#L-640 9/4/84

First Supplement to Memorandum 84-29

Subject: Study L-640 - Trusts (Comments on Judicial Administration)

This supplement reviews the comments we have received on the materials in Memorandum 84-29 concerning judicial administration of trusts. Comments of the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association (LABA Committee), the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar (State Bar Committee), and the California Bankers Association (CBA) are included in letters attached to Memorandum 84-58. Additional comments by Melvin H. Wilson on behalf of the CBA are attached as Exhibits 1 through 5 to this supplement; additional comments by Mr. Wilson on this subject are included in material attached as Exhibit 5 to Memorandum 84-58.

Court Jurisdiction Over Trusts

(See draft statute in Exhibit 1 attached to Memorandum 84-29)

Draft §§ 4601, 4634. Jurisdiction and Power of Court

In several memorandums Mr. Melvin H. Wilson, on behalf of the CBA, raises issues relating to the jurisdiction of the court over trusts. (See especially Exhibit 4 attached hereto.) Mr. Wilson's remarks seem to argue for a broader, unified jurisdiction. The State Bar Committee is also concerned with draft Sections 4601 and 4630 relating to jurisdiction:

> If these sections provide that the superior court sitting in probate has exclusive jurisdiction to review the acts of the trustee and award damages to the trust and to the beneficiaries if they are personnally injured by the trustee's action, our concern in unfounded. However the proposed statute is not clear on this point.

(See Memorandum 84-58, Exhibit 6, p. 3.)

These comments point up an oddity of probate court jurisdiction. It is well known that California has not had a separate probate court since 1879. The "probate court" is the superior court sitting in exercise of its probate jurisdiction, which is determined by looking to the Probate Code for the limits on the court's power. Although the 1879 Constitution unified the courts, this attempt was not entirely successful; certain superior court judges soon found themselves sitting in

probate with "limited and special" jurisdiction and without the general equity jurisdiction and powers of the superior court. One will search in vain for a convincing policy reason supporting this scheme. Many cases have agonized over this state of affairs and tried to draw distinctions between different forms of jurisdiction and between the proper and improper exercise of equitable powers. This tension has spurred both the courts and the Legislature to expand the subject matter jurisdiction and power of the probate courts to deal efficiently with questions that arise. For example, the court in Estate of Baglione, 65 Cal.2d 192, 196-97, 417 P.2d 683, 53 Cal. Rptr. 139 (1966), extended the jurisdiction of the probate court to allow a determination of the whole matter once before it. Jurisdiction was expanded legislatively in Probate Code Sections 851.2, 852, and 853 to permit the probate court to determine disputes over property in the estate claimed by a third person.

Until late 1970, questions arising in the administration of inter vivos trusts were determined as an exercise of the general equitable powers of the superior court, not the probate court. See generally Wile, Judicial Assistance in the Administration of California Trusts, 14 Stan. L. Rev. 231 (1962). This cumbersome and limited procedure was replaced by Probate Code Sections 1138-1138.13 which permitted intermittent resort to the superior court on petition to determine questions of administration of inter vivos trusts. Jurisdiction of testamentary trusts continued in the probate court under Probate Code Sections 1120-1126 in the form of probate proceedings deriving from the continuing jurisdiction of the court over the decedent's estate.

Apparently the success of the new scheme providing for intermittent intervention of the court on petition lead to the abandonment of the older provisions in Probate Code Sections 1120-1126 which had applied to testamentary trusts. Now testamentary trusts are under the new procedure except where a trust provides for continuing supervision under the old sections. In addition, a procedure has been enacted that provides for removing pre-1977 trusts from "mandatory court supervision." Prob. Code §§ 1120(a), 1120.1a. Hence, by a gradual statutory evolution, inter vivos and testamentary trust administration is largely united in statutes that were originally enacted to fill the gap in administration of inter vivos trusts.

Several jurisdictional questions have arisen, however, since it is not apparent from Probate Code Sections 1138-1138.13 whether reference

is made to the superior court sitting in exercise of all its powers or the superior court sitting in probate. At least one authority concluded that "[a]lthough the statute is in the Probate Code, jurisdiction is not in the Probate Court but in the superior court of the county in which the principal place of administration is located." 7 B. Witkin, Summary of California Law Trusts § 10, at 5373 (8th ed. 1974). However, this view was rejected in Copley v. Copley, 80 Cal. App.3d 97, 106, 145 Cal. Rptr. 437 (1978), where the court found that the language used (superior court) is "the language used by the Legislature when treating with matters within the jurisdiction of the superior court sitting in probate and not in an exercise of its general jurisdiction." The case does not suggest what language the Legislature might have used if it had meant to refer to the superior court not sitting in probate. In any event, the question now appears to be settled that trust administration under Probate Code Sections 1138-1138.13 is that "limited and special" jurisdiction of the "probate court" and not the general equity jurisdiction of the superior court.

This state of affairs has long been criticized by commentators. See, e.g., Simes & Basye, The Organization of the Probate Court in America (reprinted in Problems in Probate Law, Including a Model Probate Code 385, 426-27, 484-85 (1946)); Wile, Judicial Assistance in the Administration of California Trusts, 14 Stan. L. Rev. 231, 249 n.73 (1962); Note, Equitable Jurisdiction of Probate Courts and Finality of Probate Decrees, 48 Yale L.J. 1273, 1276-77 (1939). In recognition of the undesirability of limiting probate court jurisdiction, the Supreme Court extended jurisdiction to allow determination of the whole matter before it if there is jurisdiction over the necessary parties. See Estate of Baglione, 65 Cal.2d at 196-97.

A closer examination of Copley v. Copley should illustrate the procedural tangle that can result from this scheme. In this case the trustees of an inter vivos trust sold stock in Copley Press back to the company and sought approval of their actions under Probate Code Section 1138 et seq. Some beneficiaries filed a complaint in federal court, which was dismissed for lack of subject matter jurisdiction, and also opposed the trustees' petition. For some reason, the trustees also filed a complaint for declaratory relief and approval of their actions in the superior court. The beneficiaries counterclaimed in the declaratory relief action and joined Copley Press, among others. The counter-

claim sought rescission of the sale of the stock, restoration of stock and dividends to the trust, imposition of a constructive trust, removal of the trustees, and exemplary damages. The beneficiaries also sought to have the proceedings under Section 1138 dismissed, which motion was denied, leading to the appeal. The Court of Appeal reversed the denial because the probate court (as it was determined to be) under Section 1138 et seq. had no power to join Copley Press and determine the respective interests in that part of the controversy or grant relief affecting Copley Press. The court noted that there is

> no hint of a legislative directive to the probate court in Section 1138 proceedings to try a fraud action seeking damages, recission /sic/ and other equitable relief. These proceedings clearly do not come within the principles set forth in Baglione or any disclosed extension of probate court processes.

Id. at 109. Consequently, the court ordered the probate court proceeding consolidated with the plenary declaratory relief action in the superior court, with the declaratory relief action to be tried first and the probate court proceeding thereafter if any issues remained.

Without disrupting the ability of the court system to channel a certain type of case to a particular judge or group of judges, the staff suggests that the jurisdictional limitations resulting from the concept of a probate court be discountinued. The historical process of eliminating the distinctions in this area should proceed so that the probate court has full powers to deal with the controversies presented to it and to fashion appropriate relief just as if the case were before the superior court not sitting in probate. We suspect this was the intention of the court unification accomplished by the 1879 Constitution.

Most of the traditional limitations on probate courts and their determinations have been eliminated in California over the years. Hence, the probate court is not an inferior court as it once was, nor are decrees of the probate court accorded less finality. However, the probate court still cannot give complete relief, perhaps not even when the necessary parties are before it. See Copley, 80 Cal. App.3d at 108. In their discussion of the elements that constitute an ideal probate court, Professors Simes and Basye wrote:

> [T]he probate court should be the same court as the court of general jurisdiction or should be a division of it. . . . It means a unification of courts. Indeed, this unification should be so complete that, if, after a proceeding is begun, it is found to come under the equity or common-law jurisdiction of the court, it can be

> transferred to another docket of the court or to another division, without beginning the proceeding anew. Only in this way can be completely avoided the hardships incident to determining where the shadowy, marginal line of probate jurisdiction is to be drawn. The question of whether a given matter should be in equity or in probate will cease to be one in which a slight misstep on the part of the attorney may prejudice an innocent litigant.

(Simes & Basye, supra, at 483-84.)

The goal of fully empowering probate courts has been attained in a number of states. For many years Arizona, Oregon, Utah, and Washington have had unitary courts without the "sitting in probate" limitations. See id. at 427-28. States that have enacted the Uniform Probate Code also have full-power courts. See UPC §§ 1-302, 7-201, 7-206.

Once full powers are provided, it appears that the only remaining defect might be the lack of necessary parties, as in the Copley case. This defect should be remedied by making clear that the court or a party may give notice to a person interested in the trust or trust property. (See draft Section 4615 in Exhibit 1, attached to Memorandum 84-29.)

The State Bar Committee asks that it be made clear that the probate court has exclusive jurisdiction over the remedies of the beneficiary against the trustee. (See Memorandum 84-58, Exhibit 6, p. 4.) The State Bar cites a recent case as illustrative of the problem. (The State Bar refers to this case as Pitzer v. Security Pacific National Bank, but as printed in the advance sheets, it is entitled Burton v. Security Pacific National Bank, 155 Cal. App.3d 967 (1984).) In Burton the beneficiaries of a testamentary trust filed a complaint in superior court for breach of trust, breach of statutory duties, and constructive fraud, and sought recovery for emotional distress and punitive damages. Soon thereafter the trustee petitioned for approval of its actions pursuant to Probate Code Section 1120 and demurred to the complaint in the civil action. Eventually the probate proceeding and civil action were consolidated and a jury was empanelled to adjudicate the claim of intentional infliction of emotional distress. (The issue of the extent of the right to a jury trial will be discussed infra.) The court heard the matters concurrently and determined the "probate issues" out of hearing of the jury. The judge found a breach and surcharged the trustee about $25,000. The jury also found breach and assessed $27,500 in compensatory damages and $3,000,000 in punitive damages. The Court of Appeal reversed the jury's award of punitive damages as well as the compensatory damages based on emotional distress, saying that the surcharge

was "the only 'damages' available in this instance" and that being the province of the court. Id. at 977. However, since all the necessary parties were before the court, it was proper to consolidate the "breach of trust (equitable/ probate) issues and the legal water rights claim." Id. In footnote 11 the court writes:

> Since the matter at bench for adjudication is exclusively within the jursidiction of the probate court, respondents' inclusion of a claim for damages erroneously sought to expand those remedies presently available for breach of a testamentary trust. The remedies which were sought, those being an award of compensatory and punitive damages, are beyond the jurisdiction of the probate court to award.

One wonders what the court would have said if the case had arisen under Probate Code Sections 1138-1138.13 (as it would now) in view of Section 1138.11 which provides that the "remedies provided under this article are cumulative and nonexclusive" and Section 1138.12 which refers to the "jurisdiction of the courts of this state as invoked pursuant to this article or otherwise invoked pursuant to law."

The draft statute attached to Memorandum 84-29 continues some of the defects of existing law, although it was our intention to unify trust administration matters in one place. Part of the problem comes about because of the provision in draft Section 4636 that the remedies are nonexclusive. Hence, it would appear that a beneficiary could start both a proceeding and an action as in Burton. One alternative would be to eliminate the option of bringing an action and make the proceeding in draft Sections 4600 et seq. the exclusive procedure. According to the court in Burton, this would be consistent with the law under Probate Code Section 1120 as it existed when that case commenced.

Another problem is that the terminology of the draft (like that of existing law) is not completely satisfactory. When "superior court" is used in Probate Code Section 1138 et seq. it means the court sitting in probate, as we learn from Copley. If we are to avoid limitations on the jurisdiction and power of the court, we need to refer to the superior court, as is done in draft Section 4601. But then it is confusing in draft Section 4601(b) to refer to concurrent jurisdiction of the superior court over the types of actions listed there, such as actions involving trustees and third persons. Since we are striving for the goal of a fully empowered superior court (without regard to whether it is organized in divisions or departments by court rule), it is hard to

determine with which court the superior court has concurrent jurisdiction. Perhaps some confusion could be banished if draft Section 4601(b) were deleted, but it seems useful to make explicit that the "probate" court may, like any other superior court, determine the existence of trusts, and entertain proceedings involving creditors or debtors of trusts and other third persons, if they are properly joined. A less drastic clarification would be to describe the court as follows: "The superior court in a proceeding under this chapter has concurrent jurisdiction of . . . ." The staff thinks this is a better solution than to perpetuate the "limited and special" jurisdiction of the superior court sitting in exercise of its probate jurisdiction. The courts are then free to direct probate and trust business to a specific department of the court without creating a limitation on powers or subject matter jurisdiction. The obvious next step would be to make the same revision in the remainder of Division 3 of the Probate Code relating to estate administration.

Draft § 4602. Venue

This section provides a dual venue rule in the case of testamentary trusts. This provision was approved by the Commission in 1983, but is discussed again in the memorandum since we are reconsidering the entire trust statute. The State Bar supports the dual venue concept as an inhibition on forum shopping by corporate trustees. (See Memorandum 84-58, Exhibit 6, pp. 5-6.) The staff prefers rules under which venue is in one court whether the trust is testamentary or inter vivos. We would prefer a dual rule for testamentary trusts, however, to the suggestion of the State Bar that if "one-court venue is appropriate, then it should be the court in which the estate was administered."

Draft § 4603. Jurisdiction over parties

The LABA Committee finds that there is a gap in jurisdiction where a California decedent establishes a testamentary trust that names as trustee a nonresident individual. (See Memorandum 84-58, Exhibit 3, p. 10.) The LABA Committee argues that "when a California decedent establishes a trust under his or her will, the California courts continue to have an interest in the proper administration of that trust." This situation seems to arise under the newly revised California scheme under which post-1977 testamentary trusts and all inter vivos trusts are subject to intermittent judicial administration pursuant to Probate Code Section 1138 et seq. Reflecting an ancient in rem theory, Probate Code

Section 1120 provided that the superior court did not lose jurisdiction of a testamentary trust after final distribution of the estate, but retained jurisdiction "for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination, . . . of settling the accounts and passing upon the acts of the trustee, . . . and for other purposes . . . ." This provision now applies only to certain pre-1977 trusts that have not been removed and trusts that provide for "continuing jurisdiction." Probate Code Section 1138.3, however, provides for venue in the case of a testamentary trust either in the superior court of the principal place of administration or the superior court "which has jurisdiction over the administration of the estate pursuant to Section 301." The staff draft, consistent with what seems to be the trend in California law, the law of other states that have modernized their trust statutes, and the Uniform Probate Code, seeks to unify the jurisdictional approach to testamentary and inter vivos trusts. One benefit of unifying the rules is that it becomes unimportant to determine whether a trust is a pour-over or a testamentary trust. Of course, in some instances we have been prevailed upon to retain a rule applicable to testamentary trusts, such as the dual venue provision in draft Section 4602.

Neither the existing California law nor the staff draft attempts to deal with all jurisdictional issues. Presumably the general conflict of laws principles would apply in the sort of case with which the LABA Committee is concerned. Draft Section 4603 is not the exclusive form of jurisdiction over persons or property; perhaps this should be made clear in the statute and comment. Subdivision (c) could be added to the effect that "nothing in this section limits the exercise of jurisdiction over persons or trust property in a manner consistent with law." Thus in a case where a testamentary trust of real property names a trustee who resides in another state, the courts of this state could exercise jurisdiction over the administration of the trust insofar as it related to the land in California, even though jurisdiction over the trustee personally was lacking. See Restatement (Second) of Conflict of Laws § 276 & comment b (1969). In the case of movables the issue is more complicated since it may depend upon whether the trustor intended the place of administration to be in the foreign state where the trustee is located. If the trustor intended the place of administration to be

outside California, then California courts should not take jurisdiction over the trust. See id. § 267 & comment a. In most situations it is reasonable to infer that the trustor intended the trust to be administered where the trustee is located. Id. § 267 comment c. However, if the trustee is a person who frequently moves from state to state or if there are trustees resident in two or more foreign states, there may be no intent that the trust should be administered in any particular state. Id. In this type of case any court with jurisdiction over the parties or trust property will exercise jurisdiction. Id. § 267 comment e.

Draft § 4618. Notice in cases involving future interests

The note following draft Section 4618 in Exhibit 1 attached to Memorandum 84-29 suggests that the language in brackets in subdivision (a) may be unnecessary. We will keep the question open until the entire draft is revised after the Commission has concluded review of the memorandums on trust law, but it should be noted that the LABA Committee is of the opinion that the bracketed language could be removed. (See Memorandum 84-58, Exhibit 3, p. 10.)

Draft § 4630. Grounds for petition
Draft § 4631. Commencement of proceeding

Mr. Melvin H. Wilson, on behalf of the CBA, suggests some drafting changes in this and related draft sections. (See Memorandum 84-58, Exhibit 5, pp. 1-2; Exhibit 1, pp. 1-2, attached hereto.) Principally Mr. Wilson suggests that the procedure be opened up so that it may be commenced by petition or complaint. The staff is inclined to think this is a good approach, particularly if subject matter jurisdiction under this chapter is made to be exlusive as to internal affairs of a trust. The new Indiana Trust Code takes a similar approach. Ind. Code Ann. § 30-4-6-5 (West 1979); see also Tex. Prop. Code Ann. §§ 115.001, 115.012, 115.013 (Vernon 19__). This change would also have the effect of avoiding some procedural pitfalls.

The suggested change would be accomplished by removing the reference to "petition" in draft Section 4630(a) and elsewhere, and by revising draft Section 4631 to read: "A proceeding under this article is commenced either by filing a verified petition or a complaint stating facts showing that the petition is authorized under this article."

Draft Section 4630 permits petition by the trustee, beneficiary, or "other interested person." "Interested person" is broadly defined in Probate Code Section 48 (operative Jan. 1, 1985) to include creditors.

It is not intended, nor would it be desirable, to permit creditors to meddle in the internal affairs of a trust. Accordingly, the reference to "interested person" should be deleted from draft Section 4630.

Mr. Wilson also suggests that a paragraph be added to draft Section 4630(a) to make clear that a proceeding may be commenced to compel the trustee to redress a breach of trust. (See Exhibit 1, p. 2, attached hereto; see also Memorandum 84-58, Exhibit 5, p. 1.) If this change is made, and the staff thinks it should be, then draft Section 4635 should also be revised to permit appeal of an order compelling redress of breach.

Noninterference Policy

Mr. Melvin H. Wilson, on behalf of the CBA, suggests that the statement in Probate Code Section 1138.12 of legislative intent in enacting Probate Code Sections 1138-1138.13 be continued. (See Exhibit 1, p. 3, attached hereto.) This provision reads:

> 1138.12. It is the intent of the Legislature in enacting this article that the administration of trusts subject to this article proceed expeditiously and free of judicial intervention subject to the jurisdiction of the courts of this state as invoked pursuant to this article or otherwise invoked pursuant to law.

The Commission decided not to retain this provision when it was considered at the June 1983 meeting. The statement of intent was not considered to be needed under a new statute, particularly in light of the repeal of Probate Code Section 1120 which had been interpreted by some as requiring some sort of judicial supervision.

Excuse of Filing Fees for Formerly Supervised Testamentary Trusts

Mr. Melvin H. Wilson, on behalf of the CBA, suggests retention of the provision of Probate Code Section 1138.4 excusing filing fees for petitioners with respect to a testamentary trust that is no longer subject to continuing jurisdiction. (See Exhibit 1, p. 4, attached hereto.) This provision was disapproved by the Commission at the June 1983 meeting as a needless complication that violates the policy of eliminating unnecessary distinctions between testamentary and inter vivos trusts.

Removal of Trusts From Continuing Court Supervision

(See draft statute in Exhibit 2 attached to Memorandum 84-29)

The staff draft of Sections 4180-4186 generally continues the substance of Probate Code Section 1120.1a relating to testamentary trusts that are subject to continuing judicial supervision. In the memorandum on page six the staff suggests that ideally we would eliminate the separate treatment of pre-1977 trusts. The staff does not believe the complicated and varying procedures of Section 1120.1a should be necessary. However, the Commission should consider whether to continue the existing scheme or by statute transfer all trusts into the new regime. If the annual accounting requirement approved by the Commission is accepted by the Legislature, then we can see absolutely no reason for continuing this aspect of the old law which treated testamentary and inter vivos trusts differently.

The CBA is of the opinion that all trusts should be treated in a like manner and so recommends that the new trust statute apply to all trusts, whenever created. (See Memorandum 84-58, Exhibit 4, p. 11, and Exhibit 5, p. 2; see also Exhibit 2, p. 2, attached hereto.)

If trust law is unified as recommended, the problem of determining whether a testamentary trust has expressed an intent to remain subject to court supervision as permitted by Probate Code Section 1120(a) evaporates. This would solve the problem discussed by Mr. Melvin H. Wilson in the letter attached hereto as Exhibit 5.

Jury Trial

Mr. Melvin H. Wilson, on behalf of the CBA, argues that the trust statute should avoid expanding the right to a jury trial. (See Exhibit 3 and Exhibit 4 attached hereto; First Supplement to Memorandum 84-23, Exhibit 1, p. 6; see also Memorandum 84-58, Exhibit 4, p. 11.) The staff agrees that it would be useful to provide some guidance on this issue in the statute, although it is probably impossible to provide clear rules that would avoid all controversy in this area on the extent of the right to a jury trial. Some attempt to clarify potential issues in this area is particularly appropriate if the jurisdictional unification recommended in the staff draft and in this supplement are approved by the Commission.

In California the right to a jury trial is the right as it existed at common law in 1850. People v. One 1941 Chevrolet Coupe, 37 Cal.2d

283, 287, 231 P.2d 832 (1951); C & K Engineering Contractors v. Amber Steel Co., 23 Cal.3d 1, 8, 587 P.2d 1136, 151 Cal. Rptr. 323 (1978); see generally Bloom, The Right to a Non-Jury Trial for Trust and Probate Issues, L.A. Law., June 1984, at 34-38. There is no right to a jury in a "probate proceeding" unless the right is conferred by statute. Estate of Beach, 15 Cal.3d 623, 642, 542 P.2d 994, 125 Cal. Rptr. 570 (1975); Burton v. Security Pacific Nat'l Bank, 155 Cal. App.3d 967, 977 (1984). Nor is there a right to a jury in equitable actions, as distinct from legal actions. See 4 B. Witkin, California Procedure Trial §§ 75-77 (2d ed. 1971 & Supp. 1983) and cases cited. The Restatement (Second) of Trusts provides the following rules that are relevant to the availability of jury trials, given the equitable-legal distinction:

> § 197. Nature of Remedies of Beneficiary
>
> Except as stated in § 198, the remedies of the beneficiary against the trustee are exclusively equitable.
>
> § 198. Legal Remedies of Beneficiary
>
> (1) If the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment.
>
> (2) If the trustee of a chattel is under a duty to transfer it immediately and unconditionally to the beneficiary and in breach of trust fails to transfer it, the beneficiary can maintain an action at law against him.

In California it is the gist of the action, and not its technical form, that determines the right to a jury. See C & K Engineering, 23 Cal.3d at 9. It seems fairly clear that proceedings for an accounting from a trustee and for breach of trust do not afford a right to jury trial. This should be made clear by a provision that the remedies of a beneficiary against a trust and other proceedings under draft Section 4630 are equitable.

It might also be desirable to include a general provision that makes clear that the right to a jury trial under the trust statute does not extend beyond the constitutitonal right. The Commission should consider a provision such as Uniform Probate Code Section 1-306:

> (a) If duly demanded, a party is entitled to trial by jury in . . . which any controverted question of fact arises as to which any party has a constitutional right to trial by jury.
>
> (b) If there is no right to trial by jury under subsection (a) or the right is waived, the Court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only.

The justification for this approach is given in the comment to Section 18 of the Model Probate Code (the predecessor of the UPC) which reads in part as follows:

> Comment. Most of the questions of fact likely to arise in connection with probate matters can be decided more satisfactorily by the judge than by the jury and at less expense. Therefore, if it were not for the possibility of violating constitutional provisions which preserve the right to jury trial, it would be desirable to provide that there shall be no trial by jury except under the circumstances stated in subsection (b) hereof. It is clear that there was no right of trial by jury in England in chancery or in the ecclesiastical courts, which were the predecessors of probate courts. But certain steps in a modern proceeding for the administration of the estate of a decedent may be regarded as merely proceedings at law which, for convenience, have been transferred to the court having jurisdiction of probate matters. Most important among these are the adjudication of creditors' claims and the determination of title in disclosure proceedings. This section seeks to insure that the constitutional right to trial by jury is not violated and at the same time to minimize as far as possible the use of the jury. Similar provisions are found in Fed. Rules Civ. Proc., Rules 38 and 39, and N. Y. Surr. Ct. Act, §§ 67 and 68.
>
> It should be noted that, if the constitution of a state does not guarantee a right to trial by jury in probate matters, then a statute which denies such a jury trial would not violate any provision of the Federal constitution, either as to jury trial or as to due process of law. Hence, if it is clear that a state constitution does not guarantee a right to trial by jury in probate matters, it would be desirable, instead of the form of § 18 here proposed, to substitute a provision to the effect that there should be no right to a jury trial but that the court might, in its discretion, order a trial of issues of fact by a jury, the verdict of which would be purely advisory.

Although by statute in California a right to a jury trial is provided in certain probate matters such as will contests (Prob. Code §§ 371, 382) and determination of rights to distribution of an estate (Prob. Code § 1081), the staff is not aware of any right to a jury in trust administration matters. Recognizing the equitable nature of trust administration should accomplish the purpose of restricting the right to a jury trial within its consitutional boundaries.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

MEMORANDUM NO. 1

CLRC Study L-640, Memorandum 84-29

To: Paulette Leahy

From: Melvin H. Wilson

Date: June 7, 1984

Subj: Judicial Administration - I

I think that proposed §4601 adequately deals with the issue of an equity court having jurisdiction over both testamentary and inter vivos trusts, provided that it is clear what is meant by the "internal affairs" of the trust. §4630(b) purports to define that term.

However, I think that there may be a technical problem with the way in which the definition is structured. The problem arises this way. First, §4630(a) contemplates initiation of an "internal affairs" proceeding by filing a petition. Second, §4631 duplicates §4631(a). Third, §4636 perpetuates §1138.12 by contemplating that an interested person can also file an action. Last, tying the definition of "internal affairs" with the invocation of the court's jurisdiction in §4630(a) can conceivably give rise to the argument that the court's exclusive jurisdiction over internal affairs can only be invoked by a petition and not by a complaint, particularly when §4631 also specifies how a proceeding under Article 3 (Proceedings Concerning Trusts) is commenced.

My feeling is that §4631(a) should be deleted so that §4631 will serve in its place. In addition, I think that §4631 should be modified so that it clearly states that a proceeding under Article 3 may be commenced either by filing a petition alleging the requisite jurisdictional facts or by the filing of a complaint which alleges facts which indicate that at least part of the

relief sought involves an internal affair of the trust. The most likely situation in which a complaint rather than a petition will be employed being one where both the exclusive and concurrent jurisdiction of the court under §4601 is invoked (wittingly or unwittingly).

I also think that it is essential that the definition of "internal affairs" (what is left of §4630, if my recommendation is followed) clearly state that surcharge issues are internal affairs. I suggest inserting immediately after §4630(b)(5) a new (6) to read as follows: "(6) Compelling a trustee to redress a breach of trust." To nail it down tightly, I also recommend that §4635 (Appeals) be amended by inserting after (f) an new (g) to read as follows: "(g) Compelling a trustee to redress a breach of trust." In addition, insert after the word "petition" in §4635(1), the words "or complaint."

A collateral issue is a trustee's liability toward third parties. We have a pending case involving a real estate sale in which about the only legal theory the plaintiff has advanced that has so far kept the case alive is a third party beneficiary theory. The argument is that because we owed a fiduciary duty to the beneficiaries to make the trust productive, we had both a duty to sell and to accept the best offer received, and therefore owed the plaintiff a duty to accept his offer. The plaintiff's position is that the legal theory is valid and the obvious issue of whether the offer was a good or bad offer is a triable issue of fact (in this case the offer was unsolicited, the only one, for about 2% down, below market rate interest, and interest only for several years, i.e., a cheap option).

I think that there should be added a section under the general duties and obligations of trustees in Chapter 4 (Memorandum 84-24) which states that a

duty owed to the beneficiaries by a trustee by virtue of acting as trustee shall not be imputed as a duty owed to a person who is not a beneficiary.

As to remedies (Memorandum 84-23), if the LRC proposes nothing else, it should propose that the remedies which a beneficiary has against a trustee arising out of a poceeding pertaining to the internal affairs of the trust shall be governed by principles of the common law applicable in equity proceedings.

I completely agree with the concept of having one set of rules for resolving internal affairs of trusts and am in complete agreement with the proposal to consolidate §1120 and §1138. However, there is monumental confusion within the bar over AB3612 (§1120.1a) and this is certainly reflected in the staff memoranda. My concern is that there will be even greater confusion if the staff proposal is ultimately enacted. It seems to me that bridging the transition from the existing unclear structure to a new unclear structure can be smoothly accomplished if there is in fact a bridge built into the new law. The proposed statutes don't provide the bridge.

I think that the following should be included. First, I think that the noninterference policy statement now contained in §1138.12 should be perpetuated but the language should be cleaned up somewhat as follows: "It is the intent of the Legislature in enacting this article that the administration of trusts subject to this article shall proceed expeditiously and free of judicial intervention but shall be subject to the jurisdiction of the courts of this state when such is invoked pursuant to this article or otherwise invoked pursuant to law." Second, probably incorporated as an exception to the policy statement of §1138.12, should be a clear "pole star" for the lonely probate practitioner that states that if the instrument establishing the trust

manifests an intention of the trustor that specified internal affairs of the trust, including by way of example, approval of trustee's compensation, shall be subject to judicial review and approval, this section shall not be construed to preclude an interested person from invoking the jurisdiction of the court to comply with such intent. Third, the issue of filing fees should be resolved to provide additional comfort to the lonely practitioner. This could be accomplished by perpetuating the second sentence of §1138.4.

One final thought. I have never been sure why, but §§1120(a) and 1138.13 permit a trustor to opt out from jurisdiction under §1138 and some post-1977 wills and also some intervivos trusts contain provisions opting out from §1138 jurisdiction. My concern is that if a will or trust contains such opt out language, the statutory rules dealing with exclusive jurisdiction, procedure, remedies, and so on, under the LRC proposals, might be deemed to be inapplicable. I see no intelligible reason for some trusts to totally fall under common law rules and suggest that the LRC assure itself that the proposed statutes expressly make any such opt out language ineffective as to the scope of the courts's jurisdiction under §3601.

3793t

EXHIBIT 2

MEMORANDUM NO. 2

CLRC Study L-640, Memorandum 84-29

To: Paulette Leahy

From: Melvin H. Wilson

Date: June 8, 1984

Subj: Judicial Administration - II - The AB3612 Problem

After thinking more about the AB3612 issues which I commented on in my Memorandum No. 1, it is apparent that I did not clearly and fully state my position in that memo. It occurs to me that the direction the LRC is taking is to completely eliminate the distinction between testamentary and inter vivos trusts as to jurisdiction and procedure. I totally agree with that result. But, as I too tersely remarked in my Memorandum No. 1, we are attempting to bridge the gap from the existing unclear situation to a new unclear situation.

I strongly feel that perpetuating the AB3612 mess in the new code is counterproductive. The reason for my feeling is that if the LRC staff proposals to codification of a comprehensive trust law are enacted, AB3612 will have outlived its usefulness because the reasons for its existence will have disappeared.

Why do I say the reasons for AB3612's existence will have disappeared? The progenitor of §1120 was Civil Code §1699, originally enacted in 1889. That section imposed continuing jurisdiction "for the purpose of the settlement of accounts under the trust." Subsequent language indicated that petitioning for settlement of accounts was not obligatory. Successive amendments to §1120 did not make the filing of accounts obligatory. Operationally, many courts, by local policies or rules of practice, attempted

to regulate the amount of trustees' compensation and some courts imposed surcharges for interest on compensation which was taken on account without court approval. Those practices, coupled with §1123 which provided some comfort by purporting to make orders settling interim accounts conclusive, resulted in many testamentary trustees electing to periodically file accounts.

Legislation in 1976 removed trusts provided under wills dated after June 30, 1977 from continuing jurisdiction under §1120. AB3612 essentially completed the process by automatically removing trusts administered by corporate fiduciaries from §1120 jurisdiction and providing for optional removal of trusts administered by individual trustees. AB3612 required submission of periodic accountings and other fiscal information as well as information about the beneficiary's right to seek judicial intervention.

Section 4603 provides "continuing" jurisdiction over the trustee and the beneficiaries to the same extent that §1120 provided jurisdiction. Section 4320 (proposed by Memorandum 84-21) requires the same information and notice of rights that is provided by AB3612. So what is provided by AB3612 that is not provided by the statutory provisions proposed by the LRC? In my judgment, nothing! All that is required to invoke the court's authority to resolve internal matters of the trust under either §1120 or §4600 et seq is the filing of a petition and giving the required notice.

The fiction that a testamentary trust was somehow subject to some mystical "supervision" is not substantiated by reality. A trust was subject to supervision only if the trustee elected to subject himself thereto by voluntarily filing an account.

Accordingly, I recommend the following modifications to proposed Article 2:

1. §4180 be amended to be applicable to all testamentary trusts.

2. §4181(a) be amended to require the notice under §4181(b) to be given within six months after the effective date of enactment of the section with respect to all trusts which are then still subject to continuing jurisdiction under §1120.1a. The requirement that the notice be given within six months after funding of all other trusts should be retained.

3. §4181(b) should be commensurately modified.

4. §4182 should be amended to make it clear that new notices are not required for trusts which were previously removed from continuing jurisdiction by AB3612.

5. §4183 could be retained.

6. §4184 could be retained.

7. §§4185 and 4186 should be deleted.

8. In lieu of §4185, there could be included a provision which provides a much less elaborate but equally effective AB3612 transition by perpetuating a modified noninterference policy statement now contained in §1138.12, as follows: "It is the intent of the Legislature in enacting this article that the administration of trusts subject to this article shall proceed expeditiously and free of judicial intervention but shall be subject to the jurisdiction of the courts of this state when such is invoked pursuant to this article or otherwise invoked pursuant to law. If the instrument establishing the trust manifests an intention of the trustor that specified internal affairs of the trust, including by way of example, approval of trustee's compensation, shall be subject to judicial review and approval, this section shall not be construed to preclude an interested person from invoking the jurisdiction of the court to comply with such intent."

9. Third, the issue of filing fees for trusts previously subject to §1120 jurisdiction should be resolved. This could be accomplished by perpetuating the second sentence of §1138.4 in §4186.

3[illegible]lt

EXHIBIT 3

MEMORANDUM NO. 3

CLRC Study L-640, Memorandum 84-29

To: Paulette Leahy

From: Melvin H. Wilson

Date: June 8, 1984

Subj: Judicial Administration - III - Jurisdiction and Procedural Considerations

The provisions in the Probate Code which make the provisions of the CCP applicable to Division 3 (Administration of Estates of Decedents, §§300 - 1359) are Prob. C. §1230 - 1233. Specifically, the first paragraph of §1233 makes Part 2 (Of Civil Actions, §§307 - 1062.5) and Part 4, Title 3, Chapter 3, Article 3 (Depositions and Discovery, §§2016 - 2036.5) of the Code of Civil Procedure applicable to "proceedings mentioned in this code with regard to discovery, trials, new trials, appeals and all other matters of procedure."

At this point I do not know whether the LRC intends to incorporate omnibus provisions comparable to §§ 1230 - 1233 which are applicable to the entire Probate Code. If it does not intend to incorporate such omnibus procedure provisions, and, as discussed below, there are some valid reasons for not doing so, then there should probably be added a new §4637 which is comparable to §§1230 - 1233. In view of the fact that jurisdiction under §4601 could be both exclusive [§4601(a)] and concurrent [§4601(b)], it might be advisable to limit the more restrictive §1233 incorporation of CCP rules to cases involving internal affairs of the trust.

Not all of the provisions of §§1230 - 1233 are applicable to cases involving trusts. For example, at least in an exclusive jurisdiction case involving the internal affairs of a trust [§4601(a)], there would be no right

to a jury trial. On the other hand, in a concurrent jurisdiction case, specifically including one to determine the existence of a trust [§4601(b)(1)], there would be right to a jury trial on that issue (the right being analogous to that in a will contest). But the major defect in utilizing §§1230 - 1233 verbatim as the rules of procedure for trust cases is that they do not contemplate dealing with trusts, they only relate to decedents estates. Accordingly, I think we will need a separate set of rules of procedure sections which specifically deal with trusts and which scrupulously avoid any inference that a jury trial is permissible in a internal affairs case.

Although this may seem redundant, I also think it would be extremely beneficial for the code to clearly state that the remedies which a beneficiary has against a trustee arising out of a proceeding pertaining to the internal affairs of the trust shall be governed by principles of the common law applicable in equity proceedings.

3802t

EXHIBIT 4

MEMORANDUM

Subj: Amendment of Probate Code §1138 et seq to confer exclusive jurisdiction on the Superior Court to determine all matters pertaining to breach of trust.

Our primary concern is whether the common law rule that a court of equity has exclusive jurisdiction over trusts is the law of this state with respect to both testamentary and inter vivos trusts.

The decision in Pitzer holds that the Probate Court, in the exercise of its continuing jurisdiction under §1120, has such exclusive jurisdiction over testamentary trusts. But Pitzer raises the issue that with the enactment of §1120.1a, it is no longer clear under California law that the common law jurisdiction rule is applicable to trusts which are no longer subject to §1120 jurisdiction. With possibly a few exceptions, such trusts are subject to ad hoc jurisdiction under §1138 et seq.

It is not certain that the same exclusive jurisdiction rule applicable under §1120 is applicable to trusts which are subject to jurisdiction of an equity court under §1138. The reason for the uncertainty is that §1138.11 states:

> "The remedies under this article [§§1138 - 1138.14] are cumulative and nonexclusive."

And that Section 1138.12 states:

> "It is the intent of the Legislature in enacting this article that the administration of trusts subject to this article proceed expeditiously and free of judicial intervention subject to the jurisdiction of the courts of this state as invoked pursuant to this article or otherwise invoked pursuant to law."

The problem is the underlined language in the two quotations. It provides the opportunity for a plaintiff's counsel to re-raise the argument that consequential injuries sustained by beneficiaries, resulting from conduct of the trustee which may be the basis for a surcharge by an equity court, is a civil wrong triable by jury.

The Pitzer decision arrived at the exclusive jurisdiction conclusion on the basis of several factors dicussed in the decision. One factor is the scope of a probate court's jurisdiction. The decision discusses the recognition by the Supreme Court of an expansion of the powers which may be exercised under the probate court's jurisdiction, and then dicusses the most significant aspects of the case beginning at (Pg. 13):

> "Thus, in exercising jurisdiction over most controversies arising between the trustee and the beneficiaries of a testamentary trust, section 1120 allows the probate court to bring to its aid the full legal and equitable powers with which as a superior court it is invested. (Citation). In the instant matter, Security Pacific, acting in its capacity as testamentary trustee, properly sought the authority of the probate court for the purpose of concluding and authorizing a final accounting of the trust. (Citation) Likewise, objections to the trust accounting raised by the beneficiaries were properly set in the same forum."
>
> "The concurrent 'civil action' filed by respondents included identical causes of action based upon breach of trust as those brought in the original probate proceeding. The only distinguishing and material feature between the two causes of action is that respondents sought

damages in the 'civil action.' Damages notwithstanding, the 'civil' cause of action for breach of trust presented matters for adjudication in the probate court, not the superior court sitting outside of its probate jurisdiction. Contrary to respondents' contentions, a separate and distinct legal cause of action did not arise nor exist [Footnote: '10 This is not to confuse the fact that it is possible for a probate court to find that the breach of trust allegation includes both legal and probate/equitable issues.'] as a result of the alleged breach of trust by a trustee administering a testamentary trust. An action based upon a breach of a testamentary trustee is for the exclusive adjudication of the superior court presiding in probate. (Citations)'"

"In any event, cosolidation of those matters, since merely duplicitous of the matters already being litigated in probate, is inconsequential and nonprejudicial. [Footnote: '11 Since the matter at bench for adjudication is exclusively within the jurisdiction of the probate court, respondents' inclusion of a claim for damages erroneously sought to expand those remedies available for breach of a testamentary trust. The remedies which were sought, those being an award of compensatory and punitive damages, are beyond the jurisdiction of the probate court to award.']" (Emphasis supplied)

"Furthermore, in this matter, respondents did proffer a separate and distinct legal claim. The matter of respondent John Pitzer's alleged cause of action for unlawful interference with his purported irrevocable license to use the water well was entitled to a civil jury trial.[12] Although that cause of action is distinct and separate from the proferred breach of trust cause of action, it is related. Accordingly, in the probate court's broadening jurisdictional authority (Citation), as well as the sound policy to litigate multifaceted claims at one time when all the necessary parties are before the court, it was proper for the court to consolidate the breach of trust (equitable/probate) issues and the legal water rights claim."

The decision is commendable in dealing with the fundamental issue of the scope of the probate court's jurisdiction regarding the issue of the right of the court to adjudicate the alleged civil causes of action, but Footnote 11 appears to have further complicated the as yet unresolved question of whether a court having exclusive jurisdiction in a surcharge action also has exclusive jurisdiction to adjudicate the claims of beneficiaries for consequential personal damages which may result from a trustee's conduct which is the basis for a surcharge. Other cases involving comparable issues have resulted in an award against a trustee of both punitive damages and what are virtually consequential damages.

Thus, the decision may be a "Catch-22", in that if the trend in this state appears to be to expand liability for consequential damages, but, as the Pitzer decision seems to say, damages under such expanded cause of action are not recoverable in a surcharge action, then they must be triable before some forum. If an equity court is not available, they must be tried before a jury in a "civil action" tried contemporaneously with the surcharge action. This is precisely the environment in which plaintiff's counsel in Pitzer was able to convince a jury that it should award both damages for emotional distress and punitive damages.

What we appear to need is a code section that adopts the principle of the Restatement of Trusts, 2d, §197 which states:

"§197. Nature of Remedies of Beneficiary
Except as stated in §198, the remedies of the beneficiary against the trustee are exclusively equitable."

Section 198 states:

"§198. Legal Remedies of Beneficiary
(1) If the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment.
(2) If the trustee of a chattel is under a duty to transfer it immediately and unconditionally to the beneficiary and in breach of trust fails to transfer it, the beneficiary can maintain an action at law against him."

Section 199 states:

"§199. Equitable Remedies of Beneficiary
The beneficiary of a trust can maintain a suit
(a) to compel the trustee to perform his duties as trustee;
(b) to enjoin the trustee from committing a breach of trust;
(c) to compel the trustee to redress a breach of trust;
(d) to appoint a receiver to take possession of the trust property and administer the trust;
(e) to remove the trustee."

However, the Restatement approach presents some problems. The more obvious being that it does not recognize that a beneficiary may have a right to recover consequential damages from a trustee. Nor does it clearly recognize that punitive damages can be assessed against a trustee for egregious conduct.

The California Law Revision Commission is currently considering a number of policy considerations respecting a trustee's liabilities for breach of trust. See Study L-640, Memorandum 84-23 (Breach of Trust), dtd 4/6/84. This staff analysis does not focus on the jurisdictional issue and thus makes no recommendation as to a policy decision on this issue. In my judgment, it is imperative that the LRC make an affirmative recommendation and resulting statutory proposal which will ensure that the common law principle embodied in the Pitzer is clearly extended to inter vivos trusts.

If the Restatement rule is proposed for enactment, an opposing argument could be that the apparent limitation of a beneficiariy's remedies to those specified in §199 is contrary to the common law of this state and the Legislature should not take away such rights without a very substantial and persuasive demonstration that the broad public interest will be better served by doing so. Such demonstration may be difficult, particularly when the proponents of such legislation are the alleged big bad wolves who are predating on the innocent public.

Obviously, what we will require as a counterargument to such opposition is a demonstration that the power of a court of equity to award punitive or compensatory damages, to the extent such power exists under current common law, will not be impaired by such statute. Because the judicial recognition of the existence of such power is presently in an evolving state, and its extent is ill-defined, it may be necessary to compromise the Restatement

language by including language which clearly alowws for judicial expansion of a beneficiary's remedies. In my judgment this should not be an explicit recognition of the present ill-defined rules but a somewhat more vague manner of leaving the door ajar.

MHW/mhw
6/1/84
3741t

SECURITY PACIFIC NATIONAL BANK

FINANCIAL MANAGEMENT GROUP • LEGAL SERVICES (H40-7)
333 SOUTH HOPE STREET, LOS ANGELES, CALIFORNIA
MAILING ADDRESS: P. O. BOX 2498, TERMINAL ANNEX, LOS ANGELES, CALIFORNIA 90051

July 2, 1984

California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, California 94306

Re: Study L-640, Memo 84-29
Judicial Administration of Trusts

Gentlemen:

This is to supplement Paulette Leahy's letter summarizing comments on behalf of California Bankers Association.

One nagging problem with AB 3612 is that Probate Code Section 1120(a) provides that a testamentary trust is not subject to continuing jurisdiction "unless the testator provides otherwise." The statute does not explain what language is contemplated by the phrase "provides otherwise."

In the 3,000 testamentary trusts that this Bank administers about 10% contain language approximating the following: "The trustee shall receive such reasonable compensation as the court may allow."

There is considerable diversity of opinion within the trust industry and the courts as to whether such language constitutes a sufficient manifestation of intent of the testator that the trust is to remain subject to continuing court jurisdiction.

Estate of Goddard, Court of Appeal, Fourth District, Division One, 4 Civ. No. 28960, filed June 19, 1984, certified for publication, holds that such language regarding compensation does not constitute a provision negating the effect of Section 1120(a). A copy of the decision is attached.

Very truly yours,

Melvin H. Wilson
Vice President and
Associate Trust Counsel

MHW:hks

cc: Paulette Leahy
L. B. Norman