - Written
  - Non-discriminatory
  - Occupancy standards
- Who should fill out the application?
- Application fees
  - Hard and soft costs
  - Maximum amount
  - Itemized receipt required



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## Pre-Tenancy – Rental Application

- Citizenship and immigration status
  - Civil Code §1940.3
  - Unruh Act (SB 600)
  - Requesting SSN's
- Checking Identification
  - Forms of ID
- Renting to Corporations
  - <https://businesssearch.sos.ca.gov/>



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### Pre-Tenancy – Screening

- Credit
  - Applicant copy
- Rental history
  - Written references
  - Prior and current landlords
- Eviction history
  - UD law - AB 2819

#### Credit Score

😊	<input type="checkbox"/> Excellent
😐	<input type="checkbox"/> Average
😞	<input type="checkbox"/> Poor



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### Pre-Tenancy – Screening

- Criminal background checks
  - HUD Guidance
  - Megan’s Law
  - Jessica’s Law
  - HUD subsidized housing



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### Pre-Tenancy – Approval/Denial

- Approval/Denial
  - Test the application against rental criteria
  - No exceptions unless:
    - Disability-related accommodation
    - Conditional approval (three-tier criteria)
- Denial
  - Credit based
  - Other factors



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### Pre-Tenancy – The Lease

- Agreements/Rules
  - Month-to-month vs. long term
  - Required information
  - Forms of payment
  - Negotiations in foreign languages
    - (Civil Code §1632)
    - HUD guidance (2016)



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### Pre-Tenancy – The Lease

- Security deposits
  - Maximum allowed
  - Include all types
    - Exceptions
  - Labeling deposits
  - Escrow account?



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### Pre-Tenancy – Corporations

- Corporate tenants
  - Tenant
  - Subtenants
  - Who signs lease?
  - Consider a guaranty
- Cautions re: vacation and short term rentals



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### Pre-Tenancy – Checklist

- Turnover of possession
  - Review agreement/rules
  - Agreement/addenda/rules signed by all
    - Electronic signatures
    - Copy of agreement
  - Copy resident's ID
    - Caution re: Military IDs
  - Move-in checklist/walkthrough
  - Payment of all move-in funds or written plan
  - No keys until all complete!



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### During Tenancy – Communication

- Communication
  - Keep lines of communication open
  - Encourage reports of problems to management
  - Foster a community feeling
  - Document conversations



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### During Tenancy – Enforcement

- Rules/Community policies
  - Enforce rules consistently to all residents
  - Ask for complaints in writing
  - Address issues in writing to all parties (acknowledgement or warning)
  - If warranted, issue notice and follow-through



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### During Tenancy – Domestic Violence

- Domestic Violence
  - California
    - Victim can give 14-Day Notice to Vacate
    - Restrictions on eviction if abuser is not a tenant
    - Changing locks
  - HUD Final Rule (VAWA)
    - Notice requirements
    - Emergency transfer plan
  - Still Applies to PR/Trustee



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### During Tenancy – Unit Entry

- Right of entry/Right to privacy
- Reasons to enter (CC §1954)
  - Emergency
  - Abandonment/surrender
  - Court order
  - Necessary or agreed upon repairs, decorations, alterations, or other improvements
  - Show the rental unit to prospective tenants, purchasers, lenders
  - Provide entry to contractors or workers who are to perform work on the unit
  - Conduct an initial inspection before the end of the tenancy
  - Maintain smoke and CO detectors
  - Waterbeds
  - Personal agriculture (single family homes/duplexes)
- Still Applies to PR/Trustee



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### During Tenancy – Unit Entry

- 24-hour notice required
- Exceptions:
  - Emergencies
  - Abandonment/surrender
  - Showing property to prospective purchasers
  - Tenant has requested service/repairs and has made a verbal agreement to allow landlord to enter



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### During Tenancy – Maintenance

- Landlord responsibilities
  - Mold
  - Notice of pesticide use
  - CO detectors & plumbing fixtures
- Landlord response
  - Handling emergencies
  - Document all requests for service and follow-up
- Resident remedies for landlord's breach
  - Repair and deduct
  - Constructive eviction
  - Withhold rent



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### During Tenancy – Bed Bugs (AB 551)

- New Civil Codes §1954.600-1954.605; §1942.5
- Prohibits landlord from showing, renting, or leasing a unit with a known infestation
- Requires written notification to prospective and current tenants
- Entry to inspect/treat bed bugs must comply with CC §1954
- Requires tenants to cooperate with inspection efforts
- Landlord must provide written notice of pest control operator's findings within 2 business days of receipt
- Prohibits retaliation against lessee for reporting bed bug infestation



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### During Tenancy – Pets

- Pets
  - Restrictions
  - Rules of conduct
- When there are problems:
  - Unauthorized pets
  - Disturbances
  - Danger
- Remember: Assistive animals are not pets!



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During Tenancy – Outdoor areas




Pools

- Drains and lighting
- Signage



Parking

- Electric vehicles
- Towing



Clotheslines and drying racks

- CC §1940.20

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During Tenancy – Smoking

- Cigarettes
  - E-cigarettes
- Marijuana
  - Proposition 64
  - Federal v. state law
- Medical Marijuana
  - Disability accommodation?
  - HUD-subsidized properties



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During Tenancy – Change of Terms

- Change of terms of tenancy
  - Month-to-month
    - Rent: 30-day except 10% +
    - Other changes, 30-day
  - Fixed term lease
    - Can't force except at expiration
  - Note re: rent-control jurisdictions



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### During Tenancy – Probate/Trust Issues

- Notify Tenants or Property Manager of change of responsible person or location where to send rent (Civil Code 1962)

(c) The information required by this section shall be kept current and this section shall extend to and be enforceable against any successor owner or manager, who shall comply with this section within 15 days of succeeding the previous owner or manager. A successor owner or manager shall not serve a notice pursuant to paragraph (2) of Section 1161 of the Code of Civil Procedure or otherwise evict a tenant for nonpayment of rent that accrued during the period of noncompliance by a successor owner or manager with this subdivision. Nothing in this subdivision shall relieve the tenant of any liability for unpaid rent.

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### Termination of Tenancy – Notices

- Lease non-renewal
  - Law v. lease provisions
- 30- or 60-Day Notice to Quit
  - Month-to-month tenancies
  - 60-day notice required if ALL tenants have been in possession a year or longer
    - Language re: rights to reclaim personal property
  - Cause required?
    - Cautions: retaliation / discrimination
  - Pro-rating rent



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### Caution to Probate Practitioners

- Unlawful Detainer is a remedy created by statute – the various rules are strictly applied. Notices are highly technical and an inexperienced practitioner can easily run afoul of these rules.
- Foul ups can result in defective notices, forced re-service on occupants, or inability to prevail at trial.

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Termination of Tenancy – Service

- Service of notices
  - Methods of service
    - Personal (residential/business)
    - Substitute
    - Post and mail
  - Corporate tenants
    - Agent
    - Property
  - Counting days
    - Weekends/holidays?



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Termination of Tenancy - Eviction

- Unlawful detainer filing
  - Summons and complaint
    - Prejudgment claim to right of possession (CCP §415.46)
  - Service (3x, 3-days)
    - Military acknowledgement
- Process and timelines
  - Uncontested
  - Contested



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Termination of Tenancy – Trial

- The realities
  - Burden of proof
  - HUD or other affordable properties
  - Impact of Shriver Act
- Preparing for trial
  - Documentation
  - Witnesses
    - Subpoenas
- At trial



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### Termination of Tenancy – Tactics

- Third party claim
  - Process
  - Prejudgment claim
- Bankruptcy
  - Delay
  - Relief from stay
  - Penalty from violation
  - Bankruptcy Reform Act
- Relief from Forfeiture
  - Unusual hardship
  - Restores tenancy
  - Tenant must make full payment
- Appeal



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### Termination of Tenancy – Return of Possession

- Abandonment
- Sheriff lockout
  - Fees
  - Information form
  - At lockout
    - Changing the locks



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### Post-Tenancy – Abandonment

- Abandonment of personal property
  - Sheriff lockout vs. skip
  - Property worth less than \$700
  - Property worth \$700 or more




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### Post-Tenancy – Pre-Move Out Inspections

- Notification of right to pre-move out inspection
  - Purpose and applicability
  - Language
- Scheduling the inspection
  - Within last 2 weeks of tenancy
  - 48 hour written notice
- After the inspection
  - Itemized statement
  - Opportunity to correct deficiencies prior to move-out



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### Post-Tenancy – Security Deposit

- Deductions permissible under CA Civil Code §1950.5
  - Unpaid rent
  - Repair of damages
    - Exclusive of “normal wear and tear”
  - Cleaning to restore unit
  - Restore, replace, or return personal property if authorized by the lease



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### Post-Tenancy – Security Deposit

- Written disposition
  - Itemized statement
  - Invoices/receipts (\$125+)
  - Refund
- 21 day timeframe
  - Delivery methods
    - Personal
    - Mail
    - Electronic
- Potential Penalties
  - Bad faith retention



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### When Your Case is Heading Towards Unlawful Detainer

- Indigent Defendants in Unlawful Detainer often receive free representation from attorneys working for Legal Aid. While they have many cases, they do significantly scrutinize the PR/Trustee's right to bring the case and merits for doing so

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### Unlawful Detainer vs Ejectment vs Section 850 Petition

- California Trusts and Estates Quarterly Vol 23, Issue 3 – 2017: "Get Out, Get Out, Whoever You Are! How to Oust Occupants from Trust, Estate, or Conservatorship Real Property."
- Distinction between actions for Unlawful Detainer/Ejectment/850 Petition
- Opinion of San Diego Judges – Comments at November Probate Examiners Conference

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### Reasons for Potential Delay in Probate UD Proceeding

- Unclear Probate Court Orders
- Unclear to UD Court who has an actual ownership interest
- UD Defenses
  - Warranty of Habitability
  - Defendant's offer to pay rent prior to notice
  - Waiver or Cancellation of Notice

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## Life Estates vs Rights of Occupancy

- Occupants rights very different depending on this determination
- Life Estate: words like "for life" "for her lifetime" or "for A's life"
  - "It is not essential to the creation of a life estate that the term 'life estate' be used in the instrument creating the estate nor that it be declared expressly to be a life estate if adequate words are used describing its characteristics and showing an intention to vest a life estate." *Estate of Smythe* 132 Cal.App.2d 343, 345 (1955)
  - Very limited rights to modify or terminate (waste)

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## Rights of Occupancy

- Conditions similar to residential lease
  - explicit specifications for when a lease terminates
  - when occupant ceases uses as personal residence
  - if/when occupant stops paying rent/expenses/taxes
  - for a certain time period after death
  - if during trustor's incapacity, liquidation or fair market value rent is necessary for trustor's HMS

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## SB-2

### Building Homes and Jobs Act Fees

- (a) (1) Commencing January 1, 2018, and except as provided in paragraph (2), in addition to any other recording fees specified in this code, a fee of seventy-five dollars (\$75) shall be paid at the time of recording of every real estate instrument, paper, or notice required or permitted by law to be recorded, except those expressly exempted from payment of recording fees, per each single transaction per parcel of real property. The fee imposed by this section shall not exceed two hundred twenty-five dollars (\$225).
- "Real estate instrument, paper, or notice" means a document relating to real property, including, but not limited to, the following: deed, grant deed, trustee's deed, deed of trust, reconveyance, quit claim deed, fictitious deed of trust, assignment of deed of trust, request for notice of default, abstract of judgment, subordination agreement, declaration of homestead, abandonment of homestead, notice of default, release or discharge, easement, notice of trustee sale, notice of completion, UCC financing statement, mechanic's lien, maps, and covenants, conditions, and restrictions.

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## New, Clarified Exceptions

- (A) Any real estate instrument, paper, or notice recorded in connection with a transfer subject to the imposition of a documentary transfer tax as defined in Section 11911 of the Revenue and Taxation Code.
- (B) Any real estate instrument, paper, or notice recorded in connection with a transfer of real property that is a residential dwelling to an owner-occupier.
- (C) Any real estate instrument, paper, or notice executed or recorded by the federal government in accordance with the Uniform Federal Lien Registration Act (Title 7 [commencing with Section 2100] of Part 4 of the Code of Civil Procedure).
- (D) Any real estate instrument, paper, or notice executed or recorded by the state or any county, municipality, or other political subdivision of the state.

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## Underwater Real Property – Little to No Equity

- PR/Trustee/Conservator's Options:
  - Rent and Wait
  - Short-sale
    - Investors and Flippers
  - "Let Go" – Antideficiency Protection
- Notice of Proposed Action or Judicial Instructions

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## In a Probate Estate

- A personal representative's fundamental duty is to preserve the estate. That responsibility clearly must be accompanied by the authority to take all steps necessary to prevent deterioration of the value of the estate. See *Estate of Beach* 15 C3d 623, 639 (1975). The standard established by Beach does not require the representative to be an expert or to display more than reasonable prudence and judgment, but it does require the highest degree of honesty, impartiality, and diligence. Notwithstanding the foregoing, a professional fiduciary who undertakes to render expert services in the practice of a profession, i.e., a corporate fiduciary, will be held to more stringent standards than a lay executor. 15 C3d at 635.
- Can Get Statutory Fees for the amount of the property less amount of equity lost – *Estate of Stein*, 267 Cal. App 2d 631 (1968)

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Short Sale

- Time-Consuming, but a possibly under-utilized option
- Be careful with treatment of Cancellation of Debt Income; it is possible that the insolvency exclusion will apply, but this is something for a CPA to determine, and IRS Form 982 must be filed.
- A taxpayer may exclude from income a discharge of indebtedness that occurs while the taxpayer
- is insolvent (but not involved in bankruptcy proceedings) up to the amount by which he or she is insolvent. (IRC §108(a)(1)(B), (a)(2)(A), and (a)(3))

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Assumption of Trustor/Decedent's Mortgage

- Each Institution has own standards for qualification
- Civil Code Section 2920.7 affords protections to:
  - a deceased borrower's successor in interest who is not a party to the loan or promissory note
- "Successor in interest" means a natural person who is the spouse, domestic partner, joint tenant as evidenced by grant deed, parent, grandparent, adult child, adult grandchild, or adult sibling of the deceased borrower, "who occupied the property as his or her principal residence within the last six continuous months prior to the deceased borrower's death and who currently resides in the property."

Civil Code §2920.7(i)(4).

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Protections?

- "Upon notification by someone claiming to be a successor in interest that a borrower has died, and where that claimant is not a party to the loan or promissory note, a mortgage servicer shall not record a notice of default pursuant to Section 2924 until the mortgage servicer does both of the following:
  - Requests reasonable documentation of the death of the borrower from the claimant[.] A reasonable period of time shall be provided [..] no less than 30 days from the date of a written request by the mortgage servicer.
  - Requests reasonable documentation from the claimant demonstrating the ownership interest of that claimant in the real property. A reasonable period of time shall be provided [..] but no less than 90 days from the date of a written request by the mortgage servicer.

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THANK YOU!

LEO'S  
OFFICES  
OF

Kimball, Tirey & St. John LLP

Contact us at:  
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Probate Attorneys of San Diego

### CERTIFICATE OF ATTENDANCE

**PROVIDER:** PROBATE ATTORNEYS OF SAN DIEGO NO. 16517

**TITLE:** Real Property Issues in Probate Matters

**PRESENTED BY:** KURT RIFBJERG, Esq. Kimball, Tirey & St. John, LLP

**DATE:** May 16, 2018 **TIME:** 12:00 – 1:15

**LOCATION:** The Handlery Hotel, 950 Hotel Circle North, San Diego, CA 92108

This activity qualifies for Participatory Credit.

Total California MCLE Credit Hours for the above activity: **1 hour**, including the following subfield credits:

Legal Ethics \_\_\_\_\_

Recognition and Elimination of Bias \_\_\_\_\_

Competence Issues

### BELOW TO BE COMPLETED BY ATTORNEY AFTER PARTICIPATION IN THE ABOVE REFERENCED ACTIVITY

By signing below, I certify that I participated in all, or some\*, of the activity described above and am therefore entitled to the following MCLE credit hours:

Total California MCLE Credit Hours: 1.0, including the following subfield credits:

Legal Ethics \_\_\_\_

Recognition and Elimination of Bias \_\_\_\_\_

Competence Issues

You may not claim subfield credits unless the provider is granting credit in those areas above.

Printed Name: \_\_\_\_\_

Your California State Bar No. \_\_\_\_\_

Signature: \_\_\_\_\_

\*partial participation hours must be pro-rated

