

STUDY L-640 - TRUSTS

Memorandum 84-88 (Modification and Termination)

Draft § 4202. Manner of termination of revocable trust. The alternative draft of Section 4202 set out on pages 3-4 of the memorandum was approved with several changes. The right of revocation should be exercisable under a durable power of attorney (if authorized therein) or by a guardian or conservator (if permitted by the court) unless the trust prohibits revocation by such a person. Subdivision (a)(2) should be revised to read as follows: "By a writing (other than a will) ~~filed with~~ signed by the trustor and delivered to the trustee during the lifetime of the trustor." Trusts created prior to the operative date of the new trust law should not be subject to draft Section 4202 because it would change existing law to permit revocation by the statutory method unless the trust explicitly provides a contrary rule. The staff should give further consideration to the application of draft Section 4202 to family trusts of community property.

Draft § 4203. Power to revoke includes power to modify. This section should be revised as follows:

4203. Unless the trust instrument provides otherwise, if a trust is revocable by the trustor, the trustor may modify the trust by the same procedure, ~~but the trustor may not enlarge the duties of the trustee without the trustee's express consent.~~

If the trustee objects to the enlargement of duties, the trustee's option is to resign.

Draft § 4204. Termination by all beneficiaries. The Commission rejected the suggestion to limit the material purposes doctrine to situations where the beneficiary is restrained from alienating his or her interest. Instead, the court should be given a broader degree of discretion to loosen the application of the material purposes doctrine so that in appropriate cases a trust may be terminated by the consent of all beneficiaries. This discretion should not apply in the case of spendthrift trusts.

Draft § 4205. Modification or termination by trustor and all beneficiaries. The comment to this section should make clear that it applies to irrevocable trusts.

Draft § 4206. Guardian ad litem. The concept of expanding the grounds upon which a guardian ad litem may consent on behalf of incapacitated and unborn beneficiaries was approved, but the language of the draft section needs more work. It was suggested that consent by the guardian ad litem should be judged for consistency with the trustor's purposes and that the substituted judgment approach might be useful.

Draft § 4207. No conclusive presumption of fertility. This section should be phrased to provide that the presumption of fertility is rebuttable.

Draft § 4208. Effect of disposition in favor of "heirs" or "next of kin." This section should be redrafted to provide that the class of heirs or next of kin is closed at the time the existing beneficiaries consent to modification or termination of a trust.

Draft § 4243. Modification or termination owing to change of circumstances. This section should make clear that both administrative and dispositive provisions may be modified on petition to the court in appropriate circumstances. The comment to this section should give an example of a situation in which it would be proper to order a modification of dispositive provisions.

Draft § 4304. Trustee of multiple trusts. Subdivision (b) of this section should be revised to broaden the authority to combine trusts:

(b) If a trustee of one trust is appointed as trustee of another trust, and the provisions and terms of the two or more trusts are substantially ~~identical~~ similar, the court may order the trustee to combine the assets and administer them as a single trust if the court determines that administration as a single trust will (1) be consistent with the intent of the trustor and (2) facilitate administration of the trust without defeating or impairing the interests of the beneficiaries. ~~An order under this subdivision may be made without notice upon petition of the trustee.~~

The comment should make clear that inter vivos trusts and testamentary trusts may be combined under the authority of this section.

Division of trusts. The Commission approved the suggestion on page 10 of the memorandum to provide for the division of a trust into two or more trusts for cause shown and with the consent of all interested persons.