

Memorandum 83-43

Subject: Study L-640 - Trusts (Scope of Study)

You will recall that the Commission undertook a revision of trust law primarily because of the need to make a disposition of the provisions of the Probate Code relating to trusts. It was decided to prepare a comprehensive statute on trusts that would include the Civil Code provisions. It was also decided to continue existing law except where the Commission was persuaded that there is a need for a change in a particular provision.

At the last meeting, Professor Niles suggested that there is a need to review the law relating to spendthrift trusts, to provide some statutory clarification of the law relating to modification and termination of trusts, and to revise the rules on damages for breach of trust. He also expressed concern that the Civil Code provisions are in need of careful examination. He has followed up this discussion with the letter attached as Exhibit 1. The substance of his letter is that the Commission's study of trusts should include a careful review of the significant problems in this field and that it would be preferable to prepare a modern law than merely to carry forward, with some revision, the ancient provisions of the Field Code. He offers to help in the task he suggested, and the staff believes that he could make an outstanding contribution in view of his interest and knowledge in this field.

The staff does not believe that the Commission should submit a recommendation for a comprehensive trust statute without consideration of the significant problems in this field. For this reason, we recommend that the schedule for completion of the trust study be deferred to permit us to consider these problems. We need to have law review articles and other materials prepared to provide background on the particular problems. At the same time, we believe that the Commission should review with care the remainder of the staff draft of the trust statute at the June meeting. We can revise that draft to reflect decisions made at the May and June meetings and to include changes that result from further study of particular problems.

We originally scheduled completion of the trust recommendation this year so that the recommendation could be submitted to the 1984 session.

We did this so that we would have one substantial recommendation in 1984. However, we believe that it would be a mistake to submit a comprehensive recommendation on trusts in 1984 that ignores the significant problems in this area of the law. We do, however, recommend that the Commission submit to the 1984 session a recommendation relating to the extent to which income payable to the beneficiary of a spendthrift trust is subject to enforcement of a money judgment against the beneficiary. Even though we do not submit the comprehensive trust recommendation in 1984, the staff believes that the Commission will have a significant legislative program for 1984. See Exhibit 2 for the items likely to be included in the 1984 Legislative Program.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

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May 13, 1983

Mr. John H. De Mouly
Executive Secretary
California Law Revision Commission
4000 Middlefield Rd.
Palo Alto, CA 94306

Dear John:

I hope you are not too much of a hurry to revise the Civil Code as it relates to trusts. There is much that needs reconsideration. In many ways the Civil Code is in greater need of revision than the Probate Code. Although the Probate Code was revised in 1931, the Civil Code has only been pecked at in more than a century. I think I could be helpful to your staff if your timetable is not too rigorous. Trusts is my special field: I was an adviser to Scott on the Second Restatement of Trusts and most of my writing has been in this field.

I suggest that some member of your staff should read that part of the Second Restatement of Property which is entitled "Donative Transfers," approved in 1981. It is especially important on restraints on alienation and on other public policy questions such as restraints on marriage and other personal conduct. It is also important on no-contest clauses. The extensive coverage of the rule against perpetuities could be excluded for the present. There is discussion of CCC §§ 709, 710 and 711. I have in draft form an article on the Second Restatement.

I also suggest that the staff consider Richard B. Powell's article, The Rule against Perpetuities and Spendthrift Trusts in New York, 71 Colum. L.Rev. 688 (1971) especially on spendthrift restraints on remainders. The same conclusion is reached in my more extensive discussion in Niles, Matter of Vought's Will: A Tighter Grip by the Dead Hand, 45 N.Y.U. L.Rev. 421 (1970).

I am sending you a copy of my Hess Lecture: A Contemporary View of Liability for Breach of Trust. It was reprinted in 29 The Record of the Association of the Bar of the City of New York, 573 (1974) and reprinted in 114 Trusts & Estates, 12, 82 (1975). You might find it good background reading.

I do not favor an attempt to rewrite the Field Code. Some of it is quite harmless but some of it has been an embarrassment to the courts. Some member

Mr. John H. De Mouilly
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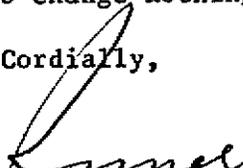
of the staff should read the criticisms of the Civil Code written by the famous old professors at Stanford, U.C. Berkeley and U.S.C. Their articles are cited in California Jurisprudence and probably by Witkin.

I shall attend the A.L.I. meeting next week in Washington, D.C. and shall not return to San Francisco until about June 10. I shall be in Carmel (26211 Atherton Pl. 93923) most of the summer. I shall have ample time in San Francisco after September first because I do not teach in the fall semester.

I hope Gail Bird will write an article on termination of trusts. If she does not, I shall submit draft code sections in September.

You have great patience to work with academicians who want to change everything and practitioners who want to change nothing.

Cordially,


Russell D. Niles
Professor of Law

RDN:ls

Exhibit 2

ITEMS LIKELY TO BE INCLUDED IN 1984 LEGISLATIVE PROGRAM

The following items are likely to be included in the 1984 Legislative Program:

- (1) Assembly Bill 1460 - liability of marital property for debts. (This is a two-year bill, to be finally acted upon in 1984.)
- (2) Follow-up matters on Assembly Bill 25 (to restore provisions deleted from bill as introduced):
 - (a) Execution of wills (delete "present at same time" requirement for witnesses to will and provide for acknowledgment before a notary as alternative to two witnesses).
 - (b) Filing notice of will with Secretary of State.
 - (c) Intestate succession - elimination of inheritance by remote heirs.
 - (d) Follow-up bill to correct any technical or substantive defects in AB 25 or AB 68 as enacted.
- (3) Statute of limitations on felonies.
- (4) Quiet title actions - technical changes.
- (5) Dormant mineral rights.
- (6) Dismissal of civil action for lack of prosecution.
- (7) Joint tenancy and community property.
- (8) Passage or collection of property without administration.
- (9) Independent administration.
- (10) Statutory durable power of attorney for health care (prepare statutory form).
- (11) Spendthrift trust exemption from enforcement of money judgment.
- (12) Limitations on disposition of community property.
- (13) Presumptions and transmutations of marital property.