

Memorandum 84-88

Subject: Study L-640 - Trusts (Modification and Termination)

The question of modification and termination of trusts was referred to Professor Gail Boreman Bird for study in 1983. Professor Bird has completed her background study; a copy accompanies this memorandum. We are now ready to consider the questions raised by Professor Bird as well as suggestions of interested persons and organizations. In order to focus the discussion of this subject, a draft statute presenting the basic rules suggested is attached as Exhibit 1. This memorandum discusses the main points made by Professor Bird, but you should read the study in full because the memorandum does not repeat most of the important information presented in the study. For your convenience, the following discussion generally parallels the order of topics in the background study. A copy of the Restatement (Second) of Trusts sections and relevant comments on termination and modification are attached as Exhibit 2 for your reference.

The Need to Permit Modification and Termination of Trusts

Despite a drafter's best efforts, a trust may prove to be unresponsive to the changing needs of the trustor and beneficiaries. See Background Study at 1-3. A trust drafted to achieve advantages under a particular state of the tax laws may become obsolete when those laws change. See Collier, Unscrambling Pre-ERTA Estate Plans, in Estate Planning 1982 § 7.1, at 186 (Cal. Cont. Ed. Bar). In some situations, it may be desirable to permit modification and termination merely in the interest of the free alienation of property. Trusts may also become uneconomical to administer.

POWER OF TRUSTOR TO MODIFY OR TERMINATE

Revocability of Trusts (Draft § 4201)

Whether the trustor may terminate a trust and take away the rights of the beneficiaries depends generally upon whether the trust is revocable. See Background Study at 4. The rule in most jurisdictions is that a trust is irrevocable unless the trustor reserves the right to revoke, but California law provides that a trust is revocable unless by its terms it is made irrevocable. Civil Code § 2280. This question has

been fully discussed by the Commission (see Memorandum 84-18, considered at the April 1984 meeting), and the Commission has decided to retain existing California law. The presumption of revocability is set out in draft Section 4201(a) in Exhibit 1.

Manner of Termination of Revocable Trust (Draft § 4202)

How may a revocable trust be terminated? Civil Code Section 2280 provides that a trust is "revocable by the trustor by writing filed with the trustee." This manner of revocation applies where a revocable trust is silent on the manner of revocation, but California courts generally hold that where the trust provides a manner of revocation, the prescribed procedure must be followed. See, e.g., Rosenauer v. Title Ins. & Trust Co., 30 Cal. App.3d 300, 304, 106 Cal. Rptr. 321 (1973) (discussed in Background Study at 5-7). Professor Bird notes that under the Rosenauer rule the trustor is deprived of the benefits of the manner of revocation in Civil Code Section 2280 where the trust instrument provides not only for revocability, but also specifies a special manner of revocation. However, she concludes that the rule is justifiable on pragmatic grounds:

If a settlor enters into a trust arrangement with a third party trustee, and limits himself to certain methods of revocation specified in the trust instrument, the trustee should be entitled to rely on the trust instrument. The Rosenauer decision does provide some needed security and certainty to trustees.

It has been suggested that a more complicated manner of revocation may be desired by the trustor where there is concern about "future senility or future undue influence while in a weakened condition." J. Cohan & J. Kasner, Supplement to Drafting California Revocable Inter Vivos Trusts § 5.2, at 73 (Cal. Cont. Ed. Bar 1982); see also Hibernia Bank v. Wells Fargo Bank, 66 Cal. App.3d 399, 136 Cal. Rptr. 60 (1977) (attempted revocation by trustor in convalescent hospital held ineffective for failure to comply with revocation procedure provided in trust instrument). In rejecting the rule in an earlier case (Fernald v. Lawsten, 26 Cal. App.2d 552, 560-61, 79 P.2d 742 (1938)) permitting revocation under Section 2280 despite the procedure in the trust, the court in Hibernia Bank stated:

Fernald would in effect require a trustor to create either an irrevocable trust or one freely revocable on written notice. It would not allow him to protect himself from the consequences of his whim, caprice, momentary indecision, or of undue influence by other persons.

66 Cal. App.3d at 404.

Professor Bird supports the California rule favoring revocability, and would continue the provision for revocation by written notice to the trustee (with some modification), but she would reject the Rosenauer rule requiring compliance with the method of revocation in the trust. Professor Bird suggests the following draft (which is also set forth in a revised form in draft Section 4202 in Exhibit 1):

Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor (1) by a writing other than a will filed with the trustee during the lifetime of the trustor or (2) by the trustor's compliance with any method of revocation specified in the trust instrument.

Background Study at 10. Professor Bird argues that making the statutory manner of revocation available for all revocable trusts would prevent the trustor from being unwittingly trapped in a permanent and irrevocable situation. Id. As for the undue influence problem mentioned by the court in Hibernia Bank, Professor Bird suggests that there are adequate remedies to set aside a revocation that is the product of fraud, duress, or undue influence. Background Study at 11. A trust should not be revocable by a will (except where the trustor so provides) because a will acts at death while a power of revocation should be exercisable as a general rule during the trustor's lifetime.

An alternative to Professor Bird's suggestion would be to codify Rosenauer so that any method of revocation in the trust is exclusive. However, the staff thinks Professor Bird gives convincing arguments for preferring her draft to the Rosenauer rule.

There is a third possibility. What would happen if the trustor provides a manner of revocation in the trust and also provides explicitly in the trust that the method of revocation provided by statute is not available? Professor Bird's draft would make the trust provision ineffective to the extent it excluded the statutory manner of revocation, but a statute could be drafted to allow the revocation in the statutory manner unless the trust instrument specifically excludes it and provides another manner. A draft of this alternative might read as follows:

§ 4202 [alternate] Manner of revocation

4202. (a) A revocable trust is terminated by its revocation in either of the following manners:

(1) By the trustor's compliance with any method of revocation provided in the trust instrument.

(2) Except as provided in subdivision (b), by a writing (other than a will) filed with the trustee during the lifetime of the trustor.

(b) If the trust instrument explicitly makes the manner of revocation specified in the instrument the exclusive manner of revocation, the trust may not be revoked pursuant to paragraph (2) of subdivision (a).

Although this section would give the trustor more freedom to control the manner of revocation than would Professor Bird's approach, it has the drawback of opening the question of what language is sufficient to restrict the manner of revocation to that specified in the trust.

Section 112.051(c) of the Texas Trust Code requires a revocation or modification of a written trust to be in writing. Is the Commission interested in such a provision for California?

Modification of Revocable Trusts (Draft § 4203)

If a trust is irrevocable, the trustor has the power to modify a trust to the extent that the power has been reserved. See Restatement (Second) of Trusts § 331 (1957) [hereinafter cited as Restatement]. Because of the structure of California law that makes inter vivos trusts revocable unless they provide otherwise, the problems relating to modifiability arising in other states are not as frequent here. As a general rule the general power to revoke includes the power to modify. See Restatement § 331 comment g; *Heifetz v. Bank of America*, 147 Cal. App.2d 776, 306 P.2d 979 (1957) (citing the first Restatement of Trusts). Should this principle be codified? Draft Section 4203 in Exhibit 1 is offered for consideration if the Commission wants to make clear that the power to revoke includes the power to modify.

It may also be that exercise of the power to modify can have the same effect as the power to terminate. If the power to modify is unrestricted, it includes the power to revoke. Restatement § 331 comment h. So too if the trustor reserves the right to exclude beneficiaries, the trust may be terminated under other principles when the trustor is the sole remaining beneficiary. See Restatement § 331 comment i; *Heifetz v. Bank of America*, supra; Background Study at 13-15. The staff does not suggest attempting to codify these rules. Nor would we codify the rules concerning proof by the trustor that the power to modify was omitted by mistake. See Background Study at 14; Restatement § 332. We would also leave the question of rescission and reform of trust instruments to the common law. See Restatement § 333; Background Study at 14-15.

POWER OF TRUSTEE TO MODIFY OR TERMINATE

The trustee may terminate or modify a trust only pursuant to the terms of the trust or as permitted by statute. See Background Study at 15. The trust may be terminated in effect where the trustee has discretion to invade principal for the benefit of beneficiaries. The debate over the limits on the trustee's discretion is summarized by Professor Bird in the Background Study at 16-19 and note 48. The control of the exercise of the trustee's discretion or "absolute" discretion is a general problem considered elsewhere. The matter of modification and termination by a trustee does not appear to call for legislation.

POWER OF BENEFICIARIES TO MODIFY OR TERMINATE

Agreement of Trustor and All Beneficiaries (Draft § 4205)

If the trustor and all beneficiaries are legally competent and seek the termination or modification of a trust, it can be terminated or modified even though the purposes of the trust have not been accomplished and notwithstanding a spendthrift provision. See Civil Code § 771; Restatement § 338 & comment d; see also Civil Code § 2258(a) (modification by consent of all interested persons). This rule is continued in draft Section 4205 in Exhibit 1.

Agreement of All Beneficiaries

Where the trustor is dead or does not agree, all the beneficiaries can consent to a termination of the trust if none is under an incapacity and a material purpose of the trust would not be defeated. See Restatement § 337. This subject is fully explored by Professor Bird in the Background Study at 20-52.

Material Purpose Doctrine (Draft § 4204)

Professor Bird recommends that the material purposes doctrine be limited to the case of spendthrift trusts. See Background Study at 27-28. This would have the effect of permitting termination by consent of the beneficiaries of trusts providing for postponement of enjoyment (Background Study at 22) or for successive beneficiaries even though there is other evidence of a material purpose (Background Study at 28). This position is supported by the general interest in free alienability and in a general preference for the living over dead hand control. In the case of a non-spendthrift trust where enjoyment is postponed, it is argued that, since the beneficiary may sell his expectancy at a great

sacrifice, the ability to accelerate enjoyment is more nearly consistent with the presumed intent of the trustor. If the trustor wants to restrain alienation, a spendthrift provision should be included in the trust. The same arguments apply to the successive beneficiary cases, since in the absence of spendthrift protection the life beneficiary may sell his interest.

Draft Section 4204 in Exhibit 1 would restrict the material purpose doctrine. The staff is divided on this issue. Part of the staff is in agreement with Professor Bird's recommendation on this subject. There is also strong feeling favoring the material purpose doctrine as a limitation on the power of the beneficiaries to terminate in the absence of a spendthrift trust clause.

Obtaining Beneficiaries' Consent (Draft §§ 4002, 4206-4208, 4618)

The difficulty with obtaining the consent of all beneficiaries is that some may be unborn or unascertained. Professor Bird discusses this problem in two contexts: where the trustor claims to be the sole beneficiary and where the living beneficiaries claim to be sole beneficiaries. See Background Study at 32 et seq.

The result is clear if the trustor establishes a trust to pay the income to him for a time and then the principal. It is also clear if the income is paid to the trustor for life with the principal to be paid to his estate at death. The trustor is not the sole beneficiary if the remaindermen are described as "children", "issue", or "descendants". However, there is some doubt where the remainder is to go to the "heirs". The doctrine of worthier title was applied in Bixby v. California Trust Co., 33 Cal.2d 495, 202 P.2d 1018 (1949), to permit the trustor as sole beneficiary to terminate the trust where the remainder was to be distributed to the trustor's "heirs at law in accordance with the laws of succession of the State of California then in effect." See Background Study at 36-38. The doctrine of worthier title was abolished in 1959, however, so Bixby would be decided differently today. Professor Bird recommends that a limited form of the worthier title doctrine be reinstated by statute. See Background Study at 50. The staff has drafted Section 4208 in Exhibit 1 to accomplish this result. A similar approach has been taken in New York. See N.Y. Est. Powers & Trusts Law § 7-1.9(b) (McKinney 19__). It is likely that application of the draft statute

would have tax consequences in a case where the trustor actually intends to create an irrevocable trust in favor of his "heirs".

Obtaining the consent of all beneficiaries is a serious problem because of the unborn beneficiary who is a member of a class such as "issue," "descendants," or "children." Termination has been precluded in California by application of the conclusive presumption of fertility--the fertile octogenarian rule. See *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 187 P. 425 (1920); *Wogman v. Wells Fargo Bank & Union Trust Co.*, 123 Cal. App.2d 657, 267 P.2d 423 (1954). Professor Bird advocates the abolition of the conclusive presumption of fertility. See Background Study at 51-52. Professor Bird suggests that proof of sterility be required to be clear and convincing and be gender-neutral. Draft Section 4207 in Exhibit 1 is offered as an implementation of this proposal.

Methods for dealing with the unborn beneficiary problem already exist in California and should be retained. The doctrine of virtual representation permits living members of a class to represent unborn members if there is no adverse interest between the living and the unborn. See *Mabry v. Scott*, 51 Cal. App.2d 245, 124 P.2d 659 (1942) (modification resulting in partial termination); Background Study at 43-45. As Professor Bird notes, the doctrine of virtual representation is not too useful in the trust termination context since the interests of the living and the unborn beneficiaries are diametrically opposed. Draft Section 4618 in Exhibit 1 continues the law on virtual representation.

The other device is the appointment of a guardian ad litem. See Background Study at 45-50. Professor Bird finds the guardian ad litem to have some drawbacks, particularly in the termination context, but recommends retention of the doctrine. Draft Section 4002 in Exhibit 1 continues the law on guardians ad litem, but we also suggest adoption of a provision drawn from Wisconsin law, as recommended by Professor Bird, that gives the guardian ad litem leeway to consider nonpecuniary quid pro quo in protecting the beneficiary's interest. See Background Study at 48-49 & n.179. This principle would be codified by draft Section 4206.

MODIFICATION AND TERMINATION BY COURT

The court has the inherent equitable power to authorize deviation from the express terms of a trust to accomplish the purposes of the trustor. See Background Study at 52-58; Restatement §§ 167, 336. The

Commission has approved a section recognizing the power of the court to relieve a trustee from restrictions on the exercise of powers under the trust. (See draft Section 4401 in Exhibit 3 attached to Memorandum 84-22, considered at the June 1984 meeting.) A provision based on Restatement Section 336 is set forth in draft Section 4243 in Exhibit 1 for Commission consideration. This would codify the emergency termination doctrine.

The question of whether modification or termination should be permitted in circumstances that do not constitute an emergency is raised in a letter from Charles A. Collier, Jr., attached hereto as Exhibit 3. Mr. Collier suggests giving the court authority to modify the terms of an irrevocable trust based on a change of circumstances. There is some concern, however, that too broad a grant of authority to the courts might engender a Robin Hood mentality. See the discussion of Petition of Wolcott in the Background Study at 56-58. Professor Bird's analysis suggests that expansion of the guardian ad litem concept as discussed above would be a more appropriate response to the problem of invading one beneficiary's interest for the benefit of a particularly needy beneficiary.

Mr. Collier seems to be suggesting not a modification of the distributive plan, however, but a modification of the administrative provisions so that the appointment of a conservator can be avoided. At the September meeting, the Commission approved a provision giving the trustee the power to pay distributable amounts for the use of, rather than to, a beneficiary who is under a legal disability. (See draft Section 4474 in Exhibit 3 attached to Memorandum 84-22.) As suggested by Mr. Collier, the cautious trustee could obtain court approval of the exercise of this power by petition.

The existing power of the court to terminate a trust with uneconomically low principal is continued in draft Section 4242 in Exhibit 1. In a related matter, Mr. Collier suggests that the probate court should be statutorily authorized to distribute a small trust directly to the beneficiaries, rather than to the trust. (See Exhibit 4 attached hereto.) In effect this would entail a termination of the trust, or at least a partial termination, and is consistent with the general statute for termination of small trusts. Mr. Collier offers a Kentucky statute as a model for such a provision (copy attached to Mr. Collier's letter in Exhibit 4). The staff thinks this is a good idea, but we suggest that

the statute should be part of the probate administration provisions which the Commission will consider in the near future.

TERMINATION BY OPERATION OF LAW

Draft Section 4240 in Exhibit 1 continues existing law relating to termination of trusts by operation of law, such as where the trust purpose has been fulfilled or has become impossible to fulfill.

A trust is terminated by operation of the doctrine of merger when the legal and equitable title unite in one person. See Background Study at 58-59. Draft Section 4241 continues the existing California statute on this subject.

MISCELLANEOUS MATTERS

Trustee's Compensation

Mr. Bruce J. Steele, on behalf of the California Bankers Association, has suggested that the statute authorize beneficiaries with "vested interests" to approve paying the trustee a greater compensation. (See the First Supplement to Memorandum 84-26, p. 2, and draft Section 4500 in Exhibit 1, attached to Memorandum 84-26.) It is unclear why the interests of contingent beneficiaries are not significant enough to require their consent. It may be that since the purpose is to avoid the need for court proceedings, the proponents assume that vested beneficiaries are known whereas contingent beneficiaries may not be. This is generally true, but perhaps it would be better to require the consent of all known beneficiaries, rather than all vested beneficiaries. This would avoid the need to get consent of unborn persons, but the problem of incapacitated persons would remain.

The question was raised in the First Supplement to Memorandum 84-26 about the appropriate location of such a compensation modification provision, should the Commission adopt the suggestion. The staff believes it would be best to put it in draft Section 4500 since it would be a special, limited provision that is not of general application.

Acceptance of Trustee's Resignation

The CBA has suggested elsewhere that a majority of beneficiaries, rather than all beneficiaries, should be empowered to accept the resignation of a trustee. (See the First Supplement to Memorandum 84-26, p. 5, and draft Section 4570 in Exhibit 1, attached to Memorandum 84-26.) If this suggestion is adopted, the staff would locate it in draft Section 4570, rather than in the general termination provisions.

Consolidation and Division of Trusts

A special type of modification of trusts involves the combination of two or more trusts into one or the separation of a trust into two or more separate trusts. California has a statute permitting the combination of assets and unification of administration of "substantially identical" trusts having the same trustee. See Prob. Code § 1133 (testamentary trusts). The Commission has already approved a draft that continues the substance of this provision and applies it to both testamentary and inter vivos trusts. See draft Section 4304(b) in Exhibit 1.

The Commission may wish to consider providing a broader authority, not limited by the requirements that the trusts have the same trustee or that the terms be "substantially identical." Pennsylvania law provides such authority in the following terms:

§ 7192. Combination of trusts

The court, for cause shown, may authorize the combination of separate trusts with substantially similar provisions upon such terms and conditions and with such notice as the court shall direct notwithstanding that the trusts may have been created by separate instruments and by different persons. If necessary to protect possibly different future interests, the assets shall be valued at the time of any such combination and a record made of the proportionate interest of each separate trust in the combined fund.

Pa. Cons. Stat. Ann. tit. 20, § 7192 (Purdon Supp. 1984). Is the Commission interested in revising California law along these lines?

Pennsylvania also provides for separating a trust into two or more trusts, a possibility not recognized by statute in California. Pennsylvania provides:

§ 7191. Separate trusts

The court, for cause shown and with the consent of all parties in interest, may divide a trust into two or more separate trusts.

Pa. Cons. Stat. Ann. tit. 20, § 7191 (Purdon 1975). It is assumed that "parties in interest" means all beneficiaries, and the trustor, if still living. The staff knows of no reason why the general authority to modify a trust would not include the power to split it; however, the matter would be clarified if a provision like the Pennsylvania statute were included in the modification sections.

Transitional Provisions

With the exception of the proposed abolition of the conclusive presumption of fertility, none of the rules that expand the right to revoke or modify should apply to trusts created before the operative date or created by wills executed and not amended before the operative date.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

Staff Draft

Modification and Termination of Trusts

Note. These sections will be renumbered when the comprehensive draft is assembled. For the time being, some section numbers from earlier drafts have been retained for ease of cross-reference.

[Guardian ad Litem]

35084

§ 4002. Appointment of guardian ad litem

4002. (a) The court may, on its own motion or on request of a trustee or other person interested in a trust, appoint a guardian ad litem at any stage of a proceeding concerning a trust. If the court determines that representation of the interest otherwise would be inadequate, a guardian ad litem may be appointed to represent the interest of any of the following:

- (1) A minor.
- (2) An incapacitated person.
- (3) An unborn person.
- (4) An unascertained person.
- (5) A person whose identity or address is unknown.
- (6) A designated class of persons who are not ascertained or are not in being.

(b) If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests.

(c) Sections 373 and 373.5 of the Code of Civil Procedure do not apply to the appointment of a guardian ad litem under this section.

Comment. Section 4002 continues the substance of paragraph (2) of subdivision (a) and subdivision (b) of former Section 1215.3 and the substance of subdivision (a) of former Section 1138.7, and supersedes part of the last paragraph of subdivision (b) of former Section 1120. Subdivision (c) continues the substance of subdivision (c) of former Section 1138.7 and the last sentence of subdivision (b) of former Section 1120.

Note. This section is presented for reference purposes; it is scheduled for consideration in Exhibit 5 of Memorandum 84-29.

CHAPTER __. MODIFICATION AND TERMINATION OF TRUSTS

§ 4201. Presumption of revocability

4201. (a) Unless expressly made irrevocable by the instrument creating the trust, a trust is revocable by the trustor.

(b) If a trust was created when the trustor was a resident of another state and the intention of the trustor can not be determined, the revocability of the trust is governed by the law of the other state and not by subdivision (a).

Comment. Subdivision (a) of Section 4201 continues the substance of part of the first sentence of former Civil Code Section 2280. For the procedure for revoking a trust, see Section 4202. [See also Section 4203 (power to terminate includes power to modify).]

Subdivision (b) is a new provision that is intended to avoid the application of the presumption of revocability to a trust created by a nonresident trustor. Subdivision (b) recognizes that a nonresident trustor may not be aware of the rule on revocability in force in California, since most jurisdictions presume trusts to be irrevocable unless the right to revoke is reserved. See 5 A. Scott, *The Law of Trusts* § 581, at 3857 (3d ed. 1967). If the trustor manifests an intention to make California law applicable, however, subdivision (b) does not make inapplicable the presumption of revocability provided in subdivision (a).

Note. This section is discussed in Memorandum 84-34.

37000

§ 4202. Manner of termination of revocable trust

4202. (a) A revocable trust is terminated by its revocation in either of the following manners:

(1) By the trustor's compliance with any method of revocation provided in the trust instrument.

(2) By a writing (other than a will) filed with [delivered to] the trustee during the lifetime of the trustor.

(b) When a trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust property.

Comment. Subdivision (a) of Section 4202 supersedes part of the first sentence of former Civil Code Section 2280. The rule of this section that a revocable trust may always be revoked by a writing filed with the trustee rejects to the case law rule under the former statute. See *Rosenauer v. Title Ins. & Trust Co.*, 30 Cal. App.3d 300, 304, 106 Cal. Rptr. 321 (1973). Notwithstanding a contrary provision in the trust, the trustor may revoke a revocable trust in the manner provided in subdivision (a)(2). The trustor may not revoke a trust by a will under subdivision (a)(2), even if the will purporting to revoke is

delivered to the trustee during the lifetime of the trustor. However the trustor may revoke by will if the trust so provides, pursuant to subdivision (a)(1). See Restatement (Second) of Trusts § 330 comment j (1957).

Subdivision (b) continues the substance of the second sentence of former Civil Code Section 2280.

8347

§ 4203. Power to revoke includes power to modify

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].

Comment. Section 4203 is new and codifies the general rule that a power of revocation implies the power of modification. See *Heifetz v. Bank of America Nat'l Trust & Sav. Ass'n*, 147 Cal. App.2d 776, 305 P.2d 979 (1957); Restatement (Second) of Trusts § 331 comment g (1957). [The restriction on the enlargement of the trustee's duties in Section 4203 is drawn from Texas law. See Tex. Prop. Code § 112.051(b) (Vernon 19__).] An unrestricted power to modify may also include the power to revoke a trust. See *Heifetz v. Bank of America Nat'l Trust & Sav. Ass'n*, supra; Restatement (Second) of Trusts § 331 comment h (1957).

Note. The language in brackets is offered for Commission consideration. It is not really necessary, since the trustee may resign if the trustee's duties are altered. See Restatement § 331 comment g.

8354

§ 4204. Termination by all beneficiaries

4204. Unless the continuance of a trust is necessary because of a spendthrift or similar protective provision, if all of the beneficiaries of the trust consent, they can compel termination of the trust.

Comment. Section 4204 is drawn from Section 337 of the Restatement (Second) of Trusts (1957). Unlike the Restatement section, however, Section 4204 limits the material purposes doctrine to the situation where a spendthrift, support, education, or similar provision is included in the trust. This section rejects the California case law rule. See, e.g., *Moxley v. Title Ins. & Trust Co.*, 27 Cal.2d 457, 165 P.2d 15 (1945). Hence, under Section 4204 a trust may be terminated with the consent of all beneficiaries where the trust provides for successive beneficiaries or is intended to postpone enjoyment of a beneficiary's interest, but does not prevent the beneficiary from alienating his or her expectancy. For provisions relating to obtaining consent of persons under an incapacity, see e.g., Civil Code §§ 2450, 2467 (statutory form of durable power of attorney); Prob. Code §§ 2580 (conservator), 4002 & 4206 (appointment of guardian ad litem); see also Sections 4207, 4208.

§ 4205. Modification or termination by trustor and all beneficiaries

4205. (a) If the trustor and all of the beneficiaries of a trust consent, they can compel the modification or termination of the trust.

(b) If any of the beneficiaries do not consent to the modification or termination of the trust, the other beneficiaries with the consent of the trustor can compel a modification or a partial termination of the trust if the interests of the beneficiaries who do not consent are not prejudiced thereby.

Comment. Section 4205 is drawn from Section 338 of the Restatement (Second) of Trusts (1957). Subdivision (a) continues the substance of the second sentence of the second paragraph of Civil Code Section 771 and supersedes part of former Civil Code Section 2258(a). For provisions relating to obtaining consent of persons under an incapacity, see, e.g., Civil Code §§ 2450, 2467 (statutory form of durable power of attorney); Prob. Code §§ 2580 (conservator), 4002 & 4206 (appointment of guardian ad litem); see also Sections 4207, 4208. A trust may be modified or terminated under this section regardless of any spendthrift or other protective provision and regardless of whether its purposes have been achieved. See Restatement (Second) of Trusts § 338 comments b-d (1957).

Note. The staff suggests that the second sentence of the second paragraph of Civil Code Section 771 (in brackets) be deleted because it would be unnecessary in light of draft Section 4205. Civil Code Section 771 reads as follows:

§ 771. Duration of trust exceeding time for vesting of future interests; termination

A trust is not invalid, either in whole or in part, merely because the duration of the trust may exceed the time within which future interests in property must vest under this title, if the interest of all the beneficiaries must vest, if at all, within such time.

If a trust is not limited in duration to the time within which future interests in property must vest under this title, a provision, express or implied, in the instrument creating the trust that the trust may not be terminated is ineffective insofar as it purports to be applicable beyond such time. [A provision, express or implied, in an instrument creating an inter vivos trust that the trust may not be terminated shall not prevent termination by the joint action of all of the creators of the trust and all of the beneficiaries thereunder if all concerned are competent and if the beneficiaries are all of the age of majority.]

Whenever a trust has existed longer than the time within which future interests in property must vest under this title

(1) It shall be terminated upon the request of a majority of the beneficiaries

(2) It may be terminated by a court of competent jurisdiction upon the petition of the Attorney General or of any person who would be affected thereby if the court finds that such termination would be in the public interest or in the best interest of a majority of the persons who would be affected thereby.

§ 4206. Guardian ad litem

4206. For the purposes of Section 4204 or 4205, the consent of a beneficiary who is legally incapacitated, unascertained, or unborn may be given by a guardian ad litem appointed pursuant to Section 4002, if it would be appropriate to do so. A guardian ad litem for such a beneficiary may rely on general family benefit accruing to living members of the beneficiary's family as a basis for approving a modification or termination of a trust.

Comment. Section 4206 recognizes that, where appropriate, a guardian ad litem may give consent to modification or termination on behalf of certain incapacitated beneficiaries. The second sentence of this section permits a non-pecuniary quid pro quo as a basis for protecting the interests of the beneficiaries represented by the guardian ad litem. This provision is drawn from Wisconsin law. Wisc. Stat. Ann. § 701.12(2) (West 1981). On the quid pro quo requirement generally, see *Hatch v. Riggs Nat'l Bank*, 361 F.2d 559 (D.C. Cir. 1966).

9407

§ 4207. No conclusive presumption of fertility

4207. In determining the class of beneficiaries whose consent is necessary to modify or terminate a trust pursuant to Section 4204 or 4205, the conclusive presumption of fertility does not apply.

Comment. Section 4207 abandons the "fertile octogenarian" doctrine as applied in the context of trust termination. Under this section, the way is open for the court to approve a termination where the possibility of the birth of additional beneficiaries is negligible. See Restatement (Second) of Trusts § 340 comment e (1957). Section 4207 thus adopts the modern view that fertility may not be a realistic issue or is subject to proof. See 4 A. Scott, *The Law of Trusts* § 340.1, at 2714 (3d ed. 1967). This section rejects the California case law rule. See *Fletcher v. Los Angeles Trust & Sav. Bank*, 182 Cal. 177, 187 P. 425 (1920); *Wogman v. Wells Fargo Bank & Union Trust Co.*, 123 Cal. App.2d 657, 267 P.2d 423 (1954).

9408

§ 4208. Effect of disposition in favor of "heirs" or "next of kin" of trustor

4208. In determining the class of beneficiaries whose consent is necessary to modify or terminate a trust pursuant to Section 4205, a disposition in favor of a class of persons described only as "heirs" or "next of kin" of the trustor does not create a beneficial interest in such persons.

Comment. Section 4208 reinstates a limited form of the doctrine of worthier title. This section is drawn from New York law. See N.Y. Est. Powers & Trusts Law § 7-1.9(b) (McKinney 19__). Under this section the consent of persons who might constitute the class of heirs or next of kin of the trustor need not be obtained for the trustor to terminate an otherwise irrevocable trust.

Note. If the policy of this section is approved, a conforming amendment to Civil Code Section 1073, which abolishes the doctrine of worthier title, may be desirable.

36617

§ 4240. Termination of trust

4240. A trust is terminated when any of the following occurs:

- (a) The term of a trust subject to a fixed term has expired.
- (b) The trust purpose is fulfilled.
- (c) The trust purpose becomes unlawful.
- (d) The trust purpose becomes impossible to fulfill.

Comment. Section 4240 continues the substance of former Civil Code Section 2279. Subdivision (a) is a new statutory provision. See In re Estate of Hanson, 159 Cal. 401, 405, 114 P. 810 (1911); Restatement (Second) of Trusts § 334 (1957).

9409

§ 4241. Exception to doctrine of merger

4241. If a trust provides for one or more successor beneficiaries after the death of the trustor, the trust is not invalid, merged, or terminated in either of the following circumstances:

- (a) Where there is one trustor who is the sole trustee and the sole beneficiary during the trustor's lifetime.
- (b) Where there are two or more trustors, one or more of whom are trustees, and the beneficial interest in the trust is in the trustors during the lifetime of the trustors.

Comment. Section 4241 continues the substance of former Civil Code Section 2225. See also In re Estate of Washburn, 11 Cal. App. 735, 746, 106 P. 415 (1909) (merger of legal and equitable estates).

§ 4242. Trust with uneconomically low principal

4242. (a) If the principal of a trust has become uneconomically low, the trustee or a beneficiary may petition the court for relief pursuant to this section.

(b) If the court determines that the fair market value of the principal of a trust has become so low in relation to the cost of administration that continuance of the trust under its existing terms will defeat or substantially impair the accomplishment of its purposes, the court may in its discretion and in a manner that conforms as nearly as possible to the intention of the trustor, order one of the following:

- (1) That the trust be terminated in whole or in part.
- (2) That the terms of the trust be modified.
- (3) That the trustee be changed.

(c) If the court orders the termination of the trust, in whole or in part, it shall direct that the principal and undistributed income be distributed to the beneficiaries in a manner that conforms as nearly as possible to the intention of the trustor. The court may make any other orders it deems necessary or appropriate to protect the interests of the beneficiaries.

(d) Proceedings pursuant to this section shall be conducted in the same manner as proceedings under Article 3 (commencing with Section 4630) of Chapter 1 of Part 4.

(e) The existence of a spendthrift or similar protective provision in the trust does not prevent application of this section.

Comment. Section 4242 continues the substance of former Civil Code Section 2279.1 and former Probate Code Section 1120.6.

Note. When the comprehensive draft is assembled, some of the material in this section should be deleted in favor of reliance on the general, unified procedure. See Memorandum 84-29 and the First Supplement thereto.

9412

§ 4243. Modification or termination owing to change of circumstances

4243. (a) On petition of a trustee or beneficiary, the court may direct or permit the modification or termination of the trust if, owing to circumstances not known to the trustor and not anticipated by the trustor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust.

(b) If necessary to carry out the purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust.

(c) The court shall consider a spendthrift or similar protective provision in the trust as a factor in making its decision whether to modify or terminate the trust, but the court is not precluded from exercising its discretion to modify or terminate the trust solely because of a spendthrift or similar protective provision.

Comment. Subdivisions (a) and (b) of Section 4243 are drawn from Sections 167 and 336 of the Restatement (Second) of Trusts (1957). Subdivision (c) is drawn from a provision of the Texas Trust Code. Tex. Prop. Code § 112.054 (Vernon 19__).

405/436

§ 4304. Trustee of multiple trusts

4304. (a) Except as provided in Section 4402, a trustee of one trust may not become a trustee under another trust adverse in its nature to the interest of the beneficiary of the first trust without the beneficiary's consent.

(b) If a trustee of one trust is appointed as trustee of another trust, and the provisions and terms of the trusts are substantially identical, 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.

Comment. Subdivision (a) of Section 4304 continues the substance of former Civil Code Section 2232, subject to the exception provided in Section 4402 (conflict of interest). Subdivision (b) continues the substance of former Probate Code Section 1133. Subdivision (b) is not limited, like former law, to testamentary trusts. For provisions governing judicial proceedings, see Section 4600 et seq.

Note. This section was approved when Memorandum 84-22 (Trustee's Duties) was considered. However, subdivision (b) should be located with the modification provisions while subdivision (a) remains in the general provisions on trustees' duties.

§ 4618. Notice in cases involving future interests

4618. (a) Subject to subdivisions (b) and (c), it is sufficient compliance with a requirement in this division that notice be given to the trust beneficiaries, [to persons interested in the trust, or to beneficiaries or remaindermen including all persons in being who shall or may participate in the principal or income of the trust,] if notice is given as follows:

(1) Where an interest has been limited on any future contingency to persons who will compose a certain class upon the happening of a certain event without further limitation, notice shall be given to the persons in being who would constitute the class if the event had happened immediately before the commencement of the proceedings.

(2) Where an interest has been limited to a living person and the same interest, or a share therein, has been further limited upon the happening of a future event to the surviving spouse or to persons who are or may be the distributees, heirs, issue, or other kindred of the living person, notice shall be given to the living person.

(3) Except as otherwise provided in subdivision (b), where an interest has been limited upon the happening of any future event to a person, or a class of persons, or both, and the interest, or a share of the interest, has been further limited upon the happening of an additional future event to another person, or a class of persons, or both, notice shall be given to the person or persons in being who would take the interest upon the happening of the first of these events.

(b) If a conflict of interest involving the subject matter of the trust proceeding exists between a person to whom notice is given and a person to whom notice is not required to be given under subdivision (a), notice shall be given to persons otherwise not entitled to notice under subdivision (a).

(c) Nothing in this section affects any of the following:

(1) Requirements for notice to a person who has requested special notice, a person who has filed notice of appearance, or a particular person or entity required by statute to be given notice.

(2) Requirements for appointment of a guardian ad litem pursuant to Section 4002.

Comment. Subdivision (a) of Section 4618 continues the substance of former Section 1215.1. See also Section 24 ("beneficiary" defined). For provisions where this section applies, see Sections 4181 (transitional provisions concerning certain testamentary trusts), 4633 (notice of hearing on petitions generally), 4654-4655 (notice of petition for transfer to another jurisdiction), 4675-4676 (notice of petition for transfer to California).

Subdivision (b) continues the substance of former Section 1215.2. Subdivision (c) continues the substance of the first sentence of former Section 1215.4.

Note. This section is presented for reference purposes; it is scheduled for consideration in Exhibit 1 of Memorandum 84-29.

EXHIBIT 2

Restatement (Second) of Trusts
§§ 127, 167, 168, 330-47

§ 127. Who are Beneficiaries

A person is a beneficiary of a trust if the settlor manifests an intention to give him a beneficial interest, except so far as this principle is limited by the rule in Shelley's Case.

Comment:

a. Scope of the Section. This Section deals primarily with the situation which arises where in the trust instrument there is a limitation, after a preceding interest, to the heirs or next of kin of the settlor or of the person who takes the preceding interest. Thus, the settlor may transfer property in trust to pay the income to him for life and on his death to convey the trust property to his heirs. The question then is whether the settlor has only a life interest, with a legal or equitable interest in remainder given to the persons who ultimately become his heirs, or whether the settlor has not merely a life interest but also a legal or equitable reversionary interest so that he is the sole beneficiary of the trust. See Comment *b*. A different, though somewhat similar, problem arises where a trust is created under which the income is payable to a third person for life and the trustee is to convey the property on his death to his heirs. In that case the question is whether the person takes only a life estate with a contingent interest in remainder to his heirs, or whether he takes a fee simple. See Comment *c*.

The question as to the settlor's heirs arises only where the trust is created inter vivos; the question as to a third person's heirs may arise whether the trust is created inter vivos or by will.

b. Where a future interest under a trust is limited to the heirs of the settlor. At common law there was a rule of the law of real property that the owner of land could not by a conveyance inter vivos create a remainder interest in his heirs, and that if he purported to do this he created no remainder interest in others but had a reversionary interest in himself. There is no longer any such rule of law. There is only a question of construction. If the owner manifests an intention to create a contingent interest in remainder, legal or equitable, in the persons who on his death may become his heirs, he can do so. In the absence of evidence of a contrary intent, however, the inference is that he does not intend to create a remainder interest in his heirs.

Where the owner of property, whether real or personal, transfers it in trust to pay the income to himself for a period of years and at the expiration of the period to pay the principal to him, he is the sole beneficiary of the trust. He is likewise the sole beneficiary where he transfers property in trust to pay the income to himself for life and on his death to pay the principal to his estate, or to his personal representatives. So also, he is the sole beneficiary where he transfers property in trust to pay the income to himself for life with no provision as to the disposition of the property on his death, since the trustee will hold upon a resulting trust for him or his estate, in the absence of evidence of a contrary intention. See §§ 430, 431.

On the other hand, if the beneficial interest is limited to the settlor for life and on his death the property is to be conveyed to his children, or issue, or descendants, he is not the sole beneficiary of the trust, but an interest in remainder is created in his children, issue or descendants.

A more doubtful question of construction arises where the owner of property transfers it in trust to pay the income to himself for life and upon his death to pay the principal to his heirs or next of kin. In the absence of a manifestation of a contrary intention, the inference is that he is the sole beneficiary of the trust, and that he does not intend to create any interest in the persons who may become his heirs or next of kin. The same thing is true where the principal is to be paid to the persons who would be entitled to his property on his death intestate, or to the persons who would succeed to his property under the statute of descent and distribution.

The inference is that the settlor is the sole beneficiary where the income is to be paid to him for life and on his death the principal is to be paid as he may by deed or by will appoint, and in default of appointment to his heirs or next of kin. If, however, he reserves power to appoint by will alone, and in default of appointment the property is to be conveyed to his heirs or next of kin, this is some indication that he intended to confer an interest upon his heirs or next of kin of which they could be deprived only by a testamentary appointment, but this is not of itself sufficient to overcome the inference that he intended to give them no such interest but intended to be the sole beneficiary of the trust.

Illustrations:

1. A transfers property to B in trust to pay the income to A for ten years and then to transfer the property to A. By the terms of the trust it is provided that the trust shall be irrevocable during the ten-year period. A is the sole beneficiary of the trust.

2. A transfers property to B in trust to pay the income to A for life and on A's death to pay the principal as A may by deed or by will appoint and in default of appointment to A's heirs or next of kin. A is the sole beneficiary of the trust.

3. A transfers Blackacre to B and his heirs in trust for A for life and on A's death to convey Blackacre to A's children. A is not the sole beneficiary of the trust, even though he has no children yet born.

The question whether the settlor is the sole beneficiary of the trust is of importance in various situations. If he is the sole beneficiary, he can revoke the trust. See § 339. On the other hand, if he is not the sole beneficiary, he cannot revoke it without the consent of the other beneficiaries (see § 340), and, if there is a remainder interest in his heirs, it is impossible to get the consent of all persons who might become his heirs. This is true even in a state where under a statute the settlor can revoke the trust with the consent of all living beneficiaries. So also, the question whether the settlor is the sole beneficiary may be of importance where he wishes to dispose of the trust property inter vivos or on his death by his will. So also, it may be of importance where creditors of the settlor, or creditors of persons who might become the heirs or next of kin of the settlor on his death, seek to reach interests in the trust property.

As to the effect of a conveyance of a legal interest to the heirs or next of kin of the conveyor, see Restatement of Property, § 314.

c. Where a future interest under a trust is limited to the heirs of a third person. In States in which the rule in Shelley's Case is not in force, if a beneficial interest is limited to a person other than the settlor for life and the remainder on his death is limited to his heirs or next of kin, his heirs or next of kin as well as the person himself are beneficiaries of the trust in the absence of a manifestation by the settlor of an intention to give the whole beneficial interest to him. On the other hand, where the beneficial interest is limited to a person other than the settlor for life and the remainder on his death is limited to his estate, or to his executor or administrator, he is the sole beneficiary of the trust.

Illustrations:

4. A transfers Blackacre to B and his heirs in trust to pay the rents and profits to C for life and on C's death to convey Blackacre to C's heirs. If the rule in Shelley's Case is not in force, C is not the sole beneficiary of the trust.

5. A transfers property to B in trust to pay the income to C for life and on C's death to pay the principal to C's estate. C is the sole beneficiary of the trust.

Under the rule in Shelley's Case if the beneficial interest under a trust of land is limited to a person for life and to his heirs in remainder, he has a beneficial interest in fee simple, and his heirs are not beneficiaries of the trust. The rule in Shelley's Case is not applicable where a legal interest is limited to a person for life and an equitable interest to his heirs, nor where an equitable interest is limited to a person for life and a legal interest to his heirs. In most of the States the rule in Shelley's Case has been abolished.

As to the rule in Shelley's Case, see Restatement of Property, §§ 312, 313.

.....

§ 167. Change of Circumstances

(1) The court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust; and in such case, if necessary to carry out the purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized or are forbidden by the terms of the trust.

(2) Under the circumstances stated in Subsection (1), the trustee can properly deviate from the terms of the trust without first obtaining the permission of the court if there is an emergency, or if the trustee reasonably believes that there is an emergency, and before deviating he has no opportunity to apply to the court for permission to deviate.

(3) Under the circumstances stated in Subsection (1), the trustee is subject to liability for failure to apply to the court for permission to deviate from the terms of the trust, if he knew or should have known of the existence of those circumstances.

Comment on Subsection (1):

a. *Change of circumstances.* If owing to circumstances not known to the settlor and not anticipated by him compliance with a specific direction by the settlor would defeat or substantially impair the accomplishment of the purposes of the trust, the court will permit or direct the trustee not to comply with the specific direction. This is true even though it is provided by statute that every conveyance by the trustee in contravention of the trust shall be absolutely void.

Compliance with a direction may be enough substantially to impair the purposes of the trust although it may not defeat the

whole trust. Thus, although a sale of certain property is forbidden by the terms of the trust, the court may direct a sale of the property where its retention would result in a serious loss to the trust estate even though there may be other trust property which is sufficiently productive to effectuate the purposes of the trust.

The rules stated in this Section are applicable to leases (see § 189, Comment *d*), to sales of land or personal property (see § 190, Comment *f*), to mortgages (see § 191, Comment *c*), to investments (see Comment *c*), as well as to other situations.

In order to carry out the purposes of the trust, the court may permit or direct the trustee not to perform an act directed by the terms of the trust.

Illustrations:

1. A bequeaths money to B in trust and directs him to invest the money in bonds of the Imperial Russian government. A revolution takes place in Russia and the bonds are repudiated. The court will direct B not to invest in these bonds.

2. A, the owner of a factory manufacturing whiskey barrels, devises and bequeaths all his property to B in trust for C. By the terms of the trust B is directed to carry on the business. After A's death the manufacture and sale of intoxicating liquor is prohibited by law. The court will direct B not to carry on the business.

3. A devises Blackacre to B in trust and directs B to sell Blackacre within one year. Owing to a depression in the real estate market it is impossible to sell the land except at a great sacrifice. The court will permit or direct B not to sell Blackacre within one year.

4. A bequeaths money to B in trust and directs that the money shall be invested only in railroad bonds. The United States becomes engaged in a war which in the event of the defeat of the United States would result in a great depreciation of railroad bonds. The court may permit B to invest in bonds issued by the United States for the purpose of enabling it to carry on the war.

5. A devises and bequeaths all his property to B in trust, and directs B to erect a building upon a particular tract of land included in the trust. It is discovered that quicksand underlies the tract and that the building could not be constructed except at extraordinary expense. The court may permit or direct B not to erect the building.

In order to carry out the purposes of the trust, the court may permit or direct the trustee to do acts not authorized by the terms of the trust.

Illustrations:

6. A devises Blackacre to B in trust to pay the income to C and on C's death to convey Blackacre to D. The income from Blackacre is insufficient to pay taxes thereon. The court may permit B to sell Blackacre to prevent its being sold for non-payment of taxes.

7. A devises a piece of land on which is a building containing stores and offices to B in trust out of the income to support A's children until the youngest reaches the age of twenty-one, and to apply any income not needed for their support to reducing a mortgage on part of the land. The building is damaged by fire. The court may permit B to mortgage the property in order to raise money to make permanent repairs.

8. A devises an apartment house to B in trust to pay the income to C and on C's death to convey the house to D. Owing to a change in the character of the neighborhood it is impossible to find tenants at a rent which will render the property productive. The court may permit B to sell the apartment house.

9. A devises his residence to B in trust to allow C, A's widow, to occupy it during her lifetime and on her death to convey it to A's children. The house becomes the center of a manufacturing district so that it becomes undesirable as a residence. The court may permit B to sell the house.

In order to carry out the purposes of the trust, the court may permit or direct the trustee to do acts which are forbidden by the terms of the trust.

Illustrations:

10. A devises an apartment house to B in trust to pay the income to C and on C's death to convey the house to D. By the terms of the trust B is directed not to sell the apartment house. Owing to a change in the character of the neighborhood it is impossible to find tenants. The court may permit B to sell the apartment house.

11. A devises a farm to B in trust to pay the income to C for life and on C's death to convey the farm to D. It is provided that the farm shall not be sold. The income from the farm is insufficient to pay taxes and mortgage interest. The court may permit B to sell the farm.

12. A devises a farm to B in trust to manage it as a farm and to pay the net income to C for life and on C's death to convey the farm to C's children. By the terms of the trust the farm is to be kept unencumbered. The farm has become included within the limits of a neighboring city so that its usefulness as a farm has decreased and its general value has materially advanced. The income is insufficient to pay the taxes and assessments. The court may permit B to sell or mortgage or lease the land or a part of it.

b. Deviation advantageous but not necessary. The court will not permit or direct the trustee to deviate from the terms of the trust merely because such deviation would be more advantageous to the beneficiaries than a compliance with such direction.

Illustrations:

13. A bequeaths money to B in trust and directs that the money shall be invested only in railroad bonds. Owing to developments in the electrical science and industry it appears that bonds of electric companies are as safe an investment as railroad bonds and yield a higher return. The court will not direct or permit B to invest in bonds of electric companies.

14. A devises Blackacre to B in trust to pay the income to C and on C's death to convey Blackacre to D. B receives an advantageous offer to buy Blackacre. The court will not permit or direct B to sell Blackacre.

By statute in some States it is provided that the court may authorize a sale or mortgage of trust property, whenever it shall in the opinion of the court best promote the interest of the beneficiaries, provided that such sale or mortgage is not prohibited by the terms of the trust.

. . . .

§ 168. Anticipation of Income and Principal

The court may permit or direct the trustee to apply income and principal from the trust estate for the necessary support of a beneficiary of the trust before the time when by the terms of the trust he is entitled to the enjoyment of such income or principal, if the interest of no other beneficiary of the trust is impaired thereby.

Comment:

a. *Anticipation of income.* The court may permit or direct the trustee to apply income from the trust fund for the necessary support of the sole beneficiary, although by the terms of the trust the trustee was directed to accumulate the income for him.

Illustration:

1. A bequeaths money to B in trust to accumulate the income during the minority of C and to pay the principal and accumulated income to C when he becomes of age. C has no other resources. The court may direct B to apply so much of the income as is necessary to maintain C before he reaches his majority.

b. *Where principal needed for support of sole beneficiary.* If by the terms of the trust it is provided that the income from the trust fund shall be applied for the support or education of a beneficiary and that the principal shall be paid to him on reaching a certain age and no other person is entitled to any interest in the trust property, vested or contingent, and the income is insufficient for the support and education of the beneficiary, the court may direct the trustee to apply the principal, or so much thereof as may be necessary, for the support and education of the beneficiary. Since the purpose of the trust is to support the beneficiary, and since owing to circumstances not anticipated by the settlor the income is insufficient for his support, the court may order an invasion of so much of the principal as is necessary for the beneficiary's support in order to carry out the primary purpose of the settlor.

Illustrations:

2. A bequeaths \$10,000 to B in trust to apply the income for the education and support of C during C's minority and to pay the principal to C when C becomes of age. No person except C has any interest in the trust property. C has no other resources. Owing to an increase in the cost of living since the death of A, the income is insufficient for the education and support of C. C is fifteen years of age. The court may direct B to apply a part or if necessary the whole of the principal for C's education and support.

3. A bequeaths \$10,000 to B in trust to pay the income to C for ten years and at the end of ten years to pay him the principal. No person except C has any interest in the trust property. C has a serious illness before the expiration of the ten-year period, and the income is insufficient for C's support. The court may direct B to pay a part or the whole of the principal to C.

c. *Considerations involved in permitting invasion of principal.* In determining whether and to what extent it should permit an invasion of the principal where the income becomes insufficient for the support of the sole beneficiary of the trust, the court will consider not only the immediate but the ultimate interest of the beneficiary. If the beneficiary is an infant and the

probability is that he will ultimately be able to support himself by his own efforts, the court will be more ready to permit an invasion of the principal than it will be where the beneficiary is a person who because of his physical or mental incapacity will probably never be able to support himself. In the latter case there is a risk that the principal will be exhausted before the death of the beneficiary and that he will be left wholly without means of support. In such a case the court may authorize the expenditure of the whole or a part of the principal in the purchase of an annuity for the beneficiary. Compare § 334, Comment *d*.

d. Where principal needed for life beneficiary. The court will not permit or direct the application of the principal to the support or education of one beneficiary where by the terms of the trust income only is to be so applied, if the result would be to deprive another beneficiary of property to which he is or may become entitled by the terms of the trust, whether the interest of such other beneficiary is vested or contingent, unless such other beneficiary consents to such application.

Illustration:

4. A bequeaths \$10,000 to B in trust to apply the income for the education and support of C during C's minority and to pay the principal to C when C becomes of age, but if C dies before coming of age to pay the principal to D. Although the income is insufficient for the education and support of C, the court will not direct B to apply any part of the principal for C's support, unless D consents.

Even though there is a gift over on the death of the beneficiary, the court will authorize or direct an invasion of the principal for the necessary support of the beneficiary where the will indicates that the support of the beneficiary was the primary purpose of the testator, even though the testator did not in express terms permit the invasion of the principal. See § 128, Comment *i*.

Illustration:

5. A bequeaths his property to B in trust to pay the income to his widow and on her death to divide the principal among his issue then living. Owing to a subsequent decrease in the amount of the income and to the increased cost of living, the income is insufficient for the support of the widow. The court may permit the use of principal for the widow's support if it finds that the support of the widow was the testator's primary purpose in creating the trust.

e. Where principal needed by one of several co-beneficiaries. If by the terms of the trust it is provided that the income from the trust fund shall be applied for the support or education of two or more beneficiaries and that the principal shall be paid to the beneficiaries at a certain time or to the survivors if one or more of them are dead and no other person is entitled to any interest in the trust property, and the income is insufficient for the

support of the beneficiaries, the court may direct the trustee to apply the principal, or so much thereof as may be necessary, for the support of the beneficiaries. The mere fact that the result of such application may be to deprive each beneficiary of the possibility of taking by survivorship what is applied to the support of the other beneficiaries will not prevent the court from making such application.

If the needs of the several beneficiaries are not the same, or if one or more of the beneficiaries is not in need, the court is not necessarily precluded thereby from permitting or directing advances to the beneficiaries to the extent of their needs out of the share of such beneficiaries in the trust property, although the other beneficiaries are thereby deprived of the possibility of taking by survivorship to the extent of such advances; but in such case the court will allocate similar amounts to the other beneficiaries. These amounts need not, however, be paid to the beneficiaries who are not in need. The effect of the allocation is only to destroy the needy beneficiary's right of survivorship to the same extent that payment to him has destroyed the right of the others.

Illustration:

6. A bequeaths \$20,000 to B in trust to apply the income for the education and support of C and D during their minorities and to pay the principal to them in equal shares when the younger comes of age, but if either dies before coming of age to pay the principal to the other on coming of age. C and D are respectively fifteen and thirteen years of age. They have no other resources. Owing to an increase in the cost of living since the death of A, the income is insufficient for their education and support. The court may direct B to apply a part or if necessary the whole of the principal for the education and support of C and D.

f. In some States by statute the court can apply the principal for the support of a beneficiary although there is a contingent gift of the principal to another person who does not consent to the application.

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THE TERMINATION AND MODIFICATION OF THE TRUST

§ 330. Revocation of Trust by Settlor

(1) The settlor has power to revoke the trust if and to the extent that by the terms of the trust he reserved such a power.

(2) Except as stated in §§ 332 and 333, the settlor cannot revoke the trust if by the terms of the trust he did not reserve a power of revocation.

Comment:

. . . .

j. Where method of revocation specified. If the settlor reserves a power to revoke the trust only in a particular manner or under particular circumstances, he can revoke the trust only in that manner or under those circumstances.

If the settlor reserves a power to revoke the trust, it is a question of interpretation to be determined in view of the language used and all the circumstances whether the settlor manifested an intention to reserve a power to revoke by will as well as by an act *inter vivos*.

If the settlor reserves a power to revoke the trust by a transaction *inter vivos*, as, for example, by a notice to the trustee, he cannot revoke the trust by his will.

If the settlor reserves a power to revoke the trust only by will, he cannot revoke it by a transaction *inter vivos*.

If the settlor reserves a power to revoke the trust by will, it is a question of interpretation whether the will of the settlor exercises the power. Ordinarily the power is not exercised by a general residuary clause disposing of all the residue of the property of the settlor or all the property over which he has a power of appointment.

If the settlor reserves a power to revoke the trust only by a notice in writing delivered to the trustee, he can revoke it only by delivering such a notice to the trustee. It is ordinarily a sufficient delivery, however, if the notice is mailed to the trustee, although it is not received by him until after the settlor's death.

If the settlor reserves power to revoke the trust only to the extent to which he may need the property for his support, he cannot revoke the trust except for that purpose and to that extent.

k. Where power reserved to revoke with consent of a beneficiary. If the settlor reserves a power to revoke the trust only with the consent of one or more of the beneficiaries, he cannot revoke without such consent. As to the termination of the trust with the consent of all the beneficiaries and of the settlor, where the settlor has not reserved a power of revocation, see § 338.

l. Where power reserved to revoke with consent of the trustee. If the settlor reserves a power to revoke the trust only with the consent of the trustee, he cannot revoke the trust without such consent. Whether the trustee can properly consent to the revocation of the trust and whether he is under a duty to consent to its revocation depend upon the extent of the power conferred upon the trustee by the terms of the trust. To the extent to which discretion is conferred upon the trustee, the exercise of the power is not subject to the control of the court, except to prevent an abuse by the trustee of his discretion. See § 187.

If there is a standard by which the reasonableness of the trustee's judgment can be tested, the court will control the trustee in the exercise of the power where he acts beyond the bounds of a reasonable judgment, unless it is otherwise provided by the terms of the trust. Thus, if the trustee is authorized to consent to the revocation of the trust if in his judgment the settlor is in need, he cannot properly consent to the revocation of the trust if it clearly appears that the settlor is not in need. So also, if the trustee is authorized to consent to the revocation of the trust if in his judgment the beneficiaries of the trust are not in need, he cannot properly consent to the revocation of the trust if it clearly appears that the beneficiaries are in need.

There may be a standard by which the reasonableness of the trustee's judgment can be tested even though there is no standard expressed in specific words in the terms of the trust, and even though the standard is indefinite. Thus, it may be provided merely that the settlor can revoke the trust with the consent of the trustee. Such a provision may be interpreted to mean that the trustee can properly consent to the revocation of the trust only if he deems it wise under the circumstances to give such consent. In such a case the court will control the trustee in the exercise of a power to consent to the revocation of the trust where the circumstances are such that it would clearly be unwise to permit the revocation of the trust; as for example where the beneficiaries are wholly dependent upon the trust for their support, and the settlor desires to terminate the trust for the purpose of dissipating the property. So also, the circumstances may be such that it would clearly be unwise not to permit the revocation of the trust, and in such a case the court can compel the trustee to permit the revocation of the trust in whole or in part; as for example where a trust is created to pay the income to the settlor for life and to pay the principal on his death to a third person and it is provided that in the discretion of the trustee a part or the whole of the principal shall be paid to the settlor, and owing to a change of circumstances the income is insufficient for the support of the settlor who has no other resources, and the beneficiary in remainder has acquired large resources.

On the other hand, the trustee may be authorized to consent to the revocation of the trust with no restriction, either in specific words or otherwise, imposed upon him in the exercise of the power. In such a case there is no standard by which the reasonableness of the trustee's judgment can be tested, and the court will not control the trustee in the exercise of the power if he acts honestly and does not act arbitrarily or from an improper motive. See § 187 and Comments *f-h* thereon. The power of the trustee in such a case to consent to the revocation of the trust is like a power to appoint among several beneficiaries.

In determining the extent of the power intended to be conferred upon the trustee to consent or to refuse to consent to the revocation of the trust, the purpose of the settlor in inserting the provision may be important. Thus, where the settlor reserves a power to revoke the trust with the consent of the trustee, it may appear that the requirement that the trustee should consent was inserted by the settlor in order to preclude himself from revoking the trust under circumstances where it would be clearly unwise for him to do so, as, for example, if he should become a drunkard or a spendthrift. On the other hand, where the purpose of requiring the consent of the trustee was to relieve the settlor or his estate of liability for income or inheritance or estate taxes, and such relief could be obtained or the settlor believed that it could be obtained if, but only if, the trustee had unrestricted power to consent or to refuse to consent to the revocation of the trust, this indicates that the trustee should be free to consent or refuse to consent regardless of any standard of reasonableness.

m. Where power reserved to revoke with consent of third persons. If the settlor reserves a power to revoke the trust only with the consent of a third person, he cannot revoke the trust without such consent. Whether the third person can properly consent to the revocation of the trust and whether he is under a duty to consent to its revocation depend upon the extent of the power conferred upon him by the terms of the trust. If there is a standard by which the reasonableness of his judgment can be tested, the court will control him in the exercise of the power where he acts beyond the bounds of a reasonable judgment, unless it is otherwise provided by the terms of the trust. If there is no standard by which the reasonableness of his judgment can be tested, the court will not control him in the exercise of the power if he acts honestly and does not act arbitrarily or from an improper motive. Whether there is a standard by which the reasonableness of his judgment can be tested depends upon the terms of the trust, as it does where the power to consent to the revocation of the trust is conferred upon the trustee. See Comment *l*. It is easier, however, to infer that the settlor intended to confer an unrestricted power to consent to the revocation of the trust upon a third person, than it is where the power is conferred upon the trustee, since the trustee is more clearly in a fiduciary position. Compare § 185.

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§ 331. Modification of Trust by Settlor

(1) The settlor has power to modify the trust if and to the extent that by the terms of the trust he reserved such a power.

(2) Except as stated in §§ 332 and 333, the settlor cannot modify the trust if by the terms of the trust he did not reserve a power of modification.

Comment:

g. *Whether power to revoke includes power to modify.* It is a question of interpretation to be determined in view of the language used and all the circumstances whether a power to revoke the trust includes a power to modify it. Ordinarily a general power to revoke the trust will be interpreted as authorizing the settlor not only to revoke the trust in part by withdrawing a part of the trust property from the trust (see § 330, Comment n), but also to modify the terms of the trust, and it will be unnecessary for the settlor first to revoke the trust and then to create a new trust. If, however, the effect of the modification is to add to or vary the duties of the trustee, this is a ground for permitting the trustee to resign as trustee. See § 106. If the settlor reserves power to revoke the trust "as an entirety," he cannot modify the trust, although he can revoke the trust and if he so desires create a new trust.

h. *Whether power to modify includes power to revoke.* If the settlor reserves a power to modify the trust, it is a question of interpretation to be determined in view of the language used and all the circumstances whether and to what extent the power is subject to restrictions. If the power to modify is subject to no restrictions, it includes a power to revoke the trust.

i. If by the terms of the trust the settlor reserves power to modify the trust by excluding all of the beneficiaries and to make himself sole beneficiary, and does so, he has power as sole beneficiary to terminate the trust under the rule stated in § 339, even though by the terms of the trust it was provided that the settlor should not have power to revoke the trust.

§ 332. Power of Revocation or Modification Omitted by Mistake

(1) If a trust is created by a written instrument and the settlor intended to reserve a power of revocation but by mistake omitted to insert in the instrument a provision reserving such a power, he can have the instrument reformed and can revoke the trust.

(2) If a trust is created by a written instrument and the settlor intended to reserve a power to modify the trust but by mistake omitted to insert in the instrument a provision reserving such a power, he can have the instrument reformed and can modify the trust.

§ 333. Rescission and Reformation

A trust can be rescinded or reformed upon the same grounds as those upon which a transfer of property not in trust can be rescinded or reformed.

§ 334. Expiration of Period for Which Trust Created

If by the terms of the trust the trust is to continue only until the expiration of a certain period or until the happening of a certain event, the trust will be terminated upon the expiration of the period or the happening of the event.

§ 335. Accomplishment of Purposes Becoming Impossible or Illegal

If the purposes for which a trust is created become impossible of accomplishment or illegal, the trust will be terminated.

Comment:

a. Impossibility. When the purposes for which a trust has been created can no longer be carried out, the court will direct or permit the termination of the trust, although the period fixed by the terms of the trust for its duration has not expired.

If some of the purposes fail for impossibility, ordinarily the court will not direct or permit the termination of the trust, but will direct or permit the trustee in carrying on the trust to deviate from the terms of the trust. See §§ 165, 167. If, however, the whole purpose of the trust has become impossible of accomplishment so that the settlor would not have intended that the trust should continue, the trust will be terminated. Thus, if a testator leaves a small sum of money in trust to apply the income to keep a certain house in repair, and the sole purpose of the trust is to apply the income for that purpose, and the house is destroyed by fire or is taken by eminent domain, the trust of the money will be terminated.

If the purposes of the trust as to a part of the trust property wholly fail for impossibility, the trust as to that part will be terminated.

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d. Illegality. If it becomes illegal to carry out the purposes of the trust, the court will direct or permit the termination of the trust, although the period fixed by the terms of the trust for its duration has not expired.

If some of the purposes of the trust fail for illegality, ordinarily the court will not direct or permit the termination of the trust, but will direct or permit the trustee in carrying on the trust to deviate from the terms of the trust. See §§ 166, 167. If, however, the whole purpose of the trust has become illegal so that the settlor would not have intended that the trust should continue, the trust will be terminated. Thus, if a testator devises a brewery with directions to carry on the brewery business, and the carrying on of the brewery business becomes illegal, and the sole purpose of the trust was to carry on the brewery and not to carry on a trust of any proceeds which might be derived from the sale of the brewery, the trust terminates.

If the purposes of the trust as to a part of the trust property fail for illegality, the trust as to that part will be terminated.

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§ 336. Termination in Case of Emergency

If owing to circumstances not known to the settlor and not anticipated by him the continuance of the trust would defeat or substantially impair the accomplishment of the purposes of the trust, the court will direct or permit the termination of the trust.

Comment:

a. *Scope of the rule.* The rule stated in this Section is an application of the general rule stated in § 167, under which the court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.

b. *Threatened loss of trust property.* If by the terms of the trust it is provided that the trust shall continue for a designated period, but owing to circumstances not known to the settlor or not anticipated by him the continuance of the trust would result in the loss of the trust property, the court may direct the termination of the trust. Thus, if a testator devises a farm in trust to carry on the farm, and owing to a change of circumstances it becomes impossible to carry on the farm except at a loss which would result ultimately in the loss of the farm, and if the testator would not have intended that the trust should continue for any purpose except to carry on the farm, the court may authorize or direct the termination of the trust. If, however, the carrying on of the farm was not the sole purpose of the trust and the testator would have intended that the trust should continue even if the farm were sold, the court may authorize or direct a sale of the farm and the continuance of the trust as to the proceeds. See § 167.

So also, if the testator bequeaths a business to the manager of the business in trust to carry on the business for ten years and to pay the income to the testator's daughters, and at the end of ten years to sell the business and pay the proceeds to the daughters, and owing to a change of circumstances it becomes impossible to carry on the business except at a loss, the court may authorize or direct the sale of the business prior to the termination of the ten-year period, and if it does not appear that the testator would have intended that the trust should continue for any purpose except to carry on the business, the court may authorize or direct the immediate distribution of the proceeds of the sale.

c. *Beneficiary under incapacity or non-consenting.* The rule stated in this Section is applicable whether or not one or more of the beneficiaries are under an incapacity or do not consent to the termination of the trust.

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§ 337. Consent of Beneficiaries

(1) Except as stated in Subsection (2), if all of the beneficiaries of a trust consent and none of them is under an incapacity, they can compel the termination of the trust.

(2) If the continuance of the trust is necessary to carry out a material purpose of the trust, the beneficiaries cannot compel its termination.

Comment:

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e. Evidence as to the purposes of the trust. If the purposes for which the trust is created are expressed in the instrument by which the trust is created, a different purpose cannot be shown by extrinsic evidence. If, however, the purposes are not expressed in the instrument, extrinsic evidence of the surrounding circumstances to aid in the construction of the instrument is admissible in order to determine the purposes of the trust.

f. Successive beneficiaries—Purposes accomplished. The mere fact that the settlor has created a trust for successive beneficiaries does not of itself indicate that it was a material purpose of the trust to deprive the beneficiaries of the management of the trust property for the period of the trust. If a trust is created for successive beneficiaries, in the absence of circumstances indicating a further purpose, the inference is that the only purpose of the trust is to give the beneficial interest in the trust property to one beneficiary for a designated period and to preserve the principal for the other beneficiary, and if each of the beneficiaries is under no incapacity, and both of them consent to the termination of the trust, they can compel the termination of the trust. Similarly, if the beneficiary who is entitled to the income acquires the interest of the remainderman, or the remainderman acquires the interest of the beneficiary entitled to the income, or the beneficiary entitled to the income disclaims with the result that the interest of the remainderman is accelerated, or if a third person acquires the interests of both, the beneficiary who thus becomes the sole beneficiary can compel the termination of the trust.

Illustrations:

(Consent of life beneficiary and remainderman.)

1. A bequeaths property to B in trust to pay the income to C for life and on C's death to pay the principal to D. C and D can compel the termination of the trust.

2. A bequeaths property to B in trust to pay the income in equal shares to C and D during their joint lives and on the death of either to pay the principal to the survivor. C and D can compel the termination of the trust.

3. A bequeaths property to B in trust to pay the income to C for life and on C's death to pay the principal to such of the children of D as are then living, and if none is living to E. D is dead. If C and all of D's children and E consent, they can terminate the trust.

(Life beneficiary acquiring interest of remainderman.)

4. A transfers property to B in trust to pay the income to C for life and on C's death to pay the principal to D. D transfers his interest to C. C can compel B to convey the trust property to him.

5. A bequeaths property to B in trust to pay the income to C for life and on C's death to pay the principal to D. D dies intestate leaving C as his sole heir and next of kin. C can compel B to convey the trust property to him.

6. A bequeaths all his property to B in trust to pay the income to C for life and on C's death to pay the principal to D. D predeceases A and the disposition to him lapses. C is A's sole heir and next of kin. C can compel B to convey the trust property to him.

7. A bequeaths all his property to B in trust to pay the income to C for life with remainders over of the beneficial interest which are invalid for remoteness. C is A's sole heir and next of kin. C can compel B to convey the trust property to him.

(Remainderman acquiring interest of life beneficiary.)

8. A bequeaths property to B in trust to pay the income to C for life and on C's death to pay the principal to D. C transfers his interest to D. D can compel B to convey the trust property to him.

(Disclaimer by life beneficiary.)

9. A bequeaths property to B in trust to pay the income to C for life and on C's death to pay the principal to D. C disclaims his interest. D, whose interest is accelerated by the disclaimer, can compel B to convey the trust property to him.

(Third person acquiring interests of life beneficiary and remainderman.)

10. A bequeaths property to B in trust to pay the income to C for life and on C's death to pay the principal to D. Both C and D transfer their interests under the trust to E. E can compel B to convey the trust property to him.

g. Trust for successive beneficiaries—Purposes not accomplished. If a trust is created for successive beneficiaries and it is not the only purpose of the trust to give the beneficial interest in the trust property to one beneficiary for a designated period and to preserve the principal for the other beneficiary, but there are other purposes of the trust which have not been fully accomplished, the trust will not be terminated merely because both of the beneficiaries desire to terminate it, or one of them acquires the interest of the other.

Thus, if one of the purposes of the trust is to deprive the beneficiary entitled to income of the management of the trust property for the period during which he is entitled to the income, the trust will not be terminated during the period, although both of the beneficiaries are of full capacity and desire to terminate it. Similarly, if by the terms of the trust it is provided that the trustee shall make payments out of income or principal to a beneficiary if the beneficiary should be in need, the trust will not be terminated although that beneficiary and all the other beneficiaries are of full capacity and desire to terminate it.

Illustrations:

11. A bequeaths all his property to B in trust to pay the income to A's widow, C, for life and on her death to pay the principal to A's children, D and E. In his will A states that one of his purposes in creating the trust is to have his estate kept together under the management of a competent trustee. C and D and E cannot compel B to transfer the trust property to them.

12. A bequeaths property to B in trust to pay the income to C for life and on C's death to pay the principal to D. In his will A indicates that one of his purposes in creating the trust is to separate the beneficial ownership of the property from its management, because he feels that C has not the ability to manage the property. C and D cannot compel the termination of the trust.

13. A bequeaths all his property to his three children B, C and D in equal shares. By the will it is provided that since D has little financial ability his share shall be held in trust to pay him the income for life and on his death to pay the principal to E. Although D and E desire to terminate the trust, or D transfers his interest to E, or E transfers his interest to D, the trust will not be terminated.

14. A bequeaths property to B in trust to pay the income to C for life and on C's death to pay the principal to D. In his will A provides further that if at any time before the death of C, E should be in want, B should pay so much of the income to E as should be necessary to preserve him from want. C, D and E cannot compel the termination of the trust.

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j. Postponement of enjoyment of interest of sole beneficiary. If by the terms of the trust it is provided that the trust shall not terminate until a certain time, or until the happening of a certain event, the court will not ordinarily decree the termination of the trust until the specified time has arrived or the specified event has occurred, although the sole beneficiary of the trust is under no incapacity and wishes to terminate the trust. As long as the purpose of the settlor has not been accomplished and is still possible of accomplishment, the court will not defeat his purpose although the only person who is beneficially interested in the trust desires to terminate it.

Thus, if by the terms of the trust it is provided that the income shall be paid to the beneficiary until he reaches a certain age and that the principal shall be paid to him when he reaches that age, he cannot insist upon a transfer of the principal to him before reaching that age, although he is the sole beneficiary and is under no incapacity.

Illustration:

17. A bequeaths securities to B in trust to pay the income to C until C reaches the age of forty years, and to pay the principal to C when he reaches that age. There is no other beneficiary who has any interest in the trust property. **C is thirty years old. C cannot compel B to convey the securities to him.**

The question whether there is merely a postponement of enjoyment until a designated time or whether the gift is conditional upon the survival of the donee to the designated time, is dealt with in the Restatement of Property, §§ 257-259. See § 128, Comment i.

k. Postponement of enjoyment where interest transferable. The rule stated in this Section is applicable not only to trusts in which the interest of the beneficiary or of one of the beneficiaries is inalienable (see Comment l), but also to trusts in which the beneficiary can transfer his interest. A provision for the postponement of enjoyment does not prevent alienation of his interest by the beneficiary. If the beneficiary transfers his interest, the provision for postponement of enjoyment is effective against the transferee. Although it is true that after the beneficiary has transferred his interest the purpose of the trust to protect him can no longer be carried out, yet to permit the transferee to terminate the trust before the period fixed for its termination by the terms of the trust would enable the beneficiary of such a trust to defeat the purpose of the trust by transferring his interest to a person who could immediately terminate the trust and pay over the trust property to him. In order to prevent such an arrangement, it is held that the provision postponing the termination of the trust is effective not only against the original beneficiary but also against anyone to whom he transfers his interest.

Illustrations:

18. A bequeaths securities to B in trust to pay the income to C for ten years, and to pay the principal to C at the expiration of ten years. There is no other beneficiary who has any interest under the trust. C being of full age transfers his interest to D. D is entitled to the income during the ten-year period and to the principal at the expiration of ten years, but cannot compel B to transfer the principal to him until the expiration of the ten-year period unless C dies before the expiration of the period.

19. A bequeaths securities to B in trust to pay the income to C until C reaches the age of forty years and to pay the principal to C when he reaches that age. There is no other beneficiary who has any interest under the trust. C being of full age transfers his interest to D. D is entitled to the income until C reaches the age of forty years or dies under that age, and to the principal when C reaches the age of forty years or dies under that age, but is not entitled to compel B to transfer the principal to him until C reaches the age of forty years or dies under that age.

As to the situation where a provision postponing enjoyment of the principal is invalid because the period of postponement is too long, see § 62, Comment o.

l. *Spendthrift trust.* If by the terms of the trust or by statute the interest of one or more of the beneficiaries is made inalienable by him (see §§ 152, 153), the trust will not be terminated while such inalienable interest still exists, although all of the beneficiaries desire to terminate it or one beneficiary acquires the whole beneficial interest and desires to terminate it.

Illustrations:

20. A bequeaths property to B in trust to pay the income to C for life, and on C's death to pay the principal to D. By the terms of the trust C's interest is inalienable by him. C and D cannot compel the termination of the trust.

21. A bequeaths property to B in trust to pay the income to C for life, and on C's death to pay the principal to D. By the terms of the trust C's interest is inalienable by him. D dies intestate leaving C as his sole heir and next of kin. C cannot compel B to convey the trust property to him.

Although the beneficiary of a spendthrift trust who has accepted the interest under the trust cannot release his interest, he can, if he has not accepted the interest, disclaim it. See § 36, Comment c.

m. *Trusts for support of beneficiary.* If a trust is created for the support of a beneficiary, it is not terminable by the consent of the beneficiaries, even though the interest of the beneficiary is transferable by him. It would be contrary to the intention of the settlor to terminate the trust.

n. *Discretionary trusts.* Where by the terms of the trust discretion is conferred upon the trustee whether or not to terminate the trust, the beneficiaries cannot compel termination, since this would be contrary to the intention of the settlor.

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§ 338. Consent of Beneficiaries and Settlor

(1) If the settlor and all of the beneficiaries of a trust consent and none of them is under an incapacity, they can compel the termination or modification of the trust, although the purposes of the trust have not been accomplished.

(2) Although one or more of the beneficiaries of a trust do not consent to its modification or termination or are under an incapacity, the other beneficiaries with the consent of the settlor can compel a modification or a partial termination of the trust if the interests of the beneficiaries who do not consent or are under an incapacity are not prejudiced thereby.

Comment:

a. Scope of the rule. The rule stated in this Section is applicable where the settlor and the beneficiaries consent to a reconveyance of the trust property to the settlor and also where they consent to a conveyance of the trust property to the beneficiaries or to a third person. It is applicable whether or not the settlor is one of the beneficiaries. As to the termination of the trust where the settlor is the sole beneficiary, see § 339.

The rule stated in this Section is applicable although the settlor does not reserve a power of revocation, and even though it is provided in specific words by the terms of the trust that the trust shall be irrevocable.

If the settlor is dead, the consent of his heirs or personal representatives is not sufficient to justify the termination of the trust under the rule stated in this Section. The rule is not applicable to trusts created by will, or to trusts created inter vivos if the settlor has died.

b. Trust for successive beneficiaries. If a trust is created for successive beneficiaries, and all of the beneficiaries and the settlor, none of them being under an incapacity, consent to terminate the trust, the trust will be terminated, although one of the purposes of the trust is to deprive the beneficiary entitled to income of the management of the trust property for the period during which he is entitled to the income, and the beneficiaries without the consent of the settlor could not compel the termination of the trust. See § 337(2) and Comment *g* thereon.

Illustrations:

1. A transfers property to B in trust to pay the income to A for life and on A's death, but in no event before A's death, to pay the principal to C. Neither A nor C is under an incapacity. If A and C agree, they can terminate the trust and compel B to transfer the trust property to A or to C or to a third person.

2. A transfers property to B in trust to pay the income to C for life and on C's death to pay the principal to D. In the trust instrument A declares that one of his purposes in creating the trust is to have the property under the management of a competent trustee. Neither A nor C nor D is under an incapacity. If A and C and D agree, they can terminate the trust and compel the trustee to transfer the trust property to A or to C or to D or to a third person.

c. Postponement of enjoyment of interest of sole beneficiary. If by the terms of the trust it is provided that the trust shall not terminate until a certain time, or until the happening of a certain event, and the sole beneficiary, or if there are several beneficiaries, all of the beneficiaries, none of them being under an incapacity, desire to terminate the trust, and the settlor consents to its termination, the trust will be terminated, although the specified time has not arrived or the specified event has not happened, and the beneficiary without the consent of the settlor could not compel the termination of the trust. See § 337(2) and Comment j thereon.

Illustration:

3. A transfers property to B in trust to pay the income to C until he reaches the age of thirty and to pay the principal to C on reaching that age. There is no other beneficiary who has any interest in the trust property. C is twenty-five years of age. If A and C agree, they can terminate the trust and compel B to transfer the trust property to A or to C or to a third person.

d. Spendthrift trust. Although by the terms of the trust or by statute the interest of one or more of the beneficiaries is made inalienable by him, if all of the beneficiaries and the settlor, none of them being under an incapacity, consent to terminate the trust, the trust will be terminated, although the beneficiaries without the consent of the settlor could not compel the termination of the trust. See § 337(2) and Comment l thereon.

Illustrations:

4. A transfers property to B in trust to pay the income to C for life, and on C's death to pay the principal to D. By the terms of the trust C's interest is inalienable by him. Neither A nor C nor D is under an incapacity. If A and C and D agree, they can terminate the trust and compel the trustee to transfer the property to A or to C or to D or to a third person.

5. A transfers property to B in trust to pay the income to C for life, and on C's death to pay the principal to D. By the terms of the trust C's interest is inalienable by him. D dies intestate leaving C as his sole heir and next of kin. If A consents, C can compel B to transfer the trust property to him.

6. A transfers property to B in trust to pay the income to C for life, and on C's death to reconvey the property to A.

By the terms of the trust C's interest is inalienable by him. If C is not under an incapacity and consents, A can compel B to reconvey the trust property to him.

e. Consent procured improperly. If the consent of the settlor or of any of the beneficiaries is procured by fraud or other improper means, the trust will not be terminated.

f. Where some beneficiaries do not consent. If some of the beneficiaries are unascertained or under an incapacity or do not consent to the termination of the trust (see § 340), the trust will not be terminated merely because the settlor consents.

g. Partial termination of trust. If the settlor and all of the beneficiaries of a trust consent and none of them is under an incapacity, they can compel the termination of the trust as to a part of the trust property, although the purposes of the trust have not been accomplished and the beneficiaries without the consent of the settlor could not compel the termination of the trust. See § 337(2) and Comment *g* thereon.

Illustration:

7. A transfers property to B in trust to pay half the income to C for life and the other half of the income to D for life, and on the death of either to pay his share of the income to E, and on the death of the survivor to pay the principal to E. By the terms of the trust D's interest is inalienable by him. C transfers his interest to E. If A and D consent, E can compel B to transfer half of the trust property to him.

h. Modification of trust. If the settlor and all of the beneficiaries of a trust consent and none of them is under an incapacity, they can compel the modification of the trust.

Even if some of the beneficiaries do not consent to the modification of the trust or are under an incapacity, if the settlor and the beneficiaries who do consent are not under an incapacity, they can compel the modification of the trust although the purposes of the trust with respect to the consenting beneficiaries have not been accomplished, if the interests of the beneficiaries who do not consent or are under an incapacity are not prejudiced thereby. Thus, although by the terms of the trust or by statute the interest of one or more of the beneficiaries is made inalienable by him, if he is not under an incapacity and the settlor consents, he can transfer his interest, although the other beneficiaries do not consent, since their interests are not affected by the transfer. The restraint on the alienation of the interest by the beneficiary can be removed by the consent of the beneficiary and of the settlor.

§ 339. Where Settlor is Sole Beneficiary

If the settlor is the sole beneficiary of a trust and is not under an incapacity, he can compel the termination of the trust, although the purposes of the trust have not been accomplished.

Comment:

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b. When settlor is sole beneficiary. The settlor is the sole beneficiary of a trust if he does not manifest an intention to give a beneficial interest to anyone else. If, however, he manifests an intention to create a vested or contingent interest in others, as for example, his children, or the persons who may be his heirs or next of kin on his death, he is not the sole beneficiary, unless such intended interests are invalid, either under the rule in *Shelley's Case* or otherwise. The question of when the settlor is and when he is not sole beneficiary is dealt with in § 127.

Illustrations:

1. A transfers property to B in trust to pay the income to A for ten years and then to transfer the property to A. By the terms of the trust it is provided that the trust shall be irrevocable during the ten-year period. A can compel B to transfer the property to him even before the expiration of the ten-year period.

2. A transfers property to B in trust to pay the income to A for life and on A's death to pay the principal as A may by deed or by will appoint and in default of appointment to A's heirs or next of kin. A reserves no power of revocation. A can compel B to transfer the property to him.

. . . .

§ 340. Where Some of the Beneficiaries Do Not Consent

(1) Except as stated in Subsection (2) and in §§ 335 and 336, if one or more of the beneficiaries of a trust do not consent to its termination or are under an incapacity, the others cannot compel the termination of the trust, except in accordance with the terms of the trust.

(2) Although one or more of the beneficiaries of a trust do not consent to its termination or are under an incapacity, the court may decree a partial termination of the trust if the interests of the beneficiaries who do not consent or are under an incapacity are not prejudiced thereby and if the continuance of the trust is not necessary to carry out a material purpose of the trust.

Comment:

. . . .

e. Contingent interest certain never to vest. The existence of a contingent interest which it has become certain will never vest does not preclude the termination of the trust. Thus, if a trust is created under which the income is to be paid to one person for life and on his death the principal is to be paid to another person if living and if not to his children and if he has died leaving no children then to a third person, and the second person dies during the life of the first person leaving no children, the trust can be terminated with the consent of the first and third persons.

If the unascertained beneficiaries are the children of a designated woman, and the woman is beyond the age of child bearing or otherwise physically incapable of bearing children, the court may terminate the trust.

Illustration:

5. A bequeaths property to B in trust to pay the income to C for life and on the death of C to convey the property to the children of C and if C dies without children to D. C is a woman who has no children and is clearly past the age of child bearing. C and D can compel the termination of the trust.

Even though it is not absolutely impossible that children should be born, but the possibility of the birth of children is negligible, the court may terminate the trust, at least upon the filing of a bond for the protection of such possible children.

. . . .

§ 341. Merger

(1) Except as stated in Subsection (2), if the legal title to the trust property and the entire beneficial interest become united in one person who is not under an incapacity, the trust terminates.

(2) If the beneficiary of a spendthrift trust having the entire beneficial interest in the trust property becomes without his consent the sole trustee, he can procure the appointment of a new trustee and have the trust reconstituted.

§ 342. Conveyance by Trustee to or at the Direction of the Beneficiary

If there is a sole beneficiary who is not under an incapacity and the trustee transfers the trust property to him or at his direction, or if there are several beneficiaries none of whom is under an incapacity and the trustee transfers the trust property to them or at their direction, the trust terminates although the purposes of the trust have not been fully accomplished.

§ 343. Conveyance by Beneficiary to Trustee

If there is a sole beneficiary of a trust and he transfers his interest to the trustee, or if there are several beneficiaries and all of them transfer their interests to the trustee, the trust terminates although the purposes of the trust have not been fully accomplished.

§ 344. Powers and Duties of Trustee on Termination of Trust

When the time for the termination of the trust has arrived, the trustee has such powers and duties as are appropriate for the winding up of the trust.

Comment:

a. The time for the termination of the trust. By "the time for the termination of the trust" is meant the time at which it becomes the duty of the trustee to wind up the trust. Ordinarily this time is at the expiration of the period for which the trust is created. See § 334. The time for the termination of the trust may arrive, however, before the expiration of the period fixed by the terms of the trust. See §§ 335-339. Although the time for the termination of the trust has arrived in accordance with the terms of the trust, the trustee does not thereby necessarily cease to be trustee, but he continues to be trustee until the trust is finally wound up. The period for winding up the trust is the period after the time for termination of the trust has arrived and before the trust is terminated by the distribution of the trust property. This period may properly be longer or shorter, depending upon the circumstances. Where the estate is large, where property not readily saleable has to be sold, where the ascertainment of the beneficiaries entitled to distribution or the amounts to which they are entitled is difficult, the period of winding up the trust may properly be longer than it would be in the absence of these circumstances.

§ 345. Duty of Trustee to Transfer Title or Possession on Termination of Trust

Upon the termination of the trust it is the duty of the trustee to the person beneficially entitled to the trust property to transfer the property to him or, if the trustee has possession but not title, to deliver possession to him.

§ 346. Direction to Convert

Although by the terms of the trust the trustee is authorized or directed to convert trust property on the termination of the trust, the beneficiary if not under an incapacity can require the trustee to transfer the trust property to him without converting it.

§ 347. Mode of Distribution Where There are Several Beneficiaries

If upon the termination of the trust there are several beneficiaries among whom the trust estate is to be distributed, whether the trustee is under a duty to convey the property to the beneficiaries as tenants in common, or to divide the property and distribute it in kind, or to sell it and distribute the proceeds, depends upon the terms of the trust and in the absence of such terms upon what under all the circumstances is reasonable.

EXHIBIT 3

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WRITER'S DIRECT DIAL NUMBER

July 26, 1984

John H. DeMouilly, Esq.
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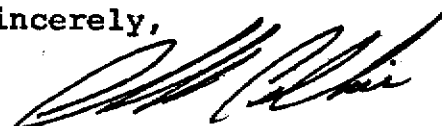
Re: Trust Law

Dear John:

A situation has arisen in our office that may suggest legislation in the trust area. Parents created irrevocable trusts for two children. The document provides that all income is to be distributed to each child after attaining age 21. One of the children has developed severe mental problems, and automatic distribution of the income from the trust to the beneficiary no longer seems appropriate. We obviously could have a conservator appointed and have money paid to the conservator rather than directly to the beneficiary. However, if there were statutory language allowing a court to modify the terms of an irrevocable trust due to a change of circumstances, it would be more efficient to simply modify the trust provisions, thereby saving the cost of a conservatorship. I am not aware of any specific language which would allow the court to modify a trust due to change of circumstances except in the case of a small trust (Civil Code §2279.1 and Probate Code §1120.6) or where all parties consent (Civil Code §2258).

You might give some thought to adding a provision in the trust law, allowing a court to modify the terms of an irrevocable trust based on change of circumstance. Perhaps this can be accomplished now by simply filing a petition for instructions, but clarifying language might facilitate the court's exercising its jurisdiction in such situations.

Sincerely,



Charles A. Collier, Jr.

CAC:ccr

EXHIBIT 4

LAW OFFICES

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WRITER'S DIRECT DIAL NUMBER

August 1, 1984

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California Law Revision
Commission
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Re: Trust Law

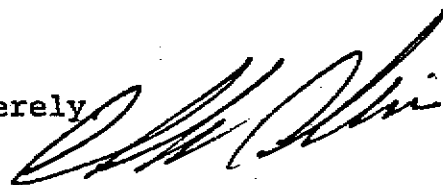
Dear John:

I have been working on a committee of the American Bar Association with reference to statutory provisions for terminating small trusts. We, of course, in California have Probate Code Section 1120.6 and Civil Code Section 2279.1. Few jurisdictions have laws of this kind, however.

In connection with the work on the committee, a statute in Kentucky came to my attention. I am enclosing a copy of that statute, Section 386.185. I think it is interesting because it allows the probate court, where a distribution is to be made to the trust, to in essence distribute the property directly to the beneficiaries in the case of a small trust. To my knowledge, California law does not contain a similar provision on direct distribution from a probate estate. In practice, the courts often will allow a direct distribution to a beneficiary if the trust is very small or if it is about to terminate. However, this might well be the subject of a specific grant of authority to the court in the Probate Code.

Kindest regards.

Sincerely



Charles A. Collier, Jr.

CAC:ccr
Enclosure

KENTUCKY

fiduciary shall, on demand by any party to its accounting or on demand by the attorney for such party, certify in writing to such party the securities deposited by such fiduciary in such clearing corporation for its account as such fiduciary.

(2) This section shall apply to any fiduciary holding securities in a fiduciary capacity, and to any bank or trust company holding securities as a custodian, managing agent or custodian for a fiduciary, acting on June 21, 1974, or who thereafter may act regardless of the date of the agreement, instrument or court order by which it is appointed and regardless of whether or not such fiduciary, custodian, managing agent or custodian for a fiduciary owns capital stock of such clearing corporation.

(3) As used in this section, "fiduciary" includes an executor, administrator, trustee under any trust, express, implied, resulting or constructive, guardian, conservator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer or any other person acting in a fiduciary capacity for any person, trust or estate.

HISTORY: 1982 c 141, § 100, 146, eff. 7-1-82
1980 c 396, § 109; 1974 S 225

386.170 Nonresident trustee for personal property of nonresident beneficiary; power to act in this state

(1) Where the beneficial owner of personal estate, held and controlled for his benefit or the benefit of his children or heirs by a trustee, is a nonresident of this state and has no trustee in this state, his trustee, appointed and qualified according to the laws of the place where the person resides, may collect, receive and remove to such place of residence any personal estate of the person or cestui que trust located in this state.

(2) Upon application by petition in a summary way, the circuit court having jurisdiction may authorize the foreign trustee to sue for, recover and remove any such personal estate of the nonresident cestui que trust, or to otherwise act as a trustee appointed in this state.

(3) The court shall not grant the petition or authorize the collection or removal of such property unless it is satisfied by documentary evidence that the foreign trustee has, where he qualified, given bond with good and sufficient surety to account for all the estate of the nonresident cestui que trust that might come to his hands, nor unless the court is satisfied that neither the nonresident cestui que trust nor any person having a present, future or contingent interest in the personal estate will be prejudiced by the order.

(4) The venue for such action shall lie in the county where there is jurisdiction in the district court to appoint a trustee for the nonresident person.

HISTORY: 1980 c 259, § 3, eff. 7-15-80
KS 4709 to 4711

386.180 Compensation of trustees of estates

(1) Trustees of estates may receive for their services as such a commission of six percent (6%) of the income collected by them, payable as the income is collected. They may also receive an annual commission of three-tenths of one percent (.3%) of the fair value of the real and personal estate in the care of the fiduciary, or, at the option of the fiduciary and in lieu of the annual commission on

principal, a commission which shall not exceed six percent (6%) of the fair value of the principal distributed, payable at the time the principal is distributed. In the absence of some provision, agreement, or direction to the contrary, the commission on income shall be paid out of the income from the estate, and the commission on principal shall be paid out of the principal of the estate.

(2) However, upon proof submitted showing that the fiduciary has performed additional service in the handling of the estate in his care, which has been unusual or extraordinary and not normally incident to the care and management of an estate, the court may allow to the fiduciary such additional compensation as is fair and reasonable for the additional services rendered. This additional compensation shall be payable out of principal or income, or part out of principal and part out of income, as the court directs.

HISTORY: 1982 c 277, § 1, eff. 7-15-82
KS 4711-a

CROSS REFERENCES

See Baldwin's Kentucky Practice, Vol. 3, Probate Practice 15.19

Compensation of limited guardians, guardians, limited conservators and conservators, 387.760

563 SW(2d) 476 (App 1978), First Security National Bank and Trust Co of Lexington v des Cognets. Trust company must exercise option to take annual commission on trust as allowed by statute within a reasonable time and failure to do so will constitute a waiver.

386.185 Distribution of trusts of \$15,000 or less

(1) Whenever a trustee or personal representative holds and controls an amount, exclusive of income, of fifteen thousand dollars (\$15,000) or less or the will directs that such an amount be placed in a trust, the fiduciary may petition the district court having jurisdiction of the trust or estate, for an order authorizing the fiduciary to distribute the amount held, plus income available, less fees chargeable, to the appropriate beneficiary or beneficiaries, legal representatives thereof, or other appropriate persons or institutions responsible for the object of the trust, who shall be under a duty to use the funds for the purposes of the trust. Upon receipt of said petition by the district court, and accompanying affidavit and/or oral testimony, the court shall order the amount distributed.

(2) When an order to distribute the amount petitioned is granted and entered into the court's records, no bond shall be required of the recipient of said distribution from the trustee or personal representative.

(3) A release of the trustee or personal representative shall be executed by the recipient upon distribution of the amount held, declaring said fiduciary not liable thereafter. The trustee or personal representative shall not be required to look into the application of the amount so distributed.

HISTORY: 1982 c 277, § 2, eff. 7-15-82
1978 H 494; 1976 ex s, S 15, § 327; 1974 S 9

CROSS REFERENCES

See Baldwin's Kentucky Practice, Vol. 3, Probate Practice 23.16, 23.17

TRUST TERMINATION: UNBORN, LIVING AND DEAD HANDS -
TOO MANY FINGERS IN THE TRUST PIE*

by

Gail Boreman Bird

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Copies of this study are furnished to interested persons solely for the purpose of giving the Commission the benefit of the views of such persons, and the study should not be used for any other purpose at this time.

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TRUST TERMINATION: UNBORN, LIVING AND DEAD HANDS -
TOO MANY FINGERS IN THE TRUST PIE

by

Gail Boreman Bird

INTRODUCTION

One of the primary advantages of the trust lies in its inherent flexibility. Because the device is essentially so simple (the separation of legal title from beneficial ownership),¹ it is adaptable to many circumstances and has a wide variety of uses, ranging from bankruptcy to family wealth distribution.² Indeed, it has been suggested that the limitations of the trust are only those of the imagination.³ However, unless continuing flexibility is built into a particular trust arrangement, the trust may prove rigid and unresponsive to the changing needs, values, and conditions of the settlor and the people who must live with it, particularly the beneficiaries. The problem is particularly acute in the context of trusts established for wealth distribution within the family unit.

Suppose, for example, that moved by the spirit of love and generosity, a person establishes a trust to provide for the support and education of his sole grandchild, then age three. Distributions of income are to commence at age eighteen, and the child is to receive the \$100,000 principal

at age thirty. Twenty-five years later, it is apparent that the grandchild is emotionally unstable, dependent on drugs and alcohol. Can the settlor modify the trust or perhaps revoke it entirely in order to prevent the corpus from falling into the hands of the improvident granddaughter? Or suppose that the granddaughter is not improvident, but rather is married with two children and would like to obtain some or all of the trust principal in order to purchase a house. Will the grandchild be able to reach some or all of the principal before reaching age 30? Suppose that the grandchild is suffering from a serious illness, and her support and health care needs exceed the income being generated. Can the trustee "dip into" principal in order to meet these unforeseen expenses? All of these potential problems could have been anticipated and resolved within the trust instrument itself. But suppose the settlor (or his attorney) was not so farsighted. Can anything be done now? Generally speaking, once a trust has been established, its terms setting forth the trustee's powers and duties, the identity of the beneficiaries, and the extent of the beneficial interests are fixed and final.⁴ On occasion, however, as the preceding examples illustrate, a question may arise as to the possibility of allowing a "premature" termination, in whole or in part, of a particular trust. The answer to this question depends upon a wide range of factors: is the settlor still alive; did he retain a

power of revocation; what was his predominant intent; are there other beneficiaries; is this an emergency? Judicial attitudes, rules of construction, and the statutes of the particular jurisdiction may also play a significant role.

The purpose of this article is threefold: to examine the judicial response to the question of trust termination and modification in various common factual settings, with particular emphasis on California decisional law; to describe major statutory reforms developed in other jurisdictions; and to suggest a model for possible future California legislation.

Courts confronting the trust termination issue generally consider a number of factors in determining the propriety of the requested termination or alteration. One major factor involves the status of the individual seeking the termination: is the proponent the trust settlor, the trustee, or the beneficiary? Because of the significance of this factor, the following analysis of the decisional and statutory law regarding trust termination is broken down into three major categories: the right of the settlor to compel termination, the right of the trustee, and the right of the beneficiary. Termination through merger of legal and equitable interests and the special circumstances permitting distributive deviation are also considered.

THE RIGHT OF THE SETTLOR TO COMPEL TERMINATION

Revocation and Rescission

Once a trust has come into existence, is it possible for the creator of the trust to later change his mind, cancel the arrangement, and have the trust property returned to his ownership? The answer to this question turns in large part upon whether the trust is deemed revocable or irrevocable. Generally speaking, the creation of a trust involves the completed transfer of equitable interests in the trust property to the beneficiaries. This completed transfer, whether donative or for consideration, cannot be undone. Therefore in most jurisdictions, a trust is deemed irrevocable unless the settlor expressly reserved a power of revocation.⁵ "[T]here is no implied reservation to the settlor of a power to revoke the trust, no matter how unfortunate the act of creating it may have proved to be."⁶

A few jurisdictions, including California, have altered this rule by statute. Under California Civil Code Section 2280, a trust is deemed revocable unless made expressly irrevocable by its terms.⁷ This statute

was enacted in 1931, and is applicable to trusts created after that date.⁸ Thus in California it is relatively easy for a settlor to terminate a trust. He can simply exercise the statutory power of revocation by a writing filed with the trustee.⁹

There is one major pitfall, however. If a trust is expressly made revocable and the trust instrument specifies how or when the power of revocation is to be exercised, the California courts have generally held that the settlor must comply with the terms of the trust in exercising the power.

For example, in Rosenauer v. Title Insurance and Trust Company,¹⁰ the settlor established a trust containing the following provision:

The Trustor shall have the right at any time during her lifetime . . . to revoke this Trust in whole or in part by an instrument in writing executed by the Trustor and delivered to the Trustee. Furthermore, notwithstanding any other provision contained in this trust instrument, the Trustor retains and shall have the right to appoint the principal, together with any income accrued or received and undistributed, of the Trust Estate as shall remain undisposed of upon

her death, which power may be exercised by the Trustor's written instrument other than a Will filed with the Trustee."

When the settlor died, her will was admitted to probate. The will provided: "This Will revokes the Revocable Trust Agreement...between myself as trustor and Title Insurance and Trust Company as Trustee." The will also stated that "all funds are to come from my Trust Account at Title Insurance and Trust." However, neither the will nor any other written revocation of the trust was delivered to the trustee during the lifetime of the settlor.

The executor and beneficiary under the will contended that the above provisions of the will constituted an effective revocation under Civil Code Section 2280. It was argued that the statute contains no requirement that the revocation be filed with the trustee during the life of the settlor, that the statute does not exclude a will from the definition of a "writing," and therefore the filing of the will with the trustee after the death of the decedent complied with the statute.

The appellate court rejected these arguments, stating that although "Civil Code section 2280 was undoubtedly intended to liberalize the power of revocation in California we do not believe it was intended to operate as a nullifica-

tion of a trustor's plainly expressed preference for a mode of revocation."¹¹ In reaching this conclusion, the court placed primary reliance on the Restatement of Trusts¹² and two Massachusetts cases,¹³ all of which express the view that if the settlor reserves the power to revoke a trust only in a particular manner, he can revoke the trust only in the specified manner. Thus, if the settlor reserves the power to revoke during his lifetime, he cannot exercise the power by will.¹⁴

The court's reliance on the Restatement and Massachusetts case law is curious, since these authorities, in accordance with the American majority rule, presuppose that a trust is irrevocable unless expressly made revocable and that there is no implied power of revocation. If one follows the majority rule, it is logical to say that if a trust provides for an exclusive or limited method of revocation, the trust instrument is necessarily controlling. The power of revocation cannot exceed that granted by the trust instrument. But as noted earlier, the California rule governing revocability is one hundred eighty degrees from the majority rule, and presumes that a trust is revocable unless expressly made irrevocable. The effect of the Rosenauer rule is to deprive a trust settlor of the benefits of Civil Code §2280 where the trust instrument provides not only for revocability, but also specifies a manner of revocation.

Despite this gap in logic, the court's decision in Rosenauer appears to be justifiable on more pragmatic grounds. If a settlor enters into a trust arrangement with a third party trustee, and limits himself to certain methods of revocation specified in the trust instrument, the trustee should be entitled to rely on the trust instrument. The Rosenauer decision does provide some needed security and certainty to trustees.¹⁵

Another justification for the Rosenauer rule is afforded in the case of Hibernia Bank v. Wells Fargo Bank.¹⁶ There, the trustor executed a written trust agreement on July 8, 1974 with Wells Fargo Bank as trustee. The agreement provided that the trust was revocable by the settlor, but that such revocation would not be effective unless it was contained in a notarized writing and approved by the settlor's attorney. Less than one month later, the trustor attempted to revoke the trust by signing a statement to that effect in the presence of three witnesses. Shortly thereafter, the settlor was put under a conservatorship. A photocopy of the attempted revocation was sent to the trustee by the conservator. After the settlor's death on August 31, 1974, the trustee refused to deliver the trust assets to the administrator of the settlor's estate, contending that the trust had not been validly revoked because the

purported revocation was neither notarized nor approved by the settlor's attorney.

The appellate court agreed, relying primarily on the Rosenauer case. The court also specifically disapproved an earlier California case which suggested that Civil Code section 2280 should override any trust provisions to the contrary, unless the trust is expressly irrevocable.¹⁷ The court stated that this proposal was dictum, was not supported by precedent, and could have untoward consequences:

While the law might favor the free revocability of a trust in the interests of the alienability of property generally, there is no basis to conclude that such policy would be furthered by denying to a trustor the power to specify the manner of revocation. Fernald would in effect require a trustor to create either an irrevocable trust or one freely revocable on written notice. It would not allow him to protect himself from the consequences of his whim, caprice, momentary indecision, or of undue influence by other persons.¹⁸

As in Rosenauer, the court's reasoning is somewhat strange. Is a settlor more likely to be subject to whim, caprice, or undue influence upon revoking a trust than upon entering into it in the first instance? It is possible that the underlying concern of the court in both Rosenauer and

Hibernia Bank involves ascertaining and safeguarding the settlor's true intent. If the settlor of a trust clearly delineates the method by which the trust can be revoked, and later executes a revocation in compliance with those terms, we can be reasonably certain that the settlor intended to revoke the trust arrangement. But if the purported revocation does not comport with the terms of the trust, we cannot be sure exactly what the settlor has in mind.¹⁹ The problem is, of course, most acute in those cases where the settlor has since died and cannot testify as to what his true intentions were.

In summary, the statutory presumption of trust revocability contained in Civil Code section 2280 has advantages over the current American majority rule. It prevents a trust settlor from being perhaps unwittingly trapped in a permanent and irrevocable situation.²⁰ The problems with the statute seen in the Rosenauer and Hibernia Bank cases could be partially resolved by a slight revision of the statute:

Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor (1) by a writing other than a will filed with the trustee during the lifetime of the trustor or (2) by the trustor's compliance with any method of revocation specified in the trust instrument.

This revision would alleviate the situation where a trustor purportedly attempts to revoke a trust by will. This revision would not eliminate the undue influence problem alluded to by the court in Hibernia Bank. However, if a revocation is shown to be the product of fraud, duress, or undue influence, it can certainly be set aside, regardless of the method employed.²¹ The proposed revision would also eliminate the current dichotomy between the existing statute and case law.

Now consider the irrevocable trust situation, i.e., where the settlor has not retained a power of revocation, and but as directed that the trust be irrevocable. Under what circumstances can the settlor compel termination? One possibility is to obtain the consent of all beneficiaries to an early termination of the trust. This solution and its attendant problems are explored infra.²² Another avenue open to the settlor is to attempt to have the trust voided on the grounds of fraud, undue influence, or lack of capacity. These are well established grounds for the rescission of a trust (or indeed, any gratuitous transfer of property) and the law governing the rescission of inter vivos transfers generally is applicable to both declarations of trust and transfers in trust.²³

For example, where the settlor's signature to a deed of trust was obtained by misrepresentation, rescission of the transaction was granted by the court.²⁴ Similarly, where the evidence showed that a declaration of trust was executed while the settlor was "in an extremely agitated and nervous condition" and through the exercise of undue influence, the cancellation of the trust was upheld.²⁵

A related ground for seeking termination of a trust involves mistake. A settlor is entitled to rescind a trust that was created as a result of a material mistake.²⁶ It is not necessary that the mistake be mutual, but may be the unilateral mistake of the settlor, assuming that there was no consideration for the trust.²⁶ One of the most commonly claimed "mistakes" is the assertion that a power of revocation was mistakenly omitted from the trust, or that the settlor mistakenly believed that he had such a power.²⁷

According to the Restatement of Trusts, such a mistake is grounds for reformation and revocation of the trust,²⁸ but the mistake cannot be proved merely by the subsequent statement or testimony of the settlor as to his beliefs or state of mind at the time of the creation of the trust.²⁹ Thus, the real problem is a problem of proof. However, as Professor Palmer points out, the courts will look at a variety of circumstances in such cases, including the improvidence of the trust and the hardship on the settlor,

and these factors, coupled with the statements of the settlor, may well provide a basis for equitable relief.³⁰ Professor Palmer suggests that the willingness of the courts to grant rescission on the grounds of "mistake" is a means of mitigating the harsh majority rule that a trust is deemed irrevocable unless expressly made revocable, and criticizes the evidentiary requirements imposed by the Restatement: "The formality attached to intervivos trusts rests on uncertain ground at best, and it is unwise to reinforce a rule of doubtful validity by the stringent evidentiary requirements of the Restatement."³¹

Because California has departed from the majority rule regarding the irrevocability of intervivos trusts, the issues and problems raised in other jurisdictions concerning the settlor's mistaken beliefs as to revocability are not generally the subject of litigation here. This factor is a significant advantage of the present California rule, and militates against the wholesale adoption of the majority rule in California.

Modification

Suppose that after creating a trust, the settlor would like to modify one or more of its terms. May he do so? The law respecting modification of a trust by the settlor is closely analagous to the rules regarding termination. If the settlor has retained a power to modify either admini-

strative or distributive provisions (or both), he can make whatever modifications are within the scope of the power.³² However, under the majority American view, if the settlor has failed to reserve a power of modification, he has no right to change either administrative or dispositive provisions.³³ The underlying rationale for the majority rule is that in creating the trust, the settlor has made a transfer of particular property interests, and he cannot later change the size or incidents of those property interests unless he has retained the power to do so in the trust instrument.³⁴ The majority rule respecting modification thus presupposes the irrevocability of the trust.

In California, by contrast, a trust is deemed revocable unless made irrevocable, and therefore in the absence of express irrevocability should be readily modifiable by the settlor. The power to revoke is generally deemed to include the power to modify or amend.³⁵ The obvious rationale is that since the trustor could wholly terminate the trust by exercising the power of revocation and then create a new trust on the desired terms, he should be able to accomplish the desired result in one step by amendment or modification of the original trust.³⁶

If the trust is irrevocable, and the settlor has not retained a power to modify or amend, modification may still be possible, either by proof of mistake³⁷ or by obtaining the consent of all beneficiaries.³⁸ When there has been a

mistake in expressing the terms of an inter vivos trust, it is possible for the settlor to obtain reformation of the trust instrument.³⁹ The mistake may be the unintentional omission of a power of modification,⁴⁰ or a mistake in the description of trust property or beneficiaries,⁴¹ or even a mistake as to legal effect, particularly tax consequences.⁴²

Another way for the settlor of an irrevocable and nonmodifiable trust to achieve a modification of the trust terms is by obtaining the consent of all beneficiaries. If all beneficiaries are sui juris and consent to the proposed alteration, they should be estopped from later asserting that the amendment or modification was not effective.⁴³ The problem with this approach is that the beneficiaries may be recalcitrant, or may not be competent, or indeed may not all be living. These problems are explored infra.⁴⁴

TERMINATION OR MODIFICATION BY THE TRUSTEE

Generally, a trustee has no power to modify or terminate a trust in the absence of such a power expressly conferred by the trust instrument or by statute.⁴⁵

However, certain discretionary powers that are frequently conferred upon trustees, particularly the power to invade

the corpus, may be tantamount to a power of termination.⁴⁶

For example, if the trustee is given the discretion to pay to or apply the trust principal for the benefit of a particular beneficiary, it is clear that the exercise of this discretionary power could ultimately result in the termination of the trust, i.e., through exhaustion of the res. The underlying issue in such a situation involves the limitations placed upon the trustee's discretion. These limitations may be imposed by the trust instrument itself; the instrument may provide that the discretionary power is exercisable only under a certain set of defined circumstances. Usually, though, such discretionary powers are conferred as a means of providing flexibility to adapt the trust to changing circumstances, and therefore such grants of discretionary power are frequently quite broad.

What then are the controls upon the trustee exercising such a broad discretionary power to achieve termination of a trust? The answer, simply, is that he must not abuse his discretion.⁴⁷ This is generally held to mean that the trustee must act in good faith, from proper motives, and within the bounds of a reasonable judgment:⁴⁸

[A]lthough there is a field, often a wide field, within which the trustee may determine whether to

act or not and when and how to act, yet beyond that field the court will control him. How wide that field is depends upon the terms of the trust, the nature of the power, and all the circumstances.⁴⁹

How wide is the field when the trustee is simply given the power to invade corpus for the benefit of the income beneficiary? This question was raised in the case of Kemp v. Patterson,⁵⁰ and answered narrowly by the New York court.

In the Kemp case, the settlor established a trust providing that after the settlor's death, the trustees were to pay the settlor's daughter "all of the net income annually during the rest of her life and so much of the principal sums of the trust from time to time as the Trustees may deem for [her] best interest," and upon the death of the daughter, to transfer the corpus to the daughter's issue then living, and if there were none, then to certain other individuals. The daughter did not need the principal for her support, but she was a British subject and the trust income was subject to a 92 1/2% tax; moreover, at her death the trust principal would be subject to heavy British estate taxes.

In order to minimize the impact of these taxes, the trustees (with the consent of the income beneficiary) sought to terminate the trust by the exercise of their discretionary power to pay over principal to the daughter. It was

concluded that the trustees were acting honestly and in good faith. Nevertheless, the majority of the court held the trust provision authorizing the trustee to invade principal for the best interest of the income beneficiary did not empower them to turn the entire corpus over to her under the existing circumstances: "In short, the power to use the principal of the trust may not be enlarged into a power to terminate it."⁵¹

The reasoning of the majority opinion appears specious. There is no question but that the trustees had the power to terminate the trust by the invasion of the corpus. If the income beneficiary had been in serious financial straits, with mounting medical bills, it is unlikely that the court would have objected to the total invasion of corpus and the ensuing termination of the trust. The real question involves then the limitation upon the exercise of the power. Because the decision of the trustees to terminate the trust was made in good faith, from the proper motives, and meets the standard of "reasonableness," the restrictions on the exercise of the power must be gleaned from the terms of the trust itself. Here, the only limitation placed by the settlor upon the power was that it be used for the "best interest" of the income beneficiary.

The question then becomes one of interpretation: What did the settlor mean by the phrase "best interest"? The

term "best interest" would appear to establish a very flexible standard, embracing whatever objectives the trustees deem appropriate.⁵² Indeed, the lower court opinion, approved and relied upon the majority in Kemp, admitted that the proposed transfer would "in a sense . . . serve the beneficiary's 'best interest,'" but was apparently concerned about the interests of the remaindermen. However, where the trust instrument authorizes the invasion of corpus for the benefit of the income beneficiary, the remaindermen have the right only to whatever principal remains at the death of the life beneficiary. "The rights of remaindermen are subordinate to the primary purpose of the trust"⁵³ Moreover, as the dissent pointed out, without termination of the trust, not only would the income beneficiary be deprived of nearly all income, but the remaindermen would ultimately receive less than one-third of the trust corpus. On the other hand, if the trust were terminated, the income would be taxed at a much lower rate and the corpus would become available to the remaindermen without deduction for tax. "Obviously such a plan would not be detrimental to the beneficiary."⁵⁴ The effect of the majority opinion is to deprive the trustees of their discretion, thereby removing the flexibility that the settlor had built into the trust instrument. The result runs counter to the expressed intent of the settlor.⁵⁵

RIGHT OF THE BENEFICIARIES TO COMPEL TERMINATION

Suppose that for one reason or another, a trust beneficiary desires to remove himself from the constraints of the trust and achieve outright ownership of the trust property. Under what circumstances can the trust beneficiary compel termination of the trust to attain this result? It is generally stated that if all beneficiaries are sui juris and agree to the termination, termination of the trust will be permitted unless a material purpose of the settlor would thereby be defeated.⁵⁸ Thus there are two major hurdles that must be overcome in order to achieve termination: (1) The so-called material purpose doctrine and (2) the requirement that the consent of all beneficiaries be obtained.⁵⁹

Material Purpose Doctrine

Under the current American majority rule, a beneficiary who seeks early termination of a trust must show that either the settlor's purpose has been accomplished or it is impossible of accomplishment.⁶⁰ This rule was developed in this country in the late nineteenth century⁶¹ and runs sharply counter to the attitude taken by English courts to trust termination. Under the English view, emphasis is placed upon the equitable ownership rights of the beneficiary and if all of the beneficiaries are sui juris, they may compel termination regardless of the intention or

purposes of the settlor.⁶² Thus, although the intention of the settlor governs the extent of the beneficial interests, it is not a limitation upon the control of such interests.⁶³ The policy underlying the English rule is essentially free alienability and control of property by the living.⁶⁴

The American rule, by contrast, places great weight on the intention and goals of the settlor, and hence will not permit termination of a trust, even where all beneficiaries are sui juris and consent, if the termination would defeat a material purpose of the settlor.⁶⁵ One major problem in the application of the American rule involves ascertaining what the material purposes of the settlor were, and then determining whether premature termination would thwart those purposes. Because these questions are essentially factual, the cases are not wholly consistent; nevertheless some patterns are discernable. The presence or absence of certain factors play a major role in predicting whether termination will be permitted under the American standard.

For the purpose of analysis, the cases may be conveniently grouped into the following categories: trusts involving postponement of enjoyment to a certain age; trusts involving successive beneficiaries; and spendthrift trusts. Needless to say, these analytical categories are

artificial constructs and there is considerable overlap with many cases falling into more than one category.

(1) Postponement of Enjoyment

Where a trust is established for the benefit of a single beneficiary with the provision that the principal is to be distributed to the beneficiary upon his attainment of a certain age, it is very unlikely that the beneficiary will be able to achieve termination of the trust prior to reaching the specified age. This conclusion is mandated by the so-called Claflin doctrine derived from the leading case of Claflin v. Claflin⁶⁶, decided by the Massachusetts court in 1889.

In that case, the settlor established a testamentary trust for one of his sons. The terms of the trust provided that \$10,000 of the corpus would be paid to the son at age 21; another \$10,000 at age 25, and the remaining principal balance at age 30. After reaching age 21, the son sought to compel the trustees to pay him the entire balance of the trust fund, relying on the English rule⁶⁷ that trust provisions postponing the payment of money beyond the age of majority are void. The court rejected the beneficiary's argument, reasoning that the trust was not dry, its purposes had not been accomplished, and the intention of the settlor should be carried out:

In the case at bar, nothing has happened which the testator did not anticipate, and for which he has not made provision. It is plainly his will that neither the income nor any part of the principal should now be paid to the plaintiff [W]e are unable to see that the directions of the testator . . . are against public policy, or are so far inconsistent with the rights of property given to the plaintiff, that they should not be carried into effect.⁶⁸

The court recognized that the beneficiary's interest was not subject to any spendthrift provision, but stated merely because the settlor had not imposed all possible restrictions, it did not follow that "the restrictions which he had imposed should not be carried into effect."⁶⁹ The court concluded that "[i]t cannot be said that these restrictions placed upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own."⁷⁰

The Claflin decision has been widely followed in the United States and represents the American majority rule. Courts upholding the Claflin doctrine place great stress

upon the intention of the settlor and upon their duty to recognize and carry out that intent, even though such action may thwart the desires and needs of the beneficiaries. This judicial attitude is illustrated by the California Supreme Court's decision in Moxley v. Title Insurance and Trust Company⁷¹, where the Claflin doctrine was rigorously applied. In Moxley, the beneficiary was to receive the trust corpus and any accumulated income at age 35. The trust had been established by the beneficiary's mother, when the beneficiary was 15 years old. At the time of the termination action, the beneficiary was 26 years old, happily married, and living with her husband. She sought termination in order to use the trust principal for the purchase of a house. The beneficiary sought to avoid the operation of the Claflin doctrine on the grounds of changed circumstances and accomplishment of trust purposes.⁷² She also pointed out that the trust was not spendthrift. The court rejected the beneficiary's arguments:

In substance, plaintiff's pleading of "changed conditions" amounts to no more than the pleading of mere considerations of convenience to herself as a ground for frustration of the testamentary design for administration of the trust, and she cannot prevail.⁷³

The court indicated that the absence of spendthrift features should not change this result: the settlor "may have had good reason for desiring that the corpus of the trust should not go to plaintiff until she should attain the specified age."⁷⁴ Furthermore, the court should "do what it can to discourage wastage by refusing the decree of termination, in the hope that the cestui will not think of alienation, or will find it too costly to use, or will be unable to find a buyer for his interest."⁷⁵

In his dissenting opinion, Justice Traynor did not directly attack the Claflin doctrine, but rather emphasized that the Claflin doctrine should not preclude termination of a trust on equitable grounds:

In this state . . . a court of equity has inherent power to terminate a trust before the end of the period specified in the instrument. The beneficiaries of a trust other than a spendthrift trust may secure its termination if all the beneficiaries are sui juris and all agree upon its termination, and if a court of equity concludes that the best interests of the beneficiaries will be served thereby.⁷⁶

The dissent concluded that the beneficiary had presented equitable grounds for termination of the trust sufficient at

least to allow her to go to trial.⁷⁷

Claflin and its progeny have been sharply criticized over the years. Professor Grey was as hostile to the Claflin doctrine as he was to the spendthrift trust doctrine, viewing both as reflective of a pernicious paternalism:

The law has fixed the age of responsibility at twenty-one; if that is too young, let it be changed, but the wisdom of allowing individuals to change it at their pleasure is not clear. And if paternalism is to be introduced into our law, its introduction in this particular class of cases seems to be without the advantages that may exist elsewhere, and to retain only its irritating and demoralizing features.⁷⁸

The doctrine also runs counter to the general policy in favor of free alienability.⁷⁹ Although in the absence of the spendthrift clause, the beneficiary is free to transfer his interest, any restrictions postponing enjoyment apply with equal force to the transferee. Thus, the transferee is in no better position to compel termination than the original beneficiary.⁸⁰ This factor, although essential to the enforceability of the Claflin rule, necessarily diminishes the marketability of the beneficial interest.⁸¹

A related criticism leveled against the doctrine is that it is impractical. If, as in Claflin and Moxley, there are no spendthrift restrictions, the beneficiary is free to alienate his or her interest to a stranger. It is obvious that the settlor could have had no intent or purpose in preserving the trust property for a stranger; furthermore, the goal of protecting the beneficiary is clearly thwarted by the sale of the beneficial interest at a severely discounted price. Thus the Claflin doctrine ultimately causes the waste of beneficial interests.⁸²

Finally, as pointed out by the dissent in Moxley, extra-judicial termination of a trust may be achieved by agreement between the trustee and beneficiary, with a transfer of trust assets to the beneficiary. To preclude the same result by court decree, as the Claflin doctrine does, is to penalize beneficiaries who conscientiously seek a judicially sanctioned termination or where the trustee is desirous of continuing commissions and refuses to agree to termination.⁸³

Many of the objections to the Claflin doctrine would be eliminated if the scope of the doctrine were limited to trusts containing spendthrift provisions. The presence of spendthrift features is a much stronger indication of a protective purpose on the part of the settlor than mere postponement of enjoyment.⁸⁴ Thus it is urged that

California abolish the Claflin rule except as it relates to spendthrift trusts.⁸⁵

(2) Successive beneficiaries

Where a settlor creates a trust providing that the income is to be paid to one beneficiary for life, and on the death of the income beneficiary, the principal is to be paid to another, the mere fact that successive interests have been created is not generally held to be evidence of any "material purpose" on the part of the settlor precluding termination prior to the death of the income beneficiary.⁸⁶ Thus, if the income beneficiary and the remainderman are both competent and consent to the termination, they may compel termination.⁸⁷ Similarly, if the income beneficiary acquires the remainder interest, or if the remainderman acquires the income interest, termination can be compelled.⁸⁸

Where, however, there are not only successive interests, but there is other evidence of a "material purpose" of the settlor that remains unfulfilled, termination will not be permitted.⁸⁹ Such other evidence may be in the form of spendthrift restrictions,⁹⁰ or support provisions,⁹¹ or may even be extrinsic.⁹² For example, in Estate of Easterday,⁹³ the income beneficiary of the trust acquired the remainder interest in one-fourth of the corpus,

and sought to compel termination of the trust as to the one-quarter interest. There were no spendthrift restrictions.⁹⁴ Nevertheless, the court refused to allow termination. The testimony of the settlor's attorney indicated that the settlor had a protective intent to provide support to his son (the income beneficiary) during his life. The son was unable to support himself. The court held that such extrinsic evidence was admissible to establish the trust purposes,⁹⁵ and that the evidence plainly showed that it was the settlor's purpose that "his son should, for his own good, not have control of the principal, and that in the circumstances, his purpose was a wise one."⁹⁶ With respect to the lack of spendthrift features, the court indicated that merely because the beneficiary might circumvent the settlor's purposes by selling his interest, that was not a sufficient reason for destroying the legal interest of the settlor in creating the trust. The court added hopefully: "The life beneficiary may be unable to find a buyer"⁹⁷ The major criticisms levelled against the Claflin doctrine are equally applicable to the Easterday decision.

(3) Spendthrift trusts

Although as the preceding sections indicate, the absence of a spendthrift clause is not a bar to the operation of the Claflin rule and other aspects of the material

purpose doctrine, the mere existence of a spendthrift provision greatly strengthens the case against premature termination.⁹⁸ The typical spendthrift provision, which restrains voluntary and involuntary alienation of the beneficial interest by the beneficiary, indicates a clear intent on the part of the settlor not only to provide for the beneficiary but also to shield him from his own improvidence.⁹⁹ Although serious policy questions have been raised concerning the legality and morality of the spendthrift trust concept,¹⁰⁰ the spendthrift trust has gained wide acceptance in the United States, and is recognized in California by both statute and case law.¹⁰¹

In the great majority of American jurisdictions which accept the spendthrift trust doctrine, it is generally held that the beneficiaries under such a trust cannot compel termination, even though all are sui juris and consent. This rule applies not only to trusts involving postponement of enjoyment, but also to trusts for successive beneficiaries.¹⁰² Thus, in Leonardini v. Wells Fargo Bank & Union Trust Company,¹⁰³ where both the income beneficiary and the remainderman sought a partial termination of the trust, the court refused their request:

The testator set up this trust for the life of Mrs. Leonardini and provided that the total income should be paid to her for that period. To

protect her against herself and to assure that this income should not be depleted by her acts, he made this a spendthrift trust. It certainly violates the spirit of the spendthrift trust provisions to permit Mrs. Leonardini . . . to consent to its diminution - the very thing the testator tried to prevent by the spendthrift provision."¹⁰⁴

Cases such as Leonardini refusing termination where the trust contains a valid spendthrift provision make more sense than Clafin and related cases discussed previously. As Professor Powell has noted, "[t]he inalienability of the beneficiary's interest makes it inescapably clear that the trust's purposes would be frustrated by an early termination of the trust."¹⁰⁵

Furthermore, the spendthrift restraint operates not merely as strong evidence of the settlor's material protective purpose, but also serves as an enforcement mechanism for that purpose. Thus, unlike the situation in Clafin and Easterday, a decree denying termination in the spendthrift trust cases cannot be circumvented by a sale of the beneficial interest. In line with this reasoning, it is recommended that the "material purpose" rule insofar as it relates to spendthrift trusts be kept intact as a barrier to early termination. It is further recommended, however,

that the limitations on termination inherent in the material purpose rule be coextensive with the validity of the spendthrift restrictions. To the extent that voluntary or involuntary alienation is permitted despite the spendthrift restraint, termination by the beneficiary should be allowed.¹⁰⁶ Where the trust provides for the regular payment of a specified sum to the income beneficiary for life, with a remainder over, it is suggested that the annuity solution achieved in Estate of Nicely¹⁰⁷ be pursued. This would obviate the necessity of continued trust administration during the lifetime of the income beneficiary and hence be less costly.¹⁰⁸

Consent of All Beneficiaries

Even in cases where the material purpose doctrine does not operate as a barrier to termination, such as where the settlor is alive and consents to an early termination of the trust¹⁰⁹ or where no material purpose would be served by the continuance of the trust,¹¹⁰ the ability of the beneficiaries to compel termination may be impeded by the further requirement that the consent of all beneficiaries be obtained.

It is essential that all living beneficiaries consent to the proposed termination.¹¹¹ However, even where all living beneficiaries are amenable to termination,

the presence of unborn or unascertained beneficiaries whose consent cannot be obtained may preclude termination of the trust. The unborn beneficiary problem arises in two broad factual contexts: (1) where the settlor of the trust claims to be the sole beneficiary and (2) where the living beneficiaries claim to be the sole beneficiaries. Each of these categories will be analyzed separately. Solutions to the various problems involving unborn or unascertained beneficiaries will then be explored. As in the preceding sections, emphasis is placed on California law.

(1) Settlor as Sole Beneficiary

It is clear that if the trust settlor is himself the sole beneficiary, he may compel termination of the trust, even though the trust is stated to be irrevocable and/or spendthrift.¹¹² The problem is that in many cases it is difficult to determine whether or not the settlor is in fact the sole beneficiary. If the settlor establishes a trust to pay himself the income for a certain period of time, and at the end of that period, to pay the principal to him, he is clearly the sole beneficiary.¹¹³ Similarly, where the settlor is the trust income beneficiary and at his death the principal is to be paid to his estate or personal representative, he is regarded as the sole beneficiary.¹¹⁴

By contrast, where the settlor is the trust income beneficiary and at his death the principal is to be distributed to his "children," his "issue," or his "descendants," it is generally held that the settlor is not the sole beneficiary, and that an equitable remainder interest has been created in his children, issue, or descendants, whether the latter are in existence or not.¹¹⁵

In Levy v. Crocker-Citizens National Bank,¹¹⁶ the settlor executed two identical instruments, each providing that he was to receive the net income for his life, and on his death the trust corpus was to be distributed pursuant to his exercise of a general testamentary power of appointment, or, in the absence of such appointment, to his then surviving issue. The trusts were irrevocable.¹¹⁷ Some six years later, the settlor sought to terminate the trusts on the ground that he should be considered the sole beneficiary. The court rejected his argument, reasoning that a gift to "issue" indicates an intent to create an interest in a special class of persons and not provided merely for succession by the general class of persons who would take at the settlor's death under intestate laws.¹¹⁸

From a constructional standpoint, a more difficult question is presented in the situation where the trust provides that the settlor is to receive the income during his life, and on his death the principal is to be distri-

buted to his "heirs." This problem has arisen in several California cases over the years, but there is currently no clear resolution.

In Gray v. Union Trust Company,¹¹⁹ the settlor executed an irrevocable trust instrument which provided that she was to receive the net income during her life and upon her death the trust property was to be distributed "as she shall provide in her last will and testament, and leaving no last will and testament, said property shall go to and vest in her heirs at law, according to laws of succession of the State of California as such laws now exist." The settlor was unmarried and had no children or other lineal descendants. The trial court agreed with the settlor that she was the only person having any interest in the trust property, and granted her request for termination. The California Supreme Court reversed, finding that the above quoted trust provision created a remainder in the settlor's heirs.¹²⁰ The court relied on Civil Code section 779, under which "the term 'heirs' is changed from a word of limitation to one of purchase, and becomes a specific designation of a class which will have the right to the property upon the termination of the life estate."¹²¹ The court also found indication of an intent to create a remainder from the fact that the settlor's heirs were to be determined under the succession laws in existence at the time of the trust's creation: "by a change in the laws of succession, conceivably it could

happen that those who would be entitled to take under the trust instrument...would no one of them be an heir at law of Helen Gray at the time of her death."¹²² The court concluded that because a remainder had been created in the settlor's heirs, and they were not before the court, termination of the trust necessarily had to be denied.¹²³

The decision in Gray was subsequently followed by the California appellate court in Bixby v. Hotchkiss¹²⁴ where the settlor had established an irrevocable trust with a twenty year duration. At the end of the twenty year period, the trustees were to distribute the trust property to the settlor if he was then living, and if not, to his "heirs at law in accordance with the laws of succession of the State of California then in effect."¹²⁵ Six years after the execution of the trust instrument, the settlor sought to terminate the trust, contending that he was the sole trust beneficiary. The trial court's decision denying termination was affirmed on appeal: "One who creates a voluntary trust is not the sole beneficiary if he manifests an intention to create a contingent interest in others, such as his heirs at law."¹²⁶ The appellate court concluded that such a contingent interest had been created.¹²⁷

The possible application of the doctrine of worthier title was not raised in either Gray or Hotchkiss,¹²⁸

but the doctrine ultimately figured prominently in Bixby v. California Trust Company¹²⁹ decided by the California Supreme Court in 1949. The case involved an irrevocable trust under which the income was to be paid to the settlor for life, and upon his death, the trust property was to be distributed to the settlor's "heirs at law in accordance with the laws of succession of the State of California then in effect."¹³⁰ The trial court denied the settlor's application for termination, apparently relying on Gray and Hotchkiss. The California Supreme Court reversed, holding that the settlor was the sole beneficiary of the trust and therefore could compel termination. To achieve this result, the court resorted to the ancient worthier title doctrine which, simply stated, provides that a limitation in favor of the grantor's heirs creates a reversion in the grantor and no interest in his heirs.¹³¹

Relying on the landmark opinion of Justice Cardozo in Doctor v. Hughes¹³² the court indicated that this rule should be viewed as a rule of construction, and hence applicable unless a contrary intention of the settlor is manifested. Therefore, if a trust instrument directs that the income should be paid to the settlor for life, and on his death the principal is to be distributed to his heirs, no remainder interests are created. The settlor is himself the sole beneficiary, owning a reversionary interest in the trust corpus.¹³³ The court distinguished the earlier

decisions in Gray and Hotchkiss on the ground that in those cases, there was an indication of an intent to create an interest in a special class of persons, and not simply, as in the instant case, to provide for succession by the general class of persons who would take at death under the intestacy laws.¹³⁴

The decision in Bixby v. California Trust Co. was met with mixed reviews,¹³⁵ and in 1959 the doctrine of worthier title was statutorily abolished.¹³⁶ California Civil Code Section 1073 currently provides in pertinent part:

The law of this State does not include (1) the common law rule of worthier title that a grantor cannot convey an interest to his own heirs or (2) a presumption or rule of interpretation that a grantor does not intend, by a grant to his own heirs or next of kin, to transfer an interest to them.¹³⁷

Given this statute, the question of terminating a trust where the settlor is the income beneficiary with a remainder in his heirs cannot be resolved by construction. Other possible solutions are explored infra.

(2) The Living Beneficiaries as Sole Beneficiaries

Even if all living beneficiaries are competent and consent and there is no other bar to termination, the existence of unborn or unascertained beneficiaries may preclude an early termination of the trust. On occasion the living beneficiaries may sue to establish that they are in fact the sole beneficiaries, despite an apparent contingent limitation in favor of unborn or unascertained persons.¹³⁸ The constructional problems in these cases are similar to those in the preceding section.

Where a future interest under a trust is limited to the heirs of the income beneficiary, it is arguable at least that the settlor intended to create an equitable fee interest in the named beneficiary.¹³⁹ Some courts have achieved this result by application of the Rule in Shelley's case.¹⁴⁰ The California courts, however, have consistently rejected this argument, relying primarily on Civil Code Section 779 which abolishes the Rule in Shelley's case, and provides that "[w]hen a remainder is limited to the heirs . . . of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate are the successors or heirs . . . of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life."¹⁴¹ Even in cases where Section 779 has no application, the courts have tended to view the term "heirs" as a word of purchase. For example, in Estate of

Leonardini v. Wells Fargo Bank and Union Trust Company,¹⁴² the trust instrument provided that the income was to be paid to the settlor's god-daughter for her life, and on her death, the principal was to be paid to her son "Bradford E. Parrish, or his heirs." Both the income beneficiary and the son desired and consented to a partial termination of the trust. The court indicated that the heirs of the son had a contingent remainder in the corpus, that they took by purchase and not descent, and that their consent was therefore indispensable.¹⁴³

In cases where the class designation is more specific, such as "issue", "descendants" or "children", the California courts have uniformly held that unborn or unascertained class members have a beneficial interest necessitating their consent for termination of the trust.¹⁴⁴ This is true even where it is highly improbable if not impossible, that such class members will ever come into existence. In Fletcher v. Los Angeles Trust and Savings Bank,¹⁴⁵ the trust income was to be paid to the settlor's daughter for life, and on her death, the trust fund was to be distributed in equal shares to her children. The income beneficiary had one child, and both desired termination of the trust. It was claimed that because of the age and sterility of the income beneficiary, there was no possibility of her having more children, and that therefore she and her son represented the only possible beneficiaries under the trust. The trial court made a finding to that effect and rendered a

decree terminating the trust.

The California Supreme Court reversed. The court noted that the case was not within the purview of the Claflin doctrine and hence the only issue was whether all those holding beneficial interests in the trust were before the court. Determination of this issue was dependent on the admissibility of testimony as to the age and sterility of the income beneficiary. The court held such evidence inadmissible, relying on the conclusive presumption that a woman is capable of bearing children as long as she lives. It was recognized that although this rule is of English common law origin, the English courts have departed from it, and that trusts have been terminated in England upon the presumption that a woman has ceased to have childbearing capacity.¹⁴⁶ The Supreme Court, however, felt constrained to follow the so-called American rule establishing a conclusive presumption of fertility.¹⁴⁷ In support of its decision, the court stated: "We are the more ready to do this, as such an interpretation can wrong no one and the result of such a rule is merely to enforce the clearly expressed intention of the trustor, and is more in accord with the American law concerning trusts in personalty."¹⁴⁸

The Fletcher rule was subsequently followed by the California court in Wogman v. Wells Fargo Bank and Union Trust Company,¹⁴⁹ the court stating that although the

income beneficiary has only one child and he has consented to the termination "and while she is nearly 58, so that the probability of having any more children is extremely remote . . . such a legal possibility exists."¹⁵⁰

In summary, then, the problem of trust termination becomes particularly acute where the terms of the trust include provisions in favor of the heirs, issue, descendants, or children of a living person. The modern constructional preferences coupled with the conclusive presumption of fertility generally result in a determination that these unborn or unascertained persons have a sufficient beneficial interest requiring their consent for termination. The following section outlines some possible solutions to the unborn beneficiary problem.

(3) Solutions to the Unborn Beneficiary Problem

In addition to the resurrection of the doctrine of worthier title and the Rule in Shelley's Case, various devices have been developed to mitigate the problems raised by the presence of unborn beneficiaries. These include the doctrine of virtual representation, the appointment of a guardian ad litem, statutes limiting the consent requirement, and abrogation of the conclusive presumption of fertility.

(a) Virtual Representation

Under the doctrine of virtual representation, the unborn members of a class of beneficiaries may be represented by the living members of the same class or by those having substantially similar interests so as to effectively protect the interests of the unborn. The theory underlying the doctrine rests on the similarity of economic interest between the unborn members and the living representatives. It is assumed that in pursuing his own self-interest, the representative will effectively safeguard the interests of those whom he represents.¹⁵¹ The doctrine has been used in at least one California case in the trust termination context.

In Mabry v. Scott,¹⁵² the settlor established an irrevocable inter vivos trust, naming himself, his spouse, and their four minor children as income beneficiaries. On the death of the survivor of these six individuals, the principal was to go first to the living issue of the settlor's four children, or contingently, in the event of their death, to living spouses of the four children; in the event there were no living issue or spouses, the principal was to go to the heirs of the settlor. Shortly after establishing this trust, the settlor was divorced; he eventually remarried and had another child. He later brought suit to cancel the trust alleging fraud and undue influence on the

part of his former wife. This suit was ultimately settled by a compromise agreement, under which the settlor and his former wife would each receive \$60,000 from the trust corpus¹⁵³ and various modifications were made in the income payments. The party to object to the settlement was the trustee, who contended that the unborn contingent remaindermen (the issue of the settlor's children) were indispensable parties whose rights were adversely affected. The trial court found that the compromise was fair and equitable, and ordered modification of the trust. The compromise was upheld on appeal. The appellate court reasoned that "there was virtual representation of the unborn contingent remaindermen by the living children."¹⁵⁴ The court determined that there was no adverse interest between the living children and their issue which would prevent the living children from effectively protecting the rights of the unborn contingent remaindermen.¹⁵⁵

Furthermore, the unborn remaindermen and the living children were protected by the appointment of guardians ad litem.¹⁵⁶ The court concluded that the mere fact that unborn beneficiaries could not be brought "before the tribunal" should not preclude the rights of the living from being adjudicated.¹⁵⁷

It should be noted that the Mabry case did not involve total termination of the trust, but merely a modification

resulting in a partial termination. Furthermore, the modification was produced by a settlement of a case that could have conceivably have resulted in cancellation of the trust, thereby eliminating the interests of all beneficiaries, including those of the unborn remaindermen. In this situation, the interests of the living and unborn beneficiaries were substantially similar. However, in many cases where termination of a trust is sought, the interests of the living and the unborn beneficiaries are diametrically opposed.¹⁵⁸ Thus, the doctrine of virtual representation is of limited utility in the trust termination context. The guardian ad litem device, although similar in concept to the representation doctrine, would seem to afford greater flexibility and also greater protection to those represented. The guardian ad litem concept is discussed below.

(b) Appointment of Guardian Ad Litem

The guardian ad litem concept simply involves the appointment by the court of a person to represent a party who is under a disability.¹⁵⁹ The use of the guardian ad litem in the trust termination context came to the fore in the celebrated case of Hatch v. Riggs National Bank,¹⁶⁰ when the federal court suggested the appointment of a guardian ad litem as an alternative to the doctrine of worthier title.

In Hatch, the settlor executed an irrevocable spend-thrift trust, reserving to herself the income for life and directing that on her death the principal was to be paid pursuant to her appointment by will, or in default of appointment, to her next of kin under the District of Columbia intestacy laws then in effect. Thereafter, the settlor sought a partial termination of the trust,¹⁶¹ claiming that she was the sole beneficiary and could therefore revoke or modify the trust under accepted principles of trust law. The doctrine of worthier title was invoked to support this contention. The Court of Appeal rejected her arguments in this respect. The Court of Appeal commented on the feudal origins of the doctrine, but did recognize the fact that it had won widespread acceptance as a rule of construction following Justice Cardozo's opinion in Doctor v. Hughes. However, the court also noted that while the weight of authority supported retention of the doctrine as a rule of construction, "there has been substantial and increasing opposition to the doctrine."¹⁶² The court concluded that retention of the doctrine "is pernicious in several respects."¹⁶³

First the court questioned whether the doctrine corresponded with the intent of the average settlor, stating that although the dominant purpose of the settlor may well be to benefit himself as the income beneficiary during his life, a subsidiary but still significant purpose may be the satisfaction of a natural desire to benefit his heirs or next of

kin. In addition, the court noted that although the presumption of a reversion is rebuttable by evidence of a contrary intent, interpretation of the often murky signals of such intent has resulted "in a shower of strained decisions difficult to reconcile with one another and generative of considerable confusion in the law."¹⁶⁴ The court indicated that it was unwilling "to plunge the District of Columbia into the ranks of those jurisdictions bogged in the morass of exploring, under the modern doctrine of worthier title, 'the almost ephemeral qualities which go to prove the necessary intent.'¹⁶⁵ In rejecting the worthier title doctrine, the court concluded that treating the settlor's heirs like any other remaindermen is generally an intent-effectuating rule "and promises less litigation, greater predictability and easier drafting."¹⁶⁶

The problem with treating the settlor's heirs "like any other remaindermen" is that their consent is necessary to a termination or a modification of the trust by the settlor. To alleviate this problem, the court in Hatch proposed the appointment of a guardian ad litem to represent the interests of the heirs for purposes of consent to modification or revocation. The court noted that although the persons whose interests the guardian ad litem would represent are unascertainable as individuals, they are identifiable as a class and their interests are therefore recognizable.¹⁶⁷ It was suggested that the settlor seeking to revoke or modify

the trust "supplement his appeal to equity with a quid pro quo offered to the heirs for their consent."¹⁶⁸ In the instant case, such consideration might consist of the removal of the testamentary power of appointment from the terms of the trust.¹⁶⁹

Although the court in Hatch relied upon its inherent equitable power to appoint a guardian ad litem,¹⁷⁰ several jurisdictions, including California, have enacted statutory authorization for such appointment.¹⁷¹ California Code of Civil Procedure section 373.5 provides that a class of unborn or unascertained persons having a legal or equitable interest in property may be conclusively represented by a guardian ad litem appointed by the court.¹⁷²

The guardian ad litem device espoused in Hatch and authorized by statute in California should not be regarded as a total panacea for settlors and other living beneficiaries who desire early termination or modification of a trust. It must be remembered that the guardian ad litem acts in a fiduciary capacity and must actively safeguard the interests of the represented class.¹⁷³ "The representation by the guardian must be real and not merely formal."¹⁷⁴ The guardian cannot simply consent to a trust termination or modification adversely affecting the interests of the unborn or unascertained class members. Some corresponding benefit to the class must be forthcoming.¹⁷⁵ In the absence of

the showing of some such benefit, the consent by the guardian will be deemed ineffectual.¹⁷⁶

The "quid pro quo" requirement is not necessarily an insurmountable hurdle. In cases where the settlor/beneficiary seeks only modification or partial termination, the requirement may be fairly easy to meet. In cases such as Hatch, where the settlor had originally retained a power of appointment, renunciation of the power would probably be sufficient. Other possibilities include the transfer of additional assets to the corpus or the agreement to leave additional property to the settlor's heirs.¹⁷⁷ However, where total termination of the trust is sought, the problem becomes more difficult. Total termination necessarily entails the elimination of all beneficial interests, including those represented by the guardian. Whatever quid pro quo is given must be commensurate with the value of the estate the beneficiaries would have received in the absence of termination.¹⁷⁸ Where the settlor has placed the bulk of his assets in the trust he now seeks to terminate, the problem is acute, and termination virtually impossible.¹⁷⁹

Although the guardian ad litem concept has some drawbacks, particularly for those seeking termination, it has proved useful on occasion and should be retained as one mechanism for alleviating certain trust termination and modification situations. Because of its inherent limit-

ations, however, it is recommended that consideration be given to possible statutory modifications of the beneficiary consent requirement, discussed in the next section.

(c) Statutory Amendment of Consent Requirement

To alleviate the situation where the settlor has created an irrevocable trust, reserving an income interest to himself for life and directing that on his death the principal be distributed to his heirs or next of kin, and he later wishes to terminate this arrangement because of financial need or other reasons, it is recommended that California statutorily re-instate a limited form of the worthier title doctrine. Such legislation might simply restate the common law rule that an irrevocable trust may be terminated upon the consent of the settlor and all beneficially interested persons, but should then go on to provide that a gift or limitation in favor of the "heirs" or "next of kin" of the settlor does not create a beneficial interest.¹⁸⁰ The rationale underlying this recommendation is that the settlor's primary purpose in establishing such a trust is to provide lifetime benefits to himself, and "he probably did not intend his determination of the ultimate objects of his generosity to be final."¹⁸¹ There appears to be no public policy justification for not allowing the settlor to change his mind under these limited circumstances.¹⁸² Such legislation should apply only in those cases where the designation involves the term "heirs" or

"next of kin;" it should not apply where the limitation is in favor of the children, issue or descendants of the settlor.¹⁸³ Furthermore, the statute should not apply where there is a limitation in favor of the heirs or next of kin of someone other than the settlor.¹⁸⁴ In these latter situations, where the class includes unborn or unascertained persons, the only mechanisms for termination or modification should be the appointment of a guardian ad litem or the doctrine of virtual representation.

It is further recommended that legislation be enacted to alleviate the "fertile octogenarian" problem previously discussed.¹⁸⁵ Under the existing California case law there is a conclusive presumption of fertility, i.e., that a woman is capable of bearing children as long as she lives.¹⁸⁶ The presumption originated in cases involving the rule against perpetuities, with the courts refusing to admit evidence of a woman's sterility in order to validate interests otherwise too remote.¹⁸⁷ The rationale proffered for the rule was that such evidence is too conjectural, too uncertain.¹⁸⁸ However, with the advances in medical science, a number of jurisdictions have abandoned the conclusive presumption, and allow expert medical testimony on the issue of fertility vel non.¹⁸⁹ In the context of trust termination, most modern courts take the view that if there is no dispute as to the possibility of bearing children, there is no sufficient reason to refuse to

terminate the trust.¹⁹⁰ The only reasons given in support of retaining the conclusive presumption are the "indelicacy" or "indecentcy" of the proffered evidence; the inducement for sterilization for the purpose of terminating trusts that would exist without the rule; and the uncertainty of such evidence.¹⁹¹ The first reason is "absurdly prudish"¹⁹² and the second "utterly insubstantial."¹⁹³ As to the third, "the difficulty may be taken care of by a rule requiring that the proof of sterility, to be sufficient, must be clear and convincing."¹⁹⁴ Although the cases that have arisen in California have involved the alleged sterility of a female beneficiary, there is no reason why the proposed statute and its operation should not be "gender neutral."¹⁹⁵

DISTRIBUTIVE DEVIATION

It is well established that the court has the inherent equitable power to authorize deviation from the express terms of a trust in order to effectuate the underlying purposes of the settlor.¹⁹⁶ The question, then, is under what circumstances and conditions will the court exercise this power. Initially, a distinction should be drawn between "administrative deviation" and "distributive deviation." Courts have frequently permitted the trustee to deviate from the administrative or management provisions of the trust where unforeseen exigencies have arisen, authoriz-

ing the trustee to sell property that would otherwise have to be retained¹⁹⁷ or to make investments that would otherwise be improper under the express terms of the trust.¹⁹⁸ Courts have traditionally been less willing to authorize deviation from the distributive provisions of a trust. Two factors, viewed previously in other contexts, provide a partial explanation for this judicial attitude. One is the material purpose rule and the other is the requirement of beneficiary consent.

Under the material purpose doctrine, courts will not allow modification of or deviation from the distributive provisions of a trust if to do so would defeat a material purpose of the settlor. Indeed, deviation will only be permitted where the main purpose of the trust is threatened.¹⁹⁹ Where it appears that the settlor's primary purpose was to provide support for the income beneficiary, and the income being generated by the trust is insufficient to provide for the basic support needs of such beneficiary, it seems clear that the main purpose of the trust is being impeded. In this situation, the courts have been willing to grant relief by authorizing an invasion of corpus if this can be accomplished without impairing the interests of other beneficiaries.²⁰⁰ For example, in Whittingham v. California Trust Company,²⁰¹ the income beneficiary was at the time of execution of the trust in good health and self-supporting. Later, her health declined, she became a

chronic invalid, unable to earn her own living, and unable to make the mortgage payments on her house (which was under threat of foreclosure). Because she was ultimately entitled to succeed to one-sixth of the trust corpus, the court authorized invasion of that portion of the corpus, reasoning that no one else had a beneficial interest in it.

Where, however, the financial position of the income beneficiary is not so precarious, deviation from the trust terms has been denied, even though the interest of other beneficiaries are protected. In Moxley v. Title Insurance and Trust Company,²⁰² the court majority concluded that the beneficiary had not demonstrated sufficient changed circumstances or emergency warranting deviation from the express terms of the trust: "[W]e do not believe that a trust should be modified merely upon a showing of the beneficiary's desire to purchase a home and a showing of the insufficiency of the beneficiary's income to make such purchase"203

Even where it is conceded that the settlor's main purpose was to provide for the support of the income beneficiary and that purpose is threatened by the insufficiency of income, deviation for the benefit of the income beneficiary will not be allowed if it will adversely affect the interests of other beneficiaries; "this is true even though it appears that the income beneficiary was the primary

object of the settlor's bounty and that the settlor would have desired such a payment."²⁰⁴ In Estate of Van Deusen,²⁰⁵ the trust instrument provided that the trust income was to be paid in equal shares to the settlor's two daughters, and on the death of the survivor, the corpus was to be distributed to the settlor's grandchildren or their issue. The trust produced only \$200-\$250 per month in total income. The income beneficiaries petitioned the court to instruct the trustee to pay each of them \$200 per month, out of income if sufficient, but if not, out of the corpus of the trust. The income beneficiaries alleged that the settlor believed that the net income from the trust investments would be at least \$400 per month, and that she intended that not less than \$200 per month would be available for each daughter. It was further alleged that one beneficiary had an incurable disease needing special medical treatment and that the other was wholly dependent upon the trust income for her support. The trial court's order granting the petition was reversed by the California Supreme Court on the ground that the settlor's daughters were given only an income interest, and the invasion of the corpus without the consent of the remaindermen constituted an impermissible taking of the latter's property.²⁰⁶

"Sympathy for the needs of the respondents [income beneficiaries] does not empower the court to deprive the residuary beneficiaries of their

interests in the corpus of the trust without their consent¹⁸⁶

The court's decision in Van Deusen is supported by the substantial weight of authority.²⁰⁸ On a few occasions, however, the courts have evaded the import of this rule, either by gleaning an implied power to invade corpus from the terms of the trust, or by liberalizing the consent requirement.²⁰⁹ In the controversial case of Petition of Wolcott,²¹⁰ the court did both. There, the testator left his residuary estate in trust, directing that the income be paid to his widow for life, and on her death, the principal be distributed to the settlor's then living issue, and in default of issue, to the settlor's heirs at law. The testator was survived by his widow, two sons, and an eighteen year old grandson. The annual income generated by the trust was approximately \$2300. The widow was eighty-two years of age, ill and infirm, and the income was insufficient to afford her adequate subsistence. The trustee sought authorization to invade principal up to the sum of \$4000 a year for the purpose of providing the widow with reasonable support. The testator's children and grandchild consented to the invasion.²¹¹ The New Hampshire court authorized the deviation. The court first noted that "[a]lthough not expressly stated, the testator's purpose that during her life, his wife should have the beneficial use of his entire estate . . . is readily apparent."²¹² The

court recognized that the trust instrument contained no power to invade corpus for the widow's benefit, but "on the other hand such use was not specifically forbidden."²¹³ The court concluded that because the testator's intent to support his widow was implicit in his will, the interests of the remaindermen were necessarily secondary to his, and they took subject to the execution of that intent: "The remaindermen are deprived of no rights so long as rights which the life tenant was intended to have are not exceeded."²¹⁴ Stress was also placed upon the fact that the living remaindermen had consented to the modification, with the court indicating that the interests of unborn contingent remaindermen were sufficiently represented. The latter point is open to question.²¹⁵

The decision in Wolcott engendered some controversy, with Professor Scott commenting favorably²¹⁶ and Professor Niles likening the New Hampshire court to Robin Hood and his band of merry men.²¹⁷ The problems inherent in the Van Deusen and Wolcott cases, i.e., the taking of property from remaindermen for the benefit of the income beneficiary, would be greatly alleviated if the consent of all beneficiaries, particularly unborn or unascertained remaindermen, were more easily obtainable. The solutions to the consent problem outlined in the preceding section would be equally applicable to the distributive deviation cases. The expan-

sion of the guardian ad litem concept along the lines of the Wisconsin statute would seem particularly appropriate.²¹⁸

MERGER

Because the existence of a trust is dependent upon the separation of legal equitable title,²¹⁹ the doctrine of merger plays a role in trust termination.²²⁰ If the legal title to the trust property is united with the entire beneficial interest in the hands of one person, the equitable and legal interest are said to merge, and the trust terminates.²²¹ Thus, where the equitable interest of the sole beneficiary is transferred to the sole trustee, the trust terminates.²²² Similarly, where the legal interest of the trustee is transferred to the sole beneficiary, the trust terminates.²²³

The merger doctrine will operate to cause termination only where there is a complete coalescence of all equitable and legal interests.²²⁴ Thus, where the trustee is one of several beneficiaries or one of several trustees is the sole beneficiary, there is no merger, and the trust may continue in existence.²²⁵ Even where the sole trustee transfers legal title to the sole living beneficiary, termination will not ensue if there are unborn or unascertained contingent remaindermen.²²⁶

A related problem arises where the equitable interests of the income beneficiary and those of the remaindermen become united in one person. Although courts sometimes refer to this as a "merger" situation, this type of merger does not necessarily result in termination of the trust.²²⁷ All that has been achieved is the reduction of the number of beneficial interest holders.²²⁸ Even if that number has been reduced to one, the material purpose doctrine may still preclude termination.²²⁹ The critical question in such cases is whether a material purpose of the settlor remains unfulfilled despite the fact that the same person holds both income and remainder interests. If the settlor had any purpose beyond or in addition to providing for successive enjoyment, termination will be denied.²³⁰

CONCLUSION

This Article has attempted to survey the existing California law in the area of trust revocation and termination, and to point out particular problems or difficulties that should be resolved or alleviated. Various proposals for reform have been suggested. These proposals may be summarized as follows:

1. Revision of California Civil Code section 2280 to limit the method of revocation by the settlor to the means specified in the trust instrument or to a writing delivered in the settlor's lifetime.
2. Limitation of the material purpose doctrine to spend-thrift trusts.
3. Adoption of a modified version of the worthier title doctrine to allow termination by the settlor despite a limitation in favor of his "heirs" or "next of kin."
4. Expansion of the utility of the guardian ad litem concept to allow nonpecuniary consideration for consent.
5. Abolition of the conclusive presumption of fertility.

It is believed that the adoption of these proposals will provide greater flexibility to the creators and beneficiaries of trusts. It is admitted that these suggestions for reform are weighted in favor of living settlors and beneficiaries. Tipping the scales in favor of the living should be a conscious policy decision:

The reason . . . is a simple one of human relationships, implicit in the principle that human laws, and all other temporal things, are for the living; not for the dead or for those not in being, if to hold otherwise would result in injustice to living persons. Because parties are not in being, and therefore cannot be brought before the tribunal, is not sufficient reason for a court to stand by, helpless and impotent, when the rights of living persons, in ordinary common sense, ought to be adjudicated."²³¹

FOOTNOTES

1. The modern trust concept had its origins in the use, whereby the owner of property would transfer it to the "use" of himself or a third person. The early history of the use is somewhat murky, but it is generally believed that the device had been fully developed by the thirteenth century. The use accomplished its "manifest destiny" when it became characterized and enforced as equitable ownership, 2 F. Pollock & F. Maitland, *The History of English Law* 232 (2d ed. 1898). See also Avery, The Role of Lawyer as Fiduciary, 4 *Prob. Lawyer* 1, 21-22 (Summer 1977), suggesting that the fiduciary relationship inherent in the modern trust device greatly antedates the use: "[T]he fiduciary relationship apparently existed in all of the antecedents of English law," including the Code of Hammurabi and Roman law. Id.

2. Other purposes for which the trust concept is commonly employed include the making of charitable gifts, the administration of retirement and pension plans, and real estate financing. According to the Restatement, a trust may be established for any purpose, so long as not contrary to public policy. Restatement (Second) of Trusts § 59 (1959). In California a trust may be created for any purpose for which a contract could be

3. 1 A. Scott, *The Law of Trusts* § 1 at 4 (3d ed. 1967).
4. G. Bogert & G. Bogert, *The Law of Trusts* 518 (5th ed. 1973); 4 A. Scott, *The Law of Trusts* § 329A at 2593 (3d ed. 1967).
5. This rule in favor of irrevocability is traceable to early English common law, and is probably derived from the general law of gifts. 4 G. Palmer, *The Law of Restitution* § 18.7 31-32 (1978). "If a man will improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this court will not loosen the fetters he hath put upon himself, but he must lie down under his own folly." *Id.*, quoting *Villers v. Beaumont*, 1 Vern. 100, 101, 23 Eng. Rep. 342 (ch. 1682).
6. G. Bogert & G. Bogert, *The Law of Trusts & Trustees* § 998 at 273-274 (rev. 2d ed. 1983).
7. Cal. Civ. Code § 2280 (West 1954). According to Professor Powell, this type of legislation represents a codification of the belief of some courts that "no well-advised person would create a trust without reserving to himself a power of revocation, and hence they were astute to imply such a power." This judicial attitude was more prevalent "before the days of heavy

they were astute to imply such a power." This judicial attitude was more prevalent "before the days of heavy income and death taxes." 4 R. Powell, *The Law of Real Property* ¶ 565 at 428-39 (rev. ed. 1978). See also Comment, Trusts and Trustees: Recent Developments in the Tentative Trust Doctrine: Influence of Civil Code § 2280 on the California Law, 28 Cal. L. Rev. 202.(1940). Similar statutes exist in Oklahoma and Texas. Okla. Stat. Ann., Tit. 60 § 175.41; Tex. Civ. Stat., Art. 7425b-41 (Vernon 1960). One major advantage of such statutes is the elimination of litigation involving the question as to whether a power of revocation was omitted from the trust instrument by mistake. This issue frequently arises in jurisdictions following the usual rule of presumed irrevocability. See G. Bogert & G. Bogert, *The Law of Trusts & Trustees* § 998 at 277-82 (rev. 2d ed. 1983) and cases there cited. See also 4 G. Palmer, *The Law of Restitution* § 18.7 at 30-37 (1978).

8. Trusts created before 1931 continue to be governed by the former California rule, which, consonant with the majority rule, provided that the settlor can revoke a trust only if he originally reserved a power of revocation in the trust instruemnt. See *Gray v. Union Trust Co.*, 171 Cal. 637, 154 P. 306 (1915).

9. Cal. Civ. Code § 2280 (West 1954); *Fleishman v. Blechman*, 148 Cal. App. 2d 88, 95, 306 P. 2d 548 (1957) (any writing clearly manifesting the settlor's intention to revoke the trust is sufficient).
10. 30 Cal. App. 3d 300, 106 Cal. Rptr. 321 (1973).
11. 30 Cal.App.3d at 304, 106 Cal.Rptr. at 323.
12. Restatement (Second) of Trusts § 330(1) comment j (1959).
13. *Leahy v. Old Colony Trust Co.*, 326 Mass. 49, 93 N.E.2d 238 (1950); *National Shawmut Bank of Boston v. Joy*, 315 Mass. 457, 53 N.E.2d 113 (1944).
14. The majority of courts considering this issue have reached the same conclusion. See Ludington, Annotation - Exercise by Will of Trustor's Reserved Power to Revoke or Modify Intervivos Trust, 81 A.L.R.3d 959 (1977). However, in one case the Texas court viewed the settlor's will as an effective revocation of an intervivos trust, reasoning that the language of revocation contained in the trust was not testamentary, but was intended to be effective as of the date of the will's execution. *Sanderson v. Aubrey*, 472 S.W.2d 286 (Tex.Civ.App. 1971). In the Sanderson

case, the trust instrument did not specify a mode of revocation, but the applicable Texas statute provided that "[e]very trust shall be revocable by the settlor during his lifetime, unless expressly made irrevocable by the terms of the instrument" The question then was whether the execution containing revocatory language constituted a revocation during the settlor's lifetime. The court answered this question in the affirmative, viewing the will as having two aspects: "testamentary in part, but operating in praesenti in other parts." 472 S.W.2d at 288. For a discussion of this and related cases, see Note, The Revocation of an Inter Vivos Trust by a Will, 24 Baylor L. Rev. 274 (1972).

15. The court in Rosenauer also rejected the argument that the will provisions constituted the exercise of the power of appointment retained by the settlor under the trust, reasoning that the trust prohibited the exercise of the power by will. 30 Cal.App.3d at 304-05, 106 Cal.Rptr. at 323-24.
16. 66 Cal.App.3d 399, 136 Cal.Rptr. 60 (1977)
17. Fernald v. Lawsten, 26 Cal.App.2d 552, 79 P.2d 742 (1938).

18. *Hibernia Bank v. Wells Fargo Bank*, 66 Cal.App.3d 399, 404, 136 Cal Rptr. 60 (1977).
19. Professor Powell notes that some courts are "extremely strict" in requiring exact compliance with the terms of a power of revocation, and suggests that "[s]uch formalism is justifiable only to the extent that it assures clarity in an act which operates to change the rights of the parties." 4 R. Powell, *The Law of Real Property* ¶ 565 at 428.40(1) (rev. ed. 1978).
20. The impetus behind the 1931 amendment to Civil Code Section 2280 was the fact that "many trustors were not aware that they were creating irrevocable trusts and were unable to revoke them when their circumstances became such that they needed the trust corpus themselves." Comment, Trusts and Trustees: Recent Developments in the Tentative Trust Doctrine: Influence of Civil Code § 2280 on the California Law, 28 Calif. L. Rev. 202, 208 (1940). The situation was made particularly acute by the Great Depression. Id.
21. See generally 4 G. Palmer, *The Law of Restitution* § 20.5 at 202 (1978).
22. See text accompanying notes 109-150, infra.

23. Restatement (Second) of Trusts § 333 (1959); 2 Real Prop. Prob. & Trust J. 303 (1967). In the less common event that a trust is established for consideration, failure of consideration may also constitute grounds for rescission. *Hower v. Woman's Home Missionary Soc.*, 4 Cal.App.2d 719, 41 P.2d 593 (1935); Restatement (Second) of Trusts § 333 comment g (1959); but see Comment, Trusts: Recission of Conveyance for Failure of Consideration, 6 Calif. L.Rev. 309 (1917-18), suggesting that if the failure of consideration involves a breach of trust, the remedy should be enforcement of the trust, and not rescission.
24. *Shaper v. Shaper*, 84 Ill. 603 (1877).
25. *Weakley v. Melton*, 189 Cal. 44, 207 P. 523 (1922); but see *Hutchison v. Security Trust*, 208 Cal. 463, 281 P. 1026 (1929). See generally Restatement (Second) of Trusts § 333 comment e.
26. Wright, Termination of Trusts in Pennsylvania - Some Current Trends, 115 U. Pa. L.Rev. 917, 929-30 (1967).
27. Annotation, Cancellation of Irrevocable Inter Vivos Trust on Grounds of Mistake or Misunderstanding, 59 A.L.R. 2d 1229 (1958); see generally, 4 G. Palmer, *The Law of Restitution* § 18.7 at 31 (1978).

28. Restatement (Second) of Trusts § 332(1) (1959).
29. Restatement (Second) of Trusts § 332(1) comment c (1959).
30. 4 G. Palmer, The Law of Restitution § 18.7 at 33 (1978).
31. 4 G. Palmer, The Law of Restitution § 18.7 at 36 (1978). Professor Palmer ultimately concludes that the doctrine of mistake does not provide a truly satisfactory solution to the sad problems raised in many of the so-called mistake cases, and suggests that "it would be well to accept improvidence as a basis for rescission." Id. at 37.
32. Restatement (Second) of Trusts §331(1) (1959); G. Bogert & G. Bogert, The Law of Trusts and Trustees § 993 at 230-42.(rev. 2d ed. 1983). Note that a broad power of modification may be tantamount to a power of revocation, because the settlor could simply modify the trust to include a power of revocation. Id. at 237. See also Heifetz v. Bank of America, 147 Cal. App. 2d 776, 305 P. 2d 979 (1957), holding that an irrevocable trust may be terminated by the process of eliminating beneficiaries under a power to amend until

there are left only beneficiaries who are sui juris and consent to the termination.

33. Restatement (Second) of Trusts § 331(2) (1959).
34. G. Bogert & G. Bogert, The Law of Trusts and Trustees § 992 (rev. 2d ed. 1983).
35. Heifetz v. Bank of America, 147 Cal. App. 2d 776, 305 P. 2d 979 (1957).
36. Restatement (Second) of Trusts § 331 comment g (1959); G. Bogert & G. Bogert, The Law of Trusts and Trustees) § 1001 at 331-32 (rev. 2d ed. 1983); Note, Trusts: Power to Revoke in Part as Including Power to Terminate, 45 Calif. L. Rev. 556, 557 (1957).
37. For a discussion of the problems involved in obtaining the consent of all beneficiaries, see text accompanying notes 109-150, infra.
38. 4 G. Palmer, The Law of Restitution § 18.7 at 43 (1978).
39. Id.
40. Restatement (Second) of Trusts § 332(2) (1959).

41. Sawtelle Trust, 12 Fid. Rep. 665 (Philadelphia Orphans Ct. 1962). See generally, Wright, Termination of Trusts in Pennsylvania - Some Current Trends, 115 U. Pa. L. Rev. 917, 930-31 (1967).

42. 4 G. Palmer, The Law of Restitution § 18.7 at 37 (1978).

The latter type of mistake is illustrated by the case of Flitcroft v. Commissioner, 328 F.2d 449 (9th Cir. 1964). In Flitcroft, the settlor attempted to establish "Clifford trusts" for the benefit of his children. The trusts, if irrevocable, would free the settlor from income tax liability on the income generated by the trust property during the ten-year term of the trusts. However, the settlor was apparently unaware of the fact that under California Civil Code section 2280, a voluntary trust is revocable unless expressly made irrevocable, and failed to provide expressly for irrevocability. When the error was discovered, the settlor sought and obtained a state court decree reforming the trusts to provide that they were irrevocable from the date of creation. Fortunately for the settlor, the Ninth Circuit treated the reformed trusts as irrevocable from the date of creation, and therefore the desired tax benefits were forthcoming. The Ninth Circuit noted that the mistake involved was not really one of tax law, but of California trust law. Whether a

court would grant reformation where the only mistake is with respect to the terms of the trust in order to obtain the tax advantage is an open question.

4 G. Palmer, *The Law of Restitution* § 18.7 at 43 (1978). Professor Palmer points out that it is not unlikely that a state court would allow reformation, but the effect of the reformation decree on the tax claim would be a federal question.

43. G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 992 at 223 (rev. 2d ed. 1983).
44. See text accompanying notes 109-150, infra.
45. See generally G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 992 at 228 (rev. 2d ed. 1983).
46. See *Boyden v. Stephens*, 285 Mass. 176, 188 N.E. 741 (1934); 4, A. Scott, *The Law of Trusts* § 334.1 at 2647-48 (3d ed. 1967).
47. The Restatement provides that where "discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion." *Restatement (Second) of Trusts* § 187 (1959).

48. 3 A. Scott, The Law of Trusts § 187 at 1501 (3d ed. 1967). Where the trustee is given "absolute" or "unlimited" discretion by the express terms of the trust instrument, Professor Scott and the Restatement would dispense with the requirement of reasonableness: "In such a case the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not a sufficient ground for interposition by the court, so long as the trustee acts in a state of mind in which it was contemplated by the settlor that he could act." Restatement (Second) of Trusts § 187, comment j (1959); see also 3 A. Scott, The Law of Trusts §§ 187-187.1 at 1501-1518(3d ed. 1967). Professor Halbach, by contrast, argues that it is likely that courts will continue to apply a standard of reasonableness to the exercise of a discretionary power, even where such power is absolute. Halbach, Problems of Discretion in Discretionary Trusts, 61 Colum. L. Rev. 1425, 1431 (1961). Professors Dukeminier and Johanson take a middle ground on this question, finding that "in the final analysis it appears that the difference between simple discretion and "absolute" discretion is one of degree, and that the trustee's action must not only be in good faith but to some extent reasonable, with more elasticity in the concept of reasonableness the greater the discretion given." J. Dukeminier & S. Johanson,

Wills, Trusts, and Estates 538 (3d ed. 1984). The latter approach appears to be the most sensible and pragmatic.

49. 3 A. Scott, The Law of Trusts § 187 at 1501 (3d ed. 1967).
50. 6 N.Y.2d 40, 159 N.E.2d 661 (1959).
51. 6 N.Y.2d 40; 159 N.E.2d 661, 662 (1959).
52. Note, Trusts - Power to Distribute from Corpus Does Not Entail Power to Terminate Trust, 34 St. John's L. Rev. 173, 175 (1959); see also Fleming, "Best Interests" as a Standard for Trustee Action, 46 Ill. B.J. 765 (1958).
53. Note, Trusts - Power to Distribute from Corpus Does Not Entail Power to Terminate Trust, 34 St. John's L. Rev. 173, 175 (1959).
54. Kemp v. Patterson, 6 N.Y.2d 40, 159 N.E.2d 661, 663 (1959).
55. The decision in Kemp v. Patterson should be viewed as a warning to draftsmen that the use of general phrases such as "best interest" may be interpreted rigidly or narrowly by the courts to the detriment of the settlor's ultimate objectives, and that the powers of the

trustee should be expressed in clear and unequivocal language. See Note, Trusts - Power to Terminate - "Best Interest" of Beneficiary, 26 Brooklyn L. Rev. 156, 157-160 (1959-60).

56. Cal. Civ. Code § 2279.1 (West Supp. 1984); Cal. Prob. Code §§ 1120.6, 1138.1 (West 1981). These statutes are applicable even where the trust is spendthrift or contains other protective provisions. Id. See generally 60 Cal. Jur. 3d Trusts § 245 at 376 (1980).

57. Cal. Civ. Code § 2279.1 (West Supp. 1984); Cal. Prob. Code § 1120.6 (West 1981).

58. 4 A. Scott, The Law of Trusts § 337 at 2655 (3d ed. 1967); Restatement (Second) of Trusts § 337 (1959); see, e.g., Moor v. Vawter, 84 Cal. App. 678, 258 P.622 (1927).

59. Where the settlor is still alive and consents to the termination, the material purpose doctrine will not be a barrier to termination, but the problem of obtaining the consent of all beneficiaries may remain. See 4 A. Scott, The Law of Trusts § 338 at 2687 (3d ed. 1967).

60. 4 R. Powell, The Law of Real Property ¶ 567 at 428.50 (rev. ed. 1978). It has been suggested that there

is really no American "minority" view on this point, and that the few American cases that have allowed termination seemingly in contravention of the rule "appear to have overlooked rather than rejected it." Comment, Trusts--Termination by Consent of Beneficiaries, 37 Mich. L. Rev. 941, 942 n.5

61. 4 A. Scott, The Law of Trusts § 337.1 at 2663 (3d ed. 1967).
62. 4 R. Powell, The Law of Real Property ¶ 567 at 428.49 (rev. ed. 1978). The English rule was followed in some early American decisions, and has been adopted in Pennsylvania and Virginia. Id.; see also 4 A. Scott, The Law of Trusts § 337.1 at 2662 (3d ed. 1967).
63. 4 A. Scott, The Law of Trusts § 337 at 2655 (3d ed. 1967). The divergent attitudes of the English and American courts are also seen in the area of spendthrift trusts. English courts have refused to recognize the doctrine, reasoning that a settlor cannot make the beneficial interests inalienable by the equitable owners, while the great majority of American courts have allowed restraints on the alienation of equitable interests. Id.; see generally, G. Bogert & G. Bogert, The Law of Trusts and Trustees § 1008 at 412-13 (rev. 2d ed. 1983); Evans, The Termination of

Trusts, 37 Yale L.J. 1070 (1928); Note, Trusts: Termination: Power of Equity Court to Terminate Trust on Application of Beneficiary, 34 Calif. L. Rev. 453, 454 (1946).

64. 4 R. Powell, *The Law of Real Property* ¶ 567 at 428.49 (rev. ed. 1978). The leading English case is *Saunders v. Vautier*, 4 Beav. 115, 49 Eng. Rep. 282, decided in 1841. In that case, the trust terms provided that the beneficiary was to receive the trust corpus at age 25. However, the court granted his application for full payment at age 21. The court in *Saunders* gave little reasoning in support of its position: "the point seems to have been rather assumed than decided." *Warton v. Masterman* [1895] A.C. 186, 193. But subsequent cases, in following the *Saunders* rule, reasoned that once the property interests are vested in the beneficiary, he is the sole owner, and such restrictions are inconsistent with or repugnant to the property rights granted. *Gosling v. Gosling*, Johns. V.C. 265, 70 Eng. Rep. 423 (1859); G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 1008 at 412-13 (rev. 2d ed. 1983) and cases there cited. It has been suggested that the "reasons" given by the English courts in support of the *Saunders* rule are not so much reasons as mere reiterations of the rule, and that the real problem is not one of legal logic or

reasoning, but one of public policy: "to what extent a testator or donor inter vivos should be allowed to control not only the disposition, but also the enjoyment of his property." Note, Trusts--Power of Cestui to Compel Termination When Entire Beneficial Interest is Vested, 26 Notre Dame Law. 158, 161 (1950-51).

65. The guiding principle at the base of both the English rule and the American rule is the same: to allow a property owner to make free use of his property so long as no public policy is violated. The major distinction, then, is who the courts perceive as the "owner": the creator of the trust or the beneficiary. There is no purely logical answer to this conundrum. See Editorial Note, Post-Mortem Control of Property Through the Trust Decree, 18 U. Cin. L. Rev. 197, 199 (1949).
66. *Clafin v. Clafin*, 149 Mass. 19, 20 N.E. 454 (1889).
67. See text accompanying footnotes 61-64, supra.
68. *Clafin v. Clafin*, 149 Mass. 19, 20 N.E. 454, 456.
69. Id.

70. Id.
71. 27 Cal. 2d 457, 165 P.2d 15 (1945), Noted at 34 Calif. L. Rev. 453 (1946); 15 Fordham L. Rev. 303 (1946).
72. When the settlor executed her will, she was separated from her husband and wanted to provide for the security of her teenage daughter who lived with her. There was then the possibility that this trust would be the daughter's sole financial security, because the father might remarry and leave his property to other individuals. However, the father died some years after the mother, and left his property to his daughter under a trust, making it unnecessary for her to depend solely on the mother's trust for future security. 27 Cal. 2d 457, 476, 165 P.2d 15. The beneficiary alleged that the primary purpose of the trust was to protect her during her minority, in providing for her support and education, and that this trust purpose had been accomplished. She further argued that by means of her father's death, she was "unable to have the comforts and necessities and to buy a home as she could if her father were alive . . . and said situation was not contemplated by [the settlor] and therefore no provision was made for the same." 27 Cal. 2d 457, 460-61, 165 P.2d 15.

73. 27 Cal. 2d 457, 465, 165 P.2d 15. The court conceded that changed circumstances may, under certain conditions, warrant a modification of a trust in order to accomplish the "real intent" of the settlor, but concluded that such circumstances did not exist here. 27 Cal. 2d 457, 466-67, 165 P.2d 15. The court also recognized that a "dry" or "passive" trust may be terminated prior to the time fixed by the trust instrument, but indicated that the instant trust was active and hence beyond the ambit of that rule. 27 Cal. 2d. 457, 465, 467, 165 P.2d 15.
74. 27 Cal. 2d 457, 463, 165 P.2d 15.
75. 27 Cal. 2d 457, 464, 165 P.2d 15.
76. 27 Cal. 2d 457, 469, 165 P.2d 15.
77. 27 Cal. 2d 457, 476, 165 P.2d 15. Further ramifications of the dissenting opinion in Moxley are explored in the section of the article dealing with distributive deviation; see text accompanying notes 196-218, infra.
78. J. Gray, Restraints on Alienation § 124o (2d ed. 1895). Professor Scott reiterated this argument against the Claflin doctrine as follows: "The purpose

of a spendthrift trust is the coddling of a person as against himself and as against third persons. The purpose of postponement of enjoyment is simply the coddling of a person against himself." Scott, Control of Property by the Dead, 65 U. Pa. L. Rev. 632, 648 (1917).

79. 4 R. Powell, *The Law of Property* ¶ 567 at 428.51 (rev. ed. 1978); Scott, Control of Property by the Dead, 65 U. Pa. L. Rev. 632, 649-50 (1917).
80. 4 A. Scott, *The Law of Trusts* § 337.3 at 2671-72 (3d ed. 1967).
81. See J. Gray, *Restraints on Alienation* § 124 (2d ed. 1895).
82. "Property sold in praesenti, but not to be delivered for many years, must be sold at a sacrifice, and when the seller is a person of the character for who such restraints are supposed to be useful, the chances are that it will be sold at a very great sacrifice. In fact, the law, by sanctioning such restraints, is exposing inexperienced youth to those 'catching bargains,' against which the old fashioned equity always strove to protect it." J. Gray, *Restraints on Alienation* § 124n (2d ed. 1895). See also Note,

Testamentary Trusts - Premature Termination on Equitable Grounds - Beneficiary's Personal Necessity, 15 Fordham L.Rev. 303, 307 (1946); see also 4 R. Powell, The Law of Real Property ¶ 567 at.428.51 (rev. ed. 1978); Note, Termination of Trusts, 46 Yale L.J. 1005, 1011 (1937); G. Bogert & G. Bogert, The Law of Trusts & Trustees § 1008 at 419 (rev. 2d ed. 1983).

83. Moxley v. Title Insur. & Trust Co., 27 Cal.2d 457, 472, 165 P.2d 15; G. Bogert & G. Bogert, The Law of Trusts & Trustees § 1008 at 419 (rev. 2d ed. 1983). For a brief discussion of extra-judicial termination, see text accompanying notes 219-225, infra.
84. 4 R. Powell, The Law of Real Property ¶ 567 at.428.53 (rev. ed. 1978). The impact of spendthrift restrictions on the Claflin doctrine is discussed at text accompanying notes 98-108, infra.
85. See text accompanying notes 98-108, infra. It should be noted that there is one major limitation on the operation of the Claflin doctrine. A trust cannot remain indestructible beyond the perpetuities period. J. Dukeminier & S. Johanson, Wills, Trusts, and Estates 581 (3d ed. 1984); Comment, Trusts - Duration and Indestructibility, 24 Tenn. L. Rev. 1021, 1026

(1957). California Civil Code Section 771 codifies this rule, providing that "[w]henver a trust has existed longer than the time within which future interests in property must vest under this title . . . [i]t shall be terminated upon the request of a majority of beneficiaries." Thus if a trust has endured longer than the perpetuities period, it may be terminated, regardless of whether there is a material purpose of the settlor that remains unfulfilled. For a critical analysis of the California statute, see Dukeminier, Perpetuities Revision in California: Perpetual Trusts Permitted, 55 Calif. L. Rev. 678 (1967).

86. But see, Comment, Trusts--Termination by Consent of Beneficiaries, 37 Mich. L. Rev. 941, 943-44 (1939), suggesting that this rule is not inevitable: "Though it is reasonable to infer that the settlor's purpose is only to provide for the several beneficiaries, it is just as reasonable to infer that his purpose is to deprive the life cestui of enjoyment of the corpus, that otherwise he would have divided the corpus and have given the parcels outright to the beneficiaries."
87. 4 A. Scott, *The Law of Trusts* § 337.1 at 2658 (3d ed. 1967); Restatement (Second) of Trusts § 337 comment f (1959).

88. Id.; see, e.g., *Eakle v. Ingram*, 142 Cal. 15, 75 P. 566 (1903).
89. This rule generally holds even where termination would facilitate the settlement of a will contest. *Winn, Will Compromises Affecting Trusts*, 92 *Trusts & Estates* 777 (1953). See generally 4 A. Scott, *The Law of Trusts* § 337.6 at 2676-82 (3d ed. 1967). For example, in the leading case of *Adams v. Link*, 145 Conn. 634, 145 A.2d 753 (1958), the testator's will established a testamentary trust which provided that the income was to be paid to two individuals for life, and on the death of the survivor, the principal was to be distributed to a charitable institution. The trust contained no spendthrift restrictions. The will was contested by the testator's heirs at law. A compromise was eventually struck, whereby a portion of the corpus would be paid outright to the contestants, another portion to the income beneficiaries, and a third portion to the charitable remainderman. The court refused to approve the compromise agreement, reasoning that the testator had two objectives that would be defeated by termination of the trust: (1) financial management of the trust corpus by trustees selected by the testator, and (2) preclusion of expenditure of principal by the life beneficiaries. According to the court, the lack of spendthrift

restrictions did not indicate that the settlor intended no protection at all. The principles espoused in Adams v. Link have a wide following. See Cross, Family Settlement of Testator's Estate, 29 A.L.R.3d 8, 45-52 (1970) and cases there cited. With respect to the argument that the law favors settling disputes which might otherwise result in complex and protracted litigation, the California court has responded that the "deference to such settlements gives way . . . to adherence to basic trust law." Estate of Gilliland, 44 Cal.App.3d 32, 40, 118 Cal.Rptr. 447 (1974).

In some jurisdictions, will contest compromise agreements are regulated by statute. For example, under Uniform Probate Code Section 3-1102, the court shall approve such an agreement if it finds that the contest is in good faith, and that the effect of the agreement upon persons represented by fiduciaries is just and reasonable. The statute makes no mention of the "material purpose" requirement. See generally G. Bogert & G. Bogert, The Law of Trusts and Trustees § 1009 at 437-448 (rev. 2d ed. 1983).

90. See text accompanying notes 98-108 infra.
91. 4 A. Scott, The Law of Trusts § 337.4 at 2673-74 (3d ed. 1967); Restatement (Second) of Trusts § 337, comment m (1959); 4 R. Powell, The Law of Real Property ¶ 567 at 428.54 (rev. ed. 1978).
92. Where the settlor's purposes are not expressed in the trust instrument, extrinsic evidence of the surrounding circumstances is admissible in order to determine the purposes of the trust. Restatement (Second) of Trusts § 337, comment e (1959). Professor Powell advises that this is "a rule fraught with danger and is to be applied most sparingly." 4 R. Powell, The Law of Real Property ¶ 567 at 428.55 (rev. ed. 1978).

93. 45 Cal.App.2d 598, 114 P.2d 669 (1941).
94. The lack of a spendthrift clause was not an oversight. The settlor had told his attorney "I understand spendthrift trusts and I don't want a spendthrift trust. I want him [the settlor's son and income beneficiary] to get the income . . . during his natural life. I want it so he can't go around and beat his creditors. I want him to have an honest, upright life." Estate of Easterday, 45 Cal. App. 2d 598, 603, 114 P.2d 669.
95. Estate of Easterday, 45 Cal. App. 2d 598, 605-06, 114 P.2d 669.
96. Estate of Easterday, 45 Cal. App. 2d 598, 608, 114 P.2d 669.
97. Estate of Easterday, 45 Cal. App. 2d 598, 607, 114 P.2d 669.
98. According to Professor Scott, the most common application of the material purpose doctrine involves spend-

- thrift trust cases. 4 A. Scott, *The Law of Trusts* § 337.2 at 2664 (3d ed. 1967).
99. G. Bogert & G. Bogert, *Handbook of the Law of Trusts* § 40 at 147 (5th ed. 1973).
100. See, e.g., Gray, *Restraints on Alienation* §§ 134-277 (2d ed. 1895); Scott, Control of Property by the Dead, 65 U. Pa. L. Rev. 632, 642 (1917).
101. Cal. Civ. Code §§ 859, 867 (West 1982); Note, Spend-thrift Trusts in California, 40 Cal. L.Rev. 441 (1952).

102. 4 A. Scott, *The Law of Trusts* § 337.2 at 2664 (3d ed. 1967). It should be noted that there are exceptional cases where the courts have departed from a strict application of this rule or have found grounds for circumventing it. For example, in *Estate of Nicely*, 235 Cal. App. 2d 174, 44 Cal. Rptr. 804 (1965), the testator's will established a testamentary trust directing that \$250 per month be paid to the testator's daughter for life, and on her death, to pay the principal to certain charities. The trust was made spendthrift, and also included a provision giving the trustee the power to invade corpus in an emergency affecting the daughter. A portion of the charitable remainder gift violated former California Probate Code section 41, and would normally have passed outright to the daughter under the intestacy laws. However, because of the corpus invasion power, it was not possible to determine the extent to which section 41 was violated, and how much should pass by intestacy. The trial court held that distribution of the intestate portion would therefore be delayed until the death of the daughter. The appellate court sought and found a more practical result. The simplest solution would involve direct termination of the trust, but this was precluded by the spendthrift clause. However, the court indicated that the daughter could

waive the corpus invasion provision. With this waiver, "the trust becomes nothing more than an annuity." 235 Cal. App. 2d 174, 185, 44 Cal. Rptr. 804. The court reasoned that although under the terms of the trust, the charitable beneficiaries were not to take until the death of the life beneficiary, it was obvious that the date deferment was not for their benefit but was only a resulting consequence of the life estate. It was concluded that the daughter could apply to the probate court for the purchase of an annuity to pay her the \$250 per month, with the proviso that the annuity be inalienable, and not subject to creditors' claims or assignment. Once this was accomplished, there would be no further purpose served by the continuance of the trust; it would be "dry" and "naked" and hence terminable. 235 Cal. App. 2d 174, 186, 44 Cal. Rptr. 804. Other exceptional circumstances are discussed in the section on distributive deviation; see text accompanying notes 196-218, infra.

103. 131 Cal. App. 2d 9, 280 P.2d 81 (1955).

104. 131 Cal. App. 2d 9, 14, 280 P.2d 81. As an additional bar to termination, the court in Leonardini also found that unborn beneficiaries had an interest in the corpus. 131 Cal. App. 2d 9, 17, 280 P.2d 81. This

problem is discussed at text accompanying notes 109-150, infra.

105. 4 R. Powell, *The Law of Real Property* ¶ 567 at 428.53 (rev. ed. 1978). "The purpose of a [spendthrift] trust is to prevent voluntary or involuntary alienation by the beneficiaries. To hold that it is valid means that the court will aid in effecting the object of the settlor. It would be directly frustrating his purpose if the court ended the trust and gave the principal to the beneficiaries so they could sell and their creditors could take their interests." G. Bogert & G. Bogert, *The Law of Trusts & Trustees* § 1008 at 435-36 (rev. 2d ed. 1983).
106. This assumes, of course, that the other requisites for early termination are met; i.e., that all beneficiaries are sui juris and consent to the termination.
107. See note 102, supra. It should be noted that courts are unwilling to substitute an annuity for a trust income interest without the express consent of the life beneficiary. Thus, in *Estate of Feuereisen*, 17 Cal. App. 3d 717, 95 Cal. Rptr. 165 (1971), where the trust provided that \$270 per month should be paid to the settlor's sister for life, and on her death, the trust assets were to be distributed to certain

charities, the court refused to authorize the purchase of a commercial annuity and termination of the trust in the absence of the consent of the life beneficiary. The court also indicated that "good cause" must be shown for the purchase of an annuity, and that the saving of trustees fees did not necessarily amount to good cause, particularly where the life beneficiary apparently had objections to the substitution.

108. But see *Estate of Feuereisen*, discussed in the preceding note.

109. It is well established that termination will be permitted if the settlor and all beneficiaries desire it, even though the purposes of the trust have not been totally fulfilled. *Heifetz v. Bank of America*, 147 Cal. App. 2d 776, 785, 305 P.2d 979 (1957); Restatement (Second) of Trusts § 338(1) (1959); 4 A. Scott, *The Law of Trusts* § 337 at 2687-88 (3d ed. 1967). Similarly, where the settlor is himself the sole beneficiary, and desires to end the trust prematurely, termination will be allowed. *Title Insurance & Trust Co. v. McGraw*, 72 Cal. App. 2d 390, 164 P.2d 846 (1945); Restatement (Second) of Trusts § 339 (1959); 4 A. Scott, *The Law of Trusts* § 339 at 2694 (3d ed. 1967); Note, Termination of Trusts, 46 Yale L.J. 1005, 1015.

110. See Estate of Gallimore, 99 Cal. App. 2d 664, 222 P.2d 259 (1950).
111. See, e.g., Estate of Feuereisen, 17 Cal. App. 3d 717, 722-23, 95 Cal. Rptr. 165 (1971), holding that the consent of the life beneficiary was necessary for termination of the trust; Estate of Gallimore, 99 Cal. App. 2d 664, 222 P.2d 259 (1950), holding that the trust could not be terminated over the objections of one remainderman, even though all beneficiaries were competent adults and all other beneficiaries, including three remaindermen and the income beneficiary, consented to termination.
112. See note 100 supra; see also G. Bogert & G. Bogert, The Law of Trusts and Trustees § 1004 at 375-76 (rev. 2d ed. 1983); Early Termination of Trusts, 2 Real Prop., Prob. and Trust J. 303, 304 (1967). The only jurisdiction deviating from this rule appears to be Kentucky. 4 R. Powell, The Law of Real Property ¶ 566 at 428.40(4) (rev. ed. 1978). The underlying rationale for this rule is that since no one other than the settlor has any beneficial interest in the property, he should be permitted to do with it as he pleases, so long as he is not under any legal incapacity. The interest of the trustee in continuing fees is not

sufficient to prevent termination of the trust. Evans, *The Termination of Trusts*, 37 *Yale L.J.* 1070, 1072 (1928). The major argument against the rule is that if the settlor has created a trust for his own protection, he should not be permitted later in a moment of folly to deprive himself of that protection. Professor Scott responds: "Even though in a moment of folly he has created a trust . . . there is no reason why he should not later in a moment of wisdom revoke the trust." 4 A. Scott, *The Law of Trusts* § 339 at 2699 (3d ed. 1967).

113. Restatement (Second) of Trusts § 127, comment b (1959).

114. Restatement (Second) of Trusts § 127, comment b (1959); *Woodruff v. Trust Co. of Georgia*, 233 Ga. 135, 210 S.E.2d 321 (1974); see generally, Browder, Trusts and the Doctrine of Estates, 72 *Mich. L. Rev.* 1509, 1524 (1974). If the settlor is the income beneficiary and the trust contains no provision for the distribution of principal at his death, the settlor is regarded as the sole beneficiary, since the trustee will hold upon a resulting trust for him or his estate. Restatement (Second) of Trusts § 127, comment b (1959).

115. Restatement (Second) of Trusts § 127, comment b (1959).
116. 14 Cal. App. 3d 102, 94 Cal. Rptr. 1 (1971).
117. The settlor executed the trust instruments when he was twenty-one years of age, apparently at his mother's insistence. He testified that he did not realize that the documents were trust instruments until his mother's death six years later. The court acknowledged that it saw no logical reason for the creation of the irrevocable trusts and that the tax consequences were severe, but indicated that the settlor's testimony, although relevant in an action to rescind the trust on the ground of mistake or undue influence, had no bearing on the question of termination; i.e., whether he intended to make a gift to anyone. 14 Cal. App. 3d 102, 104-05, 94 Cal. Rptr. 1, 2-3.
118. The settlor further argued that because he had a will, it was unlikely that he would die intestate and hence there was little likelihood that anyone would take in default of the exercise of the power of appointment. The existence of the power indicated an intent not to make a gift to those who would take in default of the exercise of the power. The court indicated that it

was constrained by precedent to reject this argument.
14 Cal. App. 3d 102, 107, 94 Cal. Rptr. 1, 4.

119. 171 Cal. 637, 154 P. 306 (1915), noted at 4 Calif.
L. Rev. 354 (1915-16).

120. 171 Cal. 637, 642, 154 P. 306.

121. 171 Cal. 637, 648, 154 P. 306. Civil Code § 779
abolishes the Rule in Shelley's Case. "The effect of
the repeal of this arbitrary rule is to restore to
courts of equity their right to construe this language
. . . in accordance with its plain import and intent."
171 Cal. 637, 644, 154 P. 306. The court's discussion
of the the Rule in Shelley's Case and its reliance on
Civil Code § 779 are somewhat inapposite since the
limitation in the instant case was not technically
within the scope of the rule. The Rule in Shelley's
case contemplates a remainder in the heirs of the
grantee, and not a limitation in favor of the heirs of
the grantor, as was the case in Gray. Comment,
Trusts: Power to Revoke in Absence of an Express Power
of Revocation, 4 Cal. L. Rev. 354, 355 (1915-16); see
also Note, 22 So. Cal. L.Rev. 497, 499 (1949); Note,
Revocation of Trusts By Consent of Beneficiaries, 36
Indiana L.J. 76, 80-81, 83 n.43 (1960); Scott, Revok-
ing a Trust: Recent Legislative Simplifications, 65

Harv. L. Rev. 617, 619 (1952); Comment, The Worthier Title Doctrine in California, 1 Stan. L. Rev. 774, 778 (1949). Furthermore, it is probable that Civil Code § 779 was intended to apply only to real property, and the trust in Gray consisted of both realty and personalty. See Comment, The Worthier Title Doctrine in California, 1 Stan. L. Rev. 774, 778-79 (1949).

122. 171 Cal. 637, 640, 154 P. 306.

123. 171 Cal. 637, 641-42, 154 P. 306.

124. 58 Cal.App.2d., 445, 136 P.2d 597 (1943).

125. 58 Cal.App.2d., 445, 450, 136 P.2d 597.

126. 58 Cal.App.2d., 445, 451-452, 136 P.2d 597.

127. The court relied primarily on Gray v. Union Trust Bank in making this determination. The court did not discuss the possible distinction between Gray and the instant case, viz., the heirs in Gray were to be determined under the intestacy laws in effect at the creation of the trust, while in Hotchkiss, the heirs were to be determined under the succession laws in effect at the time of termination. However, in both cases, the class of heirs taking under the terms of the trust could be different from those who would take at the settlor's death under the laws of intestate succession.

128. The court in Bixby v. Hotchkiss, did cite a comment in the Restatement of Trusts which contained a cross-reference to the section dealing with the worthier title doctrine, but the court did not directly mention the doctrine. 58 Cal.App.2d 445, 451, 136 P.2d, 597, 600. See Verrall, The Doctrine of Worthier Title, A Questionable Rule of Construction, 6 UCLA L. Rev. 371, 391 (1959).

129. 33 Cal.2d 495, 202 P.2d 1018 (1949).

130. 33 Cal.2d 495, 497, 202 P.2d 1018

131. The worthier title doctrine originally consisted of two separate branches, one applicable to devises and the other to inter vivos conveyances. Under the first, a devise to a person who was also the heir of the testator had no effect; the person took as the heir and not under the will. The second rule rendered a limitation in an inter vivos conveyance to the heirs of the grantor void. The purpose underlying both rules was the same: to maximize the feudal incidents of relief, wardship and marriage. When the feudal system fell into obsolescence, both aspects of the doctrine were eventually abolished in England. Verrall, The Doctrine of Worthier Title: A Questionable Rule of Construction, 6 UCLA L. Rev. 371 (1959); L. Simes, The Law of Future Interests § 26 at 56-57 (2d ed. 1966). The rule relating to wills never had much impact in the United States, but the inter vivos aspect of the doctrine gained wide acceptance, though more as a rule of construction than one of law. Id.

132. 225 N.Y. 305, 122 N.E. 221 (1919). Doctor v. Hughes involved an irrevocable inter vivos trust in land with the income payable to the settlor and an express remainder in the settlor's heirs. The issue did not involve termination of the trust but whether the creditors of the remaindermen could reach any inter-

est in the trust property. The court held that no remainder interest had been created. The court recognized that "(T)here may be times . . . when a reference to the heirs of the grantor will be regarded as a gift of a remainder, and will vest title in the heirs presumptive" but indicated that this was not one of those times: "[T]o transform into a remainder what would ordinarily be a reversion, the intention to work the transformation must be clearly expressed. Here there is no clear expression of such a purpose." 225 N.Y.305, 312, 122 N.E.221, 222. The court concluded that this rule of construction most closely approximates the presumed interest of most settlors: "No one is heir to the living, and seldom do the living mean to forego the power of disposition during life by a direction that upon death there shall be a transfer to their heirs." 225 N.Y. 305, 313, 122 N.E. 221, 223.

The constructional principle developed in Doctor v. Hughes is generally accepted, and has been adopted by the Restatement of Trusts. Restatement (Second) of Trusts § 127, comment b (1959). It has, however, been the subject of much litigation. See 1 A. Scott, The Law of Trusts §127.1 (3d ed. 1967) and cases there cited.

133. Bixby v. California Trust Co; 33 Cal. 2d 495, 497, 202 P.2d 1018, 1019.
134. 33 Cal.2d, 495, 499, 202 P.2d 1018, 1020.
135. See, e.g. Comment, The Worthier Title Doctrine in California, 1 Stan. L. Rev. 774 (1949); Note, 22 So. Cal. L. Rev. 497 (1949); compare Verrall, The Doctrine of Worthier Title: A Questionable Rule of Construction, 6 UCLA L.Rev 371, 389-397, 400-402.
136. Cal. Civ. Code § 1073 (West 1982), enacted by Cal. Stats. 1959, c. 122, p. 2005, § 1; Cal. Prob. Code § 109 (West Supp. 1984), enacted by Cal. Stats. 1959, c. 122, p. 2006, § 2. Effective January 1, 1985, Probate Code Section 109 will be replaced by Probate Code Section 6145.
137. Cal. Civ. Code § 1073 (West 1982).
138. "Many of the cases in this area involve the question of whether those consenting to the termination in fact hold all of the beneficial interests in the trust. Often the answer hinges on whether the gift of the remainder is phrased in such a way that under traditional rules of property the life tenant has a fee simple." Wright, Termination of Trusts in

Pennsylvania - Some Current Trends, 115 U. Pa. L. Rev. 917, 922, (1967).

139. "Remainder to the 'heirs' of the life tenant may give him a fee." Id. at n.32.

140. See, e.g., *Fowler v. Lanpher*, 193 Wash. 308, 75 P.2d 132 (1938). Under the Rule in Shelley's Case, if the beneficial interest under a trust of land is limited to a person for life and to his heirs in remainder, he receives an equitable interest in fee, his heirs having no interest. Restatement (Second) of Trusts § 127, comment c (1959). This obviates the necessity of obtaining the consents of those who would otherwise have interests as the "heirs" of the life beneficiary. 4 R. Powell, *The Law of Real Property* ¶ 566 at 428.41 (rev. ed. 1978). Some courts have gone even further, and have held "issue" to mean "heirs" for the purpose of applying the Rule in Shelley's case. See, e.g., *Mylin v. Hurst*, 259 Pa.77, 102 A.429 (1917); *Baxter v. Early*, 31 S.C. 374, 127 S.E. 607 (1925). On occasion, the designation "children" has been interpreted as "heirs" for the purposes of the rule. See, e.g. *Simpson v. Reed*, 205 Pa. 53, 54 A. 499 (1903). See generally, Comment, Revocation of an Intervivos Trust - Who Must Consent, 2 Wayne L. Rev. 34, 36-37 (1955).

141. See e.g., *Wogman v. Wells Fargo Bank and Union Trust Co.*, 123 Cal.App.2d 657, 267 P.2d 423 (1954), holding that the heirs of the income beneficiary were a presently unascertainable group, having an interest in the corpus of the trust by purchase and not by descent.
142. 131 Cal.App.2d 9, 280 P.2d 81 (1955).
143. 131 Cal.App.2d 9, 15-17, 280 P.2d 81.
144. See, e.g. *Estate of Madison*, 26 Cal. 2d. 453, 159 P.2d 630 (1945); *Fletcher v. Los Angeles Trust and Savings Bank*, 182 Cal. 177, 187 P. 425 (1920); *Woestman v. Union Trust and Savings Bank*, 50 Cal. App. 604, 195 P. 944 (1920).
145. 182 Cal. 177, 187 P. 425 (1920), criticized at 21 Calif. L. Rev. 26 (1932-33); see also Comment, 7 Calif. L. Rev. 353 (1918-19), discussing the since vacated Court of Appeal decision in Fletcher.
146. 182 Cal. 177, 182, 187 P. 425.
147. 182. Cal. 177, 184-185, 187 P. 425.

148. Id.
149. 123 Cal.App.2d 657, 267 P.2d 423 (1954).
150. 123 Cal.App.2d 657, 655, 267 P.2d 423.
151. Rodman & Rodman, Virtual Representation: Some Possible Extensions, 6 Real Prop., Prob. & Trust L.J. 281 (1971); Note, Trust Termination and Unborn Beneficiaries, 29 Ohio St. L.J. 741, 742 (1968).
152. 51 Cal. App. 2d 245, 124 P.2d 659 (1942).
153. The trust fund as originally constituted had a value of \$1,350,000. 51 Cal. App. 2d 245, 247, 124 P.2d 659.
154. 51 Cal. App. 2d 245, 253, 124 P.2d 659.
155. The absence of "hostility" between the interest of the representative and those of the unborn is a prerequisite to application of the virtual representation doctrine. Hostility exists where the grant of the relief requested would destroy the interest limited to the unborn person. 2A R. Powell, The Law of Real Property ¶ 296 at 581-82 (rev. ed. 1977).

156. 51 Cal. App. 2d 245, 256, 124 P.2d 659.
157. 51 Cal. App. 2d 245, 252-53, 124 P.2d 659.
158. "When, then, the interest of the unborn is derived from the trust instrument, the representation doctrine is inapplicable for one who might represent the unborn in many cases involving trusts would here be destroying the interest of those represented and not protecting it." Comment, Revocation of "Irrevocable" Trusts, 6 Fordham L. Rev. 242, 253 (1937); see also Trusts: Modification of Irrevocable Trusts through Appointment of a Guardian For Unborn Heirs - Repudiation of Worthier Title Doctrine, 66 Colum. L. Rev. 1552, 1557-58 (1966), where the author suggests that the appointment of a guardian ad litem affords more substantial protection for the interests of the unborn than reliance upon representation by living beneficiaries.
159. Note, Trust Termination and Unborn Beneficiaries, 29 Ohio St. L.J. 741, 744 (1968).
160. 361 F.2d 559 (D.C. Cir. 1966).
161. The settlor desired an additional \$5000 per year to be paid from the trust corpus in order "to accomodate recently incurred expenses and to live more nearly in

accordance with her refined but modest tastes." 361 F.2d 559, 561.

162. 361 F.2d 559, 563.

163. 361 F.2d 559, 563.

164. 361 F.2d 559, 563. As an example of this confusion, the court pointed to the varying interpretations possible from the fact that the settlor has reserved a testamentary power of appointment which, if exercised, could defeat the interest of the heirs. The inclusion of such a power could be viewed as buttressing the presumption of a reversion by indicating that the settlor intended to retain control over the property. On the other hand, many courts have reasoned that the retention of a testamentary power of appointment confirms the intent to create a remainder in the heirs, since the settlor would not have retained the power unless he believed he was creating a remainder interest. 361 F.2d 559, 564. The Restatement takes a middle ground on the issue: "[T]here is some indication that he intended to confer an interest upon his heirs or next of kin which they could be deprived of only by a testamentary appointment, but this is not of itself sufficient to overcome the inference that he intended to give them no such interest but intended to

be the sole beneficiary of the trust." Restatement (Second) of Trusts § 127, comment b (1959).

165. 361 F.2d 559, 564.

166. 361 F.2d 559, 564.

167. 361 F.2d 559, 566.

168. 361 F.2d 559, 566.

169. 361 F.2d 559, 566. The settlor ultimately followed the suggestions of the Court of Appeal, and secured the appointment of a guardian ad litem who consented to the proposed modification. The modification was subsequently approved by the District Court. *Hatch v. Riggs National Bank*, 284 F.Supp. 396 (D.C.D.C. 1968).

170. 361 F.2d 559, 565-66.

171. See, e.g., Cal. Code Civ. Proc. § 373.5 (West 1973); Ill. Rev. Stat. ch. 22, § 6 (1959); Mass. Ann. Laws, ch. 203 § 17 (1955); Md. Rules Proc., Rule 275 (1961); Mich. Stats. Ann. § 27.3178(212) (1947). English law allows the court itself to consent on behalf of unborn beneficiaries to the termination or modification of a trust if the court determines that such action would

- be advantageous to the unborn beneficiaries. 6 & 7 Eliz.2, c. 53 (1958). See generally, Hiller & King, Trusts: Revocation: Doctrine of Worthier Title vs. the Use of Guardians Ad Litem, 41 Conn. B.J. 154, 160-63 (1967).
172. Cal. Code Civ. Proc. § 373.5 (West 1973). This statute was enacted in 1949 as a partial codification of the virtual representation doctrine. *Wogman v. Wells Fargo Bank & Union Trust Co.*, 123 Cal. App. 2d 657, 666, 267 P.2d 423 (1954); 7 Witkin, *Summary of California Law, Trusts*, § 122 at 5481 (8th ed. 1974).
173. Note, Trust Termination and Unborn Beneficiaries, 29 Ohio St. L.J. 741, 744-45 (1968); Trusts: Modification of Irrevocable Trusts Through Appointment of a Guardian for Unborn Heirs - Repudiation of the Worthier Title Doctrine, 66 Colum. L. Rev. 1552, 1554, 1558 (1966).
174. *Leonardini v. Wells Fargo Bank & Union Trust Co.*, 131 Cal. App. 2d 9, 17, 280 P.2d 81 (1955).
175. *Leonardini v. Wells Fargo Bank & Union Trust Co.*, 131 Cal. App. 2d 9, 17, 280 P.2d 81; *Wogman v. Wells Fargo Bank & Union Trust Co.*, 123 Cal. App. 2d 657, 666, 267 P.2d 423 (1954).

176. *Leonardini v. Wells Fargo Bank*, 131 Cal. App. 2d 9, 17-18, 280 P.2d 81.
177. Trusts: Modification of Irrevocable Trusts Through Appointment of a Guardian For Unborn Heirs - Repudiation of the Worthier Title Doctrine, 66 Colum. L. Rev. 1552, 1558-59 (1966); see also, Modification of Irrevocable Intervivos Trusts with Remainder Interests in Settlor's Heirs, 42 Wash. L. Rev. 919, 921-22 (1967).
178. Note, Trust Termination and Unborn Beneficiaries, 29 Ohio St. L.J. 740, 748-49 (1968).
179. Id. If the settlor has the good fortune to hold a testamentary power of appointment over the assets of another trust, he may be in luck. In *Moxley v. Title Insurance & Trust Co.*, 27 Cal. 2d 457, 476-77, 165 P.2d 15 (1946), Justice Traynor suggested that the beneficiary's exercise of a power of appointment over a trust fund established by her father in favor of the unborn beneficiaries under the trust established by her mother might be an adequate quid pro quo for the termination of the mother's trust. The value of the former trust fund apparently greatly exceeded the latter. The majority opinion did not discuss this

issue.

Another possible solution to the quid pro quo requirement would be to recognize non-pecuniary factors, such as familial devotion, as a substitute for consideration. Although the fiduciary responsibilities of guardianship generally would preclude such substitutes, at least one jurisdiction appears to authorize a non-pecuniary quid pro quo. Legislation in Wisconsin allows for the appointment of a guardian ad litem to represent unborn or unascertained beneficiaries, and provides that "a guardian ad litem for such beneficiary may rely on general family benefit accruing to living members of the beneficiary's family as a basis for approving a revocation, modification or termination of a trust or any part thereof." Wis. Stat. Ann. § 701.12.

180. Similar legislation was enacted in New York in 1951 as a response to the volume of litigation spawned by Doctor v. Hughes. N.Y. Laws 1951, c. 180, p. 729, now contained at N.Y.E.P.T.L. § 7-1.9. For discussion of the revised New York statute, see Scott, Revoking a Trust, Recent Legislative Simplification, 65 Harv. L. Rev. 617 (1952); Verrall, The Doctrine of Worthier Title: A Questionable Rule of Construction, 6 U.C.L.A. L. Rev. 370 (1959); Niles, Trusts and Administrations, Annual Survey of American Law 570, 575 (1952). Other

jurisdictions adopting substantially similar provisions include Maryland (Md. Code Ann., Art. 16, § 108) and Oklahoma (Okla. Stats. Ann., tit. 60, § 175.41).

181. Scott, Revoking a Trust: Recent Legislative Simplification, 65 Harv. L. Rev. 617, 623 (1952).
182. Such legislation should be limited to the case where the settlor has provided that the trust income be paid to himself for life, and on his death, the principal is to be distributed to his heirs or next of kin. It is recommended, however, that the statute be applied whether or not the settlor has reserved a testamentary power of appointment. See 4 Powell, The Law of Real Property, ¶ 566 at 428.48 (rev. ed. 1978), suggesting that the Maryland statute, which is limited to trusts containing a testamentary power of appointment, is unnecessarily restrictive. It should be noted that the proposed legislation may have tax consequences which should be explored before such a statute is adopted. See Johanson, Reversions, Remainders and the Doctrine of Worthier Title, 45 Tex. L. Rev. 1 (1966).
183. The latter terms are more clearly indicative of an intent to make a gift to the described class of persons. Restatement (Second) of Trusts § 127 comment b (1959).
184. In this situation, the settlor is not manifesting any intent to retain control over the property himself, and the common inference (in the absence

of the Rule in Shelley's case) is that a class gift was intended. Restatement (Second) of Trusts § 127 comment c (1959).

185. See text accompanying notes 144-150, supra.
186. Fletcher v. Los Angeles Trust & Savings Bank, 182 Cal. 177, 180-81, 187 P. 425, 426-27 (1920).
187. The seminal case was Jee v. Audley, 1 Cox 324 (1787), holding that a seventy year old woman was conclusively presumed capable of bearing children. The court's knowledge about these matters was derived primarily from the Old Testament. Leach, Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent, 48 A.B.A.J 942 (1962); see generally, Note, 21 Calif .L. Rev. 26 (1932-33).
188. See Leach, Perpetuities in a Nutshell, 51 Harv. L. Rev. 638, 643 (1938).
189. See, e.g., In re Bassett's Estate, 104 N.H. 504, 190 A.2d 415 (1963); P. v. Wilmington Trust Co., 188 A.2d 361 (Del. Ch. 1962). See generally 4 A. Scott, The Law of Trusts § 340.1 at 2714 (3d ed. 1967); Restatement (Second) of Trusts § 340 comment e (1959).

190. 4 A. Scott, The Law of Trusts § 340.1 at 2714 (3d ed. 1967).
191. Note, 21 Calif. L. Rev. 26, 27 n.146 (1932-33); 4 A. Scott, The Law of Trusts § 340.1 at 2714 (3d ed. 1967).
192. 4 A. Scott, The Law of Trusts § 340.1 at 2714 (3d ed. 1967).
193. Note, 21 Calif. L. Rev. 26, 27 (1932-33). "The danger that a woman would submit to such an operation for such a reason [trust termination] is surely negligible" 4 A. Scott, The Law of Trusts § 340.1 at 2714 (3d ed. 1967).
194. Note, 21 Calif. L. Rev. 26, 27 (1932-33). Moreover, even where the evidence of infertility is not conclusive, protection of possible unborn beneficiaries could be achieved by the use of a bond.
195. Courts in other jurisdictions have admitted evidence of male infertility. See, e.g., Scott Trust, 8 D. & C. 2d 66 (Pa. 1955); Krewson Trust, 6 Fid. Rptr. 54 (Pa. 1955). See also Note, Trusts - Termination - Presumption of Ability to Procreate, 14 U. Pitt. L. Rev. 452, 454 (1953).
196. G. Bogert & G. Bogert, The Law of Trusts and Trustees § 994 at 242 (rev. 2d ed. 1983). This power is analogous to the cy-pres doctrine applicable to charitable trusts. Stanton v. Wells Fargo Bank &

Union Trust Co., 150 Cal. App. 2d 763, 310 P.2d 1010 (1957).

197. See, e.g., *Adams v. Cook*, 15 Cal. 2d 352, 101 P.2d 484 (1940); compare *Security-First Nat. Bank v. Easter*, 136 Cal. App. 691, 29 P.2d 422 (1934).

198. See, e.g., *Lambertville Nat. Bank v. Bumster*, 141 N.J. Eq. 396, 57 A.2d 525 (1948); *Citizens Nat. Bank v. Morgan*, 94 N.H. 284, 51 A.2d 841 (1947); see generally, Haskell, Justifying the Principle of Distributive Deviation in Trust Law, 18 *Hastings L.J.* 267, 270-71 (1967). In more recent years some courts have been willing to authorize such deviation where inflation has eroded the value of the trust corpus. It was thought that by freeing the trustees from certain investment constraints contained in the trust instrument, the trust corpus could be invested more productively, thereby allowing the trust to keep pace with inflation. Frolik, Adjustment for Inflation for Fixed-Income Beneficiaries, 54 *Notre Dame Law.* 661, 689-92 (1979); see, e.g., *In re Trusteeship Under Agreement with Mayo*, 259 Minn. 91, 105 N.W. 2d 900 (1960); compare *Stanton v. Wells Fargo Bank & Union Trust Co.*, 150 Cal. App. 2d 763, 310 P.2d 1010 (1957).

199. Estate of Gilliland, 44 Cal.App. 3d 32, 118 Cal. Rptr. 447 (1974). The court will authorize deviation from the terms of the trust where "owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the purposes of the trust." [citation omitted]. Unusual or emergent circumstances afford the basis for deviation." Id.

200. It has been suggested that there are four factors involved in determining whether deviation should be allowed: (1) the severity of the income beneficiary's financial need; (2) the relationship between the income beneficiary and the settlor; (3) the existence of minor or unborn remaindermen; and (4) whether a primary purpose of the settlor included the preservation of corpus for the remaindermen. Frolik, Adjustment for Fixed-Income Trust Beneficiaries, 54 Notre Dame Law. 661, 676-77 (1979).

201. 214 Cal. 128, 4 P.2d 142 (1931).

202. 27 Cal. 2d 457, 165 P.2d 15 (1945); discussed supra at text accompanying notes 71-77.

203. 27 Cal. 2d 457, 468, 165 P.2d 15. See text accompanying notes 71-77, supra.

204. Halbach, Problems of Discretion in Discretionary Trusts, 61 Colum. L. Rev. 1425, 1426 (1961).
205. 30 Cal. 2d 285, 182 P.2d 565 (1947).
206. 30 Cal. 2d 285, 293, 182 P.2d 565, 571.
207. 30 Cal. 2d 285, 295, 182 P.2d 565, 573.
208. Haskell, Justifying the Principle of Distributive Deviation in the Law of Trusts, 18 Hastings L.J. 267, 277 (1967).
209. Halbach, Problems of Discretion in Discretionary Trusts, 61 Colum. L. Rev. 1425, 1427 (1961).
210. 95 N.H. 23, 56 A.2d 641 (1948), noted at 28 B.U. L. Rev. 387 (1948) and 47 Mich. L.Rev. 422 (1948-49).
211. The grandson was represented by a guardian ad litem, who also represented the possible interests of persons as yet unborn.
212. 95 N.H. 23, 25, 56 A.2d 641, 642.

213. Id.

214. 95 N.H. 23, 27, 56 A.2d 641, 644.

215. Id. The court was apparently relying on the doctrine of virtual representation. Although the interests of the unborn beneficiaries were represented by the guardian ad litem, the guardian apparently consented to the proposed modification without extracting any quid pro quo. Under the standard applied by most courts, this is not adequate representation. See text accompanying notes 151-158, supra.

216. 2 A. Scott, The Law of Trusts § 168 (3d ed. 1967); for other generally favorable discussions of the Wolcott case, see Haskell, Justifying the Principle of Distributive Deviation in the Law of Trusts, 18 Hastings L.J. 267, 277-79, 291; Note, Variation of Private Trusts in Response to Unforeseen Needs of Beneficiaries: Proposals for Reform, 47 B.U. L .Rev. 567, 582-88 (1967).

217. In reviewing the second edition of Scott's treatise, Professor Niles commented that although "Professor Scott would like to have the law developed in a more liberal fashion . . . , it does not seem to this reviewer that a judge has the power to exchange his

robes of black for Lincoln green, and to take from the remaindermen and give to the income beneficiary. The doctrine of deviation does not justify the court in playing favorites, even though in certain cases the dead hand would probably applaud." Niles, 32 N.Y.U. L. Rev. 422 (1949), criticizing the Wolcott decision.

218. See note 179, supra.

219. "No trust is created where the same person is named as both trustee and cestui, be the intention ever so clear." Evans, The Termination of Trusts, 37 Yale L.J. 1070, 1093 (1928).

220. Hill v. Conover, 191 Cal. App. 2d 171, 180; 12 Cal. Rptr. 522 (1961); Note, Termination of Trusts, 46 Yale L.J. 1005 (1937); Restatement (Second) of Trusts § 341 (1959); 4 A. Scott, The Law of Trusts § 341 at 2720 (3d ed. 1967); G. Bogert & G. Bogert, The Law of Trusts & Trustees § 1003 at 363 (rev. 2d ed. 1983).

221. Id. The underlying reason for this rule is "the futility of regarding a person as a fiduciary when his only duties in that capacity would be owed to himself." Note, Termination of Trusts, 46 Yale L.J. 1005, 1013 (1937).

222. 4 A. Scott, *The Law of Trusts* § 343 at 2730 (3d ed. 1967). Note that in a spendthrift trust, the beneficiary, having an inalienable interest, cannot terminate the trust by a transfer to the trustee. Id. at 2731.
223. 4 A. Scott, *The Law of Trusts* § 342 at 2724 (3d ed. 1967). However, if the trust contained spendthrift provisions, the beneficiary may be able to compel the trustee to reconstitute the trust. See *Matter of Wentworth*, 230 N.Y. 176, 129 N.E. 646 (1920); but see *Restatement (Second) of Trusts* § 342, comment f (1959), stating that in this situation, the beneficiary should be precluded from holding the trustee liable for breach of trust. For a general discussion of this problem, see Note, Trustee's Liability to Cestui Where Concerted Action Has Prematurely Terminated a Spendthrift Trust, 35 Va. L. Rev. 893 (1949).
224. Note, Termination of Trusts, 46 Yale L.J. 1005, 1013 (1937); see authorities cited at n. 220, supra.
225. *Hill v. Conover*, 191 Cal. App. 2d 171, 180, 12 Cal. Rptr. 522 (1961), stating that "[i]n the present case there were two trustees [who were also beneficiaries.] Neither trustee was sole beneficiary, and

the legal title and the entire beneficial interest in the property was not merged in them or in either of them." See also Restatement (Second) of Trusts §§ 99, 115 (1959; Note, Termination of Trusts, 46 Yale L.J. 1005, 1013 (1937).

226. Hunt v. Lawton, 76 Cal. App. 655, 245 P.2d 803 (1926).

227. Evans, Termination of Trusts, 37 Yale L.J. 1070, 1077-79 (1928).

228. Note that where the income beneficiary acquires an equitable interest in the trust corpus and such remainder is contingent or defeasible, termination will not be allowed due to the existence of unborn or unascertained beneficiaries whose interests would be adversely affected. Estate of Washburn, 11 Cal. App. 735, 106 P. 415 (1909); see also Hunt v. Lawton, 76 Cal. App. 655, 668-69, 245 P. 803 (1926).

229. See, e.g., Estate of Easterday, 45 Cal. App. 2d 598, 114 P.2d 669 (1941). See text accompanying notes 93-97, supra.

230. Annotation, Termination of Trust Where Life Interest and Remainder or Reversion Are Acquired by Same Person, 50 A.L.R.2d 1161 (1956).

231. Mabry v. Scott, 51 Cal.App.2d 245, 252-53, 124 P.2d
659 (1942).