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**Steve Leimberg's Estate Planning**
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## Subject: Marc Soss on *Pena v. Dey* - It Takes More than a Post-It Note to Amend Your Revocable Trust

*"In Pena v. Dey, the California Court of Appeals for the Third Appellate District addressed whether handwritten interlineations to a Revocable Trust and a Post-it note were sufficient to amend the instrument. In affirming the Trial Court, the California Court of Appeals found the trust specifically required amendments "be made by written instrument signed by the settlor and delivered to the trustee" and the unsigned Post-it note did not constitute a signed written instrument. While this ruling may seem axiomatic to most estate planners the lower court's granting of summary judgment in the proceeding was clearly not sufficient to the appellant."*

**Marc Soss** provides members with his analysis of *Pena v. Dey*.

**Marc Soss'** practice focuses on estate planning; probate and trust administration and litigation; and corporate law in Southwest Florida. Marc is a frequent contributor to **LISI** and has published articles in the Florida Bar, Rhode Island Bar, and North Carolina Bar. Marc is also a retired United States Navy Supply Corps Officer.

Here is Marc's commentary:

## EXECUTIVE SUMMARY:

In *Pena v. Dey*, the California Court of Appeals for the Third Appellate District addressed whether handwritten interlineations to a Revocable Trust and a Post-it note were sufficient to amend the instrument. In affirming the Trial Court, the California Court of Appeals found the trust specifically required amendments "be made by written instrument signed by the settlor and delivered to the trustee" and the unsigned Post-it note did not constitute a signed written instrument. While this ruling may seem axiomatic to most estate planners the lower court's granting of summary judgment in the proceeding was clearly not sufficient to the appellant.

## FACTS:

In 2004, James Robert Anderson ("James") created the James Robert Anderson Revocable Trust ("Trust"). James was both the settlor and trustee of the Trust. In 2008, James amended the Trust (the "First Amendment"). In 2014, in an attempt to establish a second amendment to the Trust, James sent the original Trust and interlineated First Amendment to his lawyer. Attached to the documents was a Post-it® note, on which James wrote: "Hi Scott, [¶] Here they are. First one is 2004. Second is 2008. Enjoy! Best, Rob." The lawyer then prepared a draft of a second amendment to the Trust. However, James passed away prior to it being executed.

After James death, the successor trustee petitioned the trial court for instructions as to the validity of the interlineations and thereafter moved for summary judgment. It was her position that "the interlineations did not amount to a valid amendment to the trust as a matter of law." The trial court concurred and granted the motion. Grey Dey, an individual excluded as a beneficiary of the Trust as a result of the trial court's refusal to accept the interlineations, appealed and argued that the "interlineations manifest an unambiguous intent to amend and, either standing alone or in conjunction with the Post-it® note attached to the trust documents."

California state law, similar to most other state laws, sets out specific statutory procedures to validly amend or revoke a testamentary document. California law also permits a trust instrument to explicitly describe the method of revocation in the trust instrument. The Trust established by James specifically required any amendment to the Trust "shall be made by written instrument signed by the settlor and delivered to the trustee."

In affirming the Trial Court, the Court of Appeals concluded the interlineations constituted a written instrument separate from the Trust and that the interlineations were "delivered to the trustee," as required by the trust's amendment provision (James was both the settlor and trustee). However, the Court of Appeals found that the Trust amendment provision, requiring the amendment be "signed by the settlor," had not been met and therefore the interlineations did not effectively amend the trust.

## COMMENT:

While a settlor's intent may be the guiding star, the state statutes are the road that must be traveled." Even states that permit "holographic wills" require them to be signed by the testator. However, during the author's research he has come across state laws that permit the modification of a testamentary document with a non-signed document.

**Other States**

Under Florida statutory law, section 736.0403 requires a revocable trust to be executed by the settlor under the same formalities as are required for the execution of a will. The Florida Probate Code requires a will to be signed in the presence of two (2) attesting witnesses and that those attesting witnesses must themselves sign the will in the presence of the testator and of each other.

Similarly, under Rhode Island statutory law, section 33-5-5 requires a testamentary document to be in writing and signed by the testator, or by some other person for him or her in his or her presence and by his or her express direction; and this signature shall be made or acknowledged by the testator in the presence of two (2) or more witnesses present at the same time, and the witnesses shall attest and shall subscribe the will in the presence of the testator.

In contrast, prior to Connecticut's enactment on June 5, 2019, of HB 7104, an Act Concerning the Connecticut Uniform Trust Code, which does not go into effect until January 1, 2020, there was no affirmative requirement that a trust agreement be signed by a settlor or trustee or notarized to create a valid and enforceable trust. Additionally, there was no statutory requirement that the settlor or the trustee's signatures be witnessed unless the trust agreement conveyed real property.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!**

Marc Soss

## CITE AS:

**LISI** Estate Planning Newsletter #2763 (November 18, 2019) at http://www.leimbergservices.com 

## CITES:

Pena v. Dey (2019) 39 Cal.App.5th 546; Prob. Code, § 15401; Prob. Code, § 15402; King v. Lynch (2012) 204 Cal.App.4th 1186; Conservatorship of Irvine (1995) 40 Cal.App.4th 1334; Florida Statute 736.0403; Rhode Island Statute 33-5-5; HB 7104, an Act Concerning the Connecticut Uniform Trust Code.