The Caregiver Conundrum

Employment Law Meets Trusts & Estates

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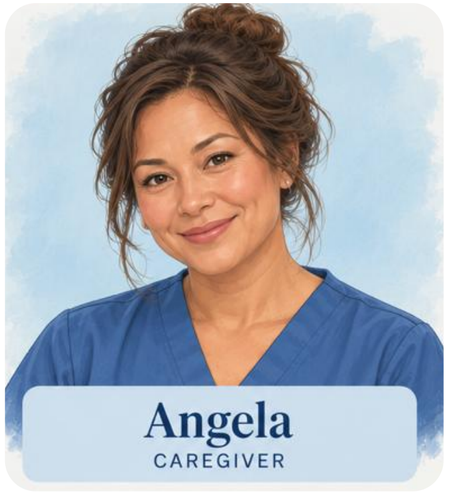
Bette Epstein, Esq.



Welcome to the mediation: Caregiver Angela v. Estate of Jane, Julia individually and as trustee of the Jane Trust

Let’s meet our cast of characters













"A domestic work employee who is a personal attendant shall not be employed more than nine hours in any workday or more than 45 hours in any workweek unless the employee receives one and one-half times the employee's regular rate of pay for all hours worked over nine hours in any workday and for all hours worked more than 45 hours in the workweek." **Labor Code § 1454.**

"Domestic work" defined

"Domestic work" is defined to mean services related to the care of persons in private households and "domestic work occupations" include caregivers of people with disabilities, sick, convalescing, or elderly persons"

Labor Code § 1451(a)(1).

"Personal attendant" defined

The Domestic Workers' Bill of Rights further defines the term "personal attendant" as any individual employed by a private household to supervise, feed, or dress a person who, by reason of advanced age, physical disability, or mental deficiency, needs supervision.

Labor Code § 1451(d).

"Domestic work employer" defined

"Domestic work employer" means a person, including corporate officers or executives, who directly or indirectly, or through an agent or any other person, including through the services of a third-party employer, temporary service, or staffing agency or similar entity, employs or exercises control over the wages, hours, or working conditions of a domestic work employee.

Labor Code § 1451(c)(1).



> "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit." **Labor Code § 1194(a)**

Liquidated damages pursuant to **Labor Code § 1194.2**, interest pursuant to **Labor Code § 1194 and 1194.2,** a waiting time penalty pursuant **to Labor Code § 203** and attorneys' fees and costs pursuant **to Labor Code § 1194**.

Fact pattern: Plaintiff, Caregiver Angela

- Angela, a devoted caregiver, was hired by Jane and Julia to care for Jane as she got more debilitated. Before Jane had a stroke, she only needed care five days a week, from 9 am to noon. Once she had her stroke, though, she needed 24-7 care, and Julia asked Angela to live in. Angela agreed. For six months, until Jane had a second stroke and never came home, Angela lived at Jane's, was on-call for toilet trips, cleaning, cooking, bathing and dressing Jane. She took three days off, total.
- Angela's attorney further claims that Julia insisted on paying cash and paid $25 per hour for the three hours of 9 am to noon, and considered rent and board to be compensation for the rest of the time.





Citing Labor Code §1454 and §1194(a), Angela is demanding $200,000 at the mediation. Counsel mentions that this includes 168 hours of work per week, for which Angela was only paid for 15 hours. The balance was to be paid at 50 hours of regular time minus the 15 that were actually paid, 118 hours of time-and-a-half, for six months, plus interest, penalties and waiting time.

For purposes of today's mediation, they are not demanding attorneys' fees.

Counsel reminds the mediator that both interest and attorneys' fees will increase as time goes on.

Defendant's statement:



- Jane, a widow of six years, felt she was getting older. She could still drive during the day, but by dusk she felt she couldn't see well enough to react safely. She still managed her grocery shopping, her own housework although she now had a day-worker come in once a week to tackle the heavier tasks; she went to her book club, the gardening club, and sometimes still did the bookkeeping for her old friend, the optician, but as he was retiring, she knew she wouldn't be doing that anymore.
- One rainy October afternoon, she tripped going up the stairs with a bag of groceries. More embarrassed than hurt, she got back up, gathered the spilled vegetables, and went inside. By evening, though, her knee was swollen. She called her oldest daughter, Julia, who came over. They iced it and decided it wasn't worth a trip to the emergency room.

The next day, Jane couldn't walk. Julia came over again, and this time they went to Urgent Care, since Jane's doctor couldn't see her for three weeks. An x-ray showed nothing broken, and rest, ice and elevation, and acetaminophen as needed, were all that is prescribed.
When the day-worker came over to clean that afternoon, she suggested that her cousin, Angela, come over and help Jane until she's on her feet again. Jane called Julia, and they decided that it was a great idea. Julia came over after work, and Angela stopped by that evening. They decided that Angela would come in every day from nine until noon to help with chores and make sure Jane had everything she needed. When asked what she charged, Angela said $25 an hour, and that she really preferred cash. Julia and Jane decided that $75 a day wasn't too much to pay for some security until Jane was up and about again.

QUESTION 1:
Angela comes in every day, 7 days a week, for two weeks. Julia pays her in cash. Is Angela entitled to overtime pay after the sixth day of each week?

A month later, taking out the trash in the evening, Jane falls on the outside stairs, this time going down, and can't get to her phone. She lies at the bottom of the stairs, terrified, until she can crawl to her handbag and call Julia. A trip to the ER shows a small fracture in her wrist and a sprained ankle.

Julia and Jane decide to ask Angela to come and stay overnight a couple of days a week, so that Jane isn't alone at night. Jane has a spare room that has its own bathroom. Angela agrees to come in daily from 9 to noon Monday through Wednesday, and to stay over Thursday night to Friday.
The total time is now 36 hours per week: 9 plus 24 plus 3. Julia increases Angela's pay to $525, based on $25 per hour for 27 hours, discounting the 9 hours between 10 pm and 7 am. This arrangement goes on for three months.

Defense counsel contends that since no work exceeded 45 hours, no overtime is due. When they get the demand letter before the mediation, Defense offers $2275.
Statutes: Labor Code 1194.2, 1454



Trust considerations:

Since Julia is the trustee of Jane's trust, what should she be thinking about?

The Trustee must manage trust assets with reasonable care, skill and caution under the circumstances then prevailing that a prudent person acting in that capacity would use. *Probate Code Section 16040.*

Should Julia have consulted with employment counsel before entering into the agreement with Angela?



Variation No. 1:



At the end of three months, Jane has a stroke. Angela breaks up with her boyfriend and has to move out of their apartment. After much discussion, Jane and Julia agree that Angela can live in Jane's spare room, and instead of rent, she can just be there if Jane needs her.

QUESTION 2:

Is Angela entitled to overtime for any portion? Even though Angela is asleep from 10 pm to 7 am? Does it matter if Angela has another job? Can leave whenever she wants to go out?

Variation No. 2:

Instead of Angela providing caregiving, Jane's granddaughter Ashley has been laid off from her job and moves into Jane's home to provide full-time care.



QUESTION 3:

- Should Ashley be paid for providing care? Should Ashley be compensated in some other manner? Eg. Trust distribution after Jane dies.
- Should Julia enter into a written agreement regarding the terms under which Ashley provides care?

Variation No. 3:



- At the end of another few months, Jane's condition worsens. She needs 24-hour care now, and Angela quits her other part-time job and tends to Jane exclusively. After three months of exclusive care, Jane has another stroke. This time, she doesn't come home. After six weeks at the Rehabilitation Center, she passes away.
- Angela comes to the funeral, and cries and holds Julia and Ashley as they mourn. Within a month of the funeral, Angela sues Jane's estate, and Julia, for unpaid overtime, failure to provide proper paychecks, and failure to pay appropriate taxes.

QUESTION 4:

Is Julia a proper defendant in this action? Is the trust? What is an employer?



Trust considerations:

The Trustee has an obligation to keep beneficiaries reasonably informed of the trust and its administration. *Probate Code Section 16060*. During Jane's lifetime, Trustee is only accountable to Jane. However, once Jane passes away Trustee is accountable to remaining beneficiaries.

QUESTION 5:

Should Julia be advising the beneficiaries of Angela's claims?

Variation No. 4:

- As Jane's condition deteriorates, Julia and Jane decide that more help is needed. They hire a caregiver from Maybel's Agency, and a young woman named Marcy comes to take care of Jane, five days a week, 9am to 6 pm. Angela continues to live in.
- Marcy from Maybel's Agency suggests that she stay the night on weekends to give Angela the weekend off. Marcy doesn't get overtime pay from Maybel's, so she asks Julia to pay her extra off the books.



QUESTION 6:

Are Jane/ Jane's estate/ Julia liable to Marcy for Maybel's failure to pay overtime? Who is an employer?

Trust considerations:

The Trustee has a duty to take reasonable steps to defend actions that may result in a loss to the trust. *Probate Code Section 16011.* However, does Julia need separate counsel to defend against claims made against her personally?



Variation No. 5:

Maybel's Agency charges for the extra time Marcy is there but does not pay Marcy overtime.



QUESTION 7:
Are Jane/ Jane's estate/ Julia liable to Marcy if Maybel's Agency charges them overtime but fails to pay Marcy?

Labor Code §1451(c)(1) “Domestic work employer” means a person, including corporate officers or executives, who directly or indirectly, or through an agent or any other person, including through the services of a third-party employer, temporary service, or staffing agency or similar entity, employs or exercises control over the wages, hours, or working conditions of a domestic work employee.

This is a Mediation!

What can the mediator do to facilitate a settlement if the estate is small? Large?

Is the situation different if there is a family member demanding money? How can that be avoided?

What precautions can you have your Trustee Client take to avoid liability in this situation?

What precautions can you have your employer clients take?



Thank You. Questions?



Bette Epstein, Esq.

Bette Epstein, Esq. has been mediating trust and estate disputes since 2000. Following a remarkable career first as a licensed Psychotherapist and then as a trust and estate litigator for over 30 years, she turned her focus to alternative dispute resolution and brings her unique blend of legal expertise and psychological insight to every case she handles. Her clients often face situations fraught with grief, family conflict, and high stakes, but Bette's calm, composed demeanor and profound understanding of the law make her an invaluable ally in the dispute resolution process, where she is available as a mediator, arbitrator, and discovery referee. As a neutral, she brings her unique emotional intelligence, sharp legal intellect, and psychotherapy background to highly emotional probate disputes, and is able to turn conflict into consensus in even the most challenging and complex issues.

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Claudia Hagadus Long has been practicing law for over 45 years. For 25 of those years she has acted as an exceptionally skilled mediator who has mediated over 2500 cases, including real estate disputes and employment matters. She spent a decade mediating with the Department of Fair Employment and Housing (now the Office of Civil Rights), and previously worked as a civil litigator in both large and small law firms and in-house counsel at a large multinational bank. Fluent in Spanish and French, she can conduct mediations entirely in Spanish when necessary. She is trusted to resolve complex disputes with multifaceted and multidisciplinary legal, organizational, cultural and personal issues.

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