

Memorandum 93-40

Subject: New Topics and Priorities

BACKGROUND

It is the Commission's practice annually to review the topics on its calendar and determine priorities for work during the coming year and thereafter. A year ago after reviewing topics and priorities, the Commission decided that its highest priorities should continue to be development of a new Administrative Procedure Act and follow-up legislation on the new Family Code. These two projects have consumed the bulk of Commission and staff resources during the past year.

The administrative procedure project will continue to consume substantial amounts of Commission and staff resources during 1993-94, but work on the Family Code should diminish. This memorandum reviews other matters on the Commission's Calendar of Topics that the Commission might wish to give a priority to, and summarizes suggestions we have received for new topics that should be studied.

Overshadowing all of this is the possibility that the Legislature will direct the Commission to make recommendations concerning trial court consolidation on a crash basis. This matter is discussed below.

TOPICS CURRENTLY AUTHORIZED FOR COMMISSION STUDY

There are 29 topics on the Commission's Calendar of Topics that have been authorized for study by the Commission. Many of these are topics the Commission has completed work on; they are retained in case corrective legislation is needed. The staff believes that if the matter has been dormant for a sufficiently long period, we ought to drop it from our Calendar.

Below is a discussion of the topics on the Commission's Calendar. The discussion indicates the status of each topic and the need for future work. We also identify matters we recommend be dropped from the Calendar.

Creditors' Remedies

Beginning in 1971, the Commission made a series of recommendations covering specific aspects of creditors' remedies and in 1980 obtained enactment

of a comprehensive statute covering enforcement of judgments. Since enactment of the Enforcement of Judgments Law, the Commission has submitted a number of recommendations to the Legislature.

Exemptions. Code of Civil Procedure Section 703.120 requires that the Law Revision Commission by July 1, 1993, and every ten years thereafter, review the exemptions from execution and recommend any changes in the exempt amounts that appear proper. The Commission has deferred work on this task to January 1, 1995, due to budgetary considerations, as authorized by Government Code Section 7550.5. If we are to meet the deferred statutory deadline, we must devote resources to this task during the coming year.

Judicial and nonjudicial foreclosure of real property liens. This is a matter that the Commission has recognized in the past is in need of work. A study of judicial and nonjudicial foreclosures would be a major project.

Default in a civil action. From time to time, the Commission has received letters suggesting that default judgment procedures are in need of study so that the existing provisions can be reorganized and improved in substance. This probably would not be as difficult as the study of foreclosure.

Probate Code

The Commission drafted the new Probate Code and remains active in the field.

Development of a comprehensive power of attorney statute. This project is well underway, and we hope to have legislation on it for 1994.

Definition of community property, quasi-community property, and separate property. The Commission has received communications addressed to problems in the definition of marital property for probate purposes. We understand the State Bar Estate Planning and Family Law Sections are working on this jointly.

Uniform rules on survival requirements, antilapse provisions, revocation, and change of beneficiaries for wills and will substitutes. We have on hand studies prepared by Professor French on antilapse provisions. The Uniform Law Commission has just completed work in this area. We now understand that the State Bar is actively working on this project. See Exhibit pp. 1-2. We would continue to defer work on it so as not to duplicate the State Bar's efforts.

Application of family protection provisions to nonprobate transfers. A related issue that the State Bar is not touching, according to Exhibit pp. 1-2, is

whether the various probate family protections, such as the share of an omitted spouse or the probate homestead, should be applied to nonprobate assets. The staff believes this issue is important and becoming critical as more and more estates pass outside probate. We have received phone calls from several lawyers about it, and the issues are popping up in the advance sheets. The Commission should address this problem.

Creditors' rights against nonprobate assets. The staff has identified policy issues. The Commission will monitor experience under the new trust claims statute to see whether to proceed with this project.

Alternative beneficiaries for unclaimed distribution. The concept is that unclaimed property distributed in probate would go to secondary heirs rather than escheat. The Commission decided to wait until the State's finances improve before considering this.

Filing fees in probate. The staff has done substantial work trying to make sense out of the filing fee system in probate, supported by the practicing bar. Court clerical staff had problems with this, and negotiations between clerks and lawyers have apparently lapsed. The Judicial Council has proposed legislation on the same issue. The staff plans to reactivate this worthwhile matter sometime.

Nonprobate transfers of community property. Professor Kasner's study raised a number of important issues that the Commission deferred. Many of these issues relate to family law and community property as well as estate planning:

Whether the statute providing for unilateral severance of joint tenancy real property should be extended to personal property such as securities.

Liberalization of gift statute (de minimis gifts, gifts made with tacit consent).

Review of policy of CC § 4800.2.

Gifts in view of impending death.

Life insurance (definition of the community property interest of uninsured spouse).

Federal preemption of community property rules under ERISA.

Terminable interest rule—has it been repealed for purposes of rights at death?

Rights of heirs of consenting spouse after death of consenting spouse/duties of donor spouse until death of consenting spouse.

Revision of transmutation statute.

Community property presumptions still necessary?

Should rules governing separate and community rights in the case of property improvement be further adjusted?

Review nonprobate transfers of quasi-community property.

Other matters the Commission has deferred for future study. In the process of preparing the new Probate Code the Commission identified a number of areas in need of further study. These are all matters of a substantive nature that the Commission felt were important but that could not be addressed quickly in the context of the code rewrite. The Commission has reserved these issues for study on an ongoing basis. Topics on the "back burner" list include:

Statutory 630 Affidavit Form

Transfer on Death Designation for Real Property

Summary Guardianship or Conservatorship Procedure

Uniform Transfers to Minors Act

Interest on Lien on Estate Property (Attorney Fees)

Tort & Contract Liability of Personal Representative

Rule Against Perpetuities and Charitable Gifts

Jury Trial on Existence of Trust

Multiple Party Bank Account Forms

Real and Personal Property

The study of property law was authorized in 1983, consolidating various previously authorized aspects of real and personal property law into one comprehensive topic.

Application of Marketable Title Act to obsolete restrictive covenants. The Commission made a series of recommendations designed to improve the marketability of title to property. Provisions were enacted upon Commission recommendation to remove clouds on title created by (1) ancient mortgages and deeds of trust, (2) dormant mineral rights, (3) unexercised options, (5) powers of termination, (6) unperformed contracts for sale of real property, and (7) abandoned easements. The Commission plans to monitor adoption of the Uniform Dormant Mineral Interest Act in other jurisdictions, and if there appears to be widespread acceptance, will again raise the issue of adoption of the act in California. The Commission has long planned to undertake a study to determine whether and how the marketable title statute should be made applicable to obsolete restrictive covenants; this is an important but rather difficult matter.

Covenants that run with the land. Another real property matter that the academics agree should be addressed is repeal of Civil Code Section 1464, relating to covenants that run with the land. It is said to be a trap for lawyers and has been on the Commission's Calendar of Topics for many years. This is a small project we could work into the agenda for review when the Commission has time.

Adverse possession of personal property. The Commission has withdrawn its recommendation on this matter pending consideration of issues raised by the State Bar Committee on Administration of Justice. The Commission has made this a low priority matter.

Family Law

The study of family law was authorized in 1983, consolidating various previously authorized studies into one comprehensive topic.

Marital agreements made during marriage. California now has the Uniform Premarital Agreements Act and detailed provisions concerning agreements relating to rights upon death of one of the spouses. However, there is no general statute governing marital agreements during marriage. Such a statute would be useful, but the development of the statute might involve controversial issues. Also, the issue whether the right to support can be waived in a premarital agreement should be considered.

The List. Many substantive issues raised in connection with drafting the Family Code have been preserved on "The List". The Commission has not been interested in getting involved with these issues.

Prejudgment Interest

This topic was added to the Commission's Calendar of Topics by the Legislature in 1971 because some members of the Legislature believed that prejudgment interest should be recoverable in personal injury actions. This topic was never given priority by the Commission. The Commission doubted that a recommendation by the Commission would carry much weight, given the positions of the Trial Lawyers Association and the insurance companies and other potential defendants on the issue.

Class Actions

This topic was added to the Commission's Calendar of Topics in 1975 on request of the Commission. However, the Commission never gave the topic any

priority because the State Bar and the Uniform Law Commissioners were reviewing the Uniform Class Actions Act. Only two states—Iowa and North Dakota—have enacted it, and it has been downgraded to a Model Act. The staff questions whether the Commission could produce a statute in this area that would have a reasonable chance for enactment, given the controversial nature of the issues involved.

Offers of Compromise

This topic was added to the Commission's Calendar of Topics at the request of the Commission in 1975. The Commission was concerned with Section 998 of the Code of Civil Procedure (withholding or augmenting costs following rejection or acceptance of offer to allow judgment). The Commission noted several instances where the language of Section 998 might be clarified and suggested that the section did not deal adequately with the problem of a joint offer to several plaintiffs. Since then Section 3291 of the Civil Code has been enacted to allow recovery of interest where the plaintiff makes an offer pursuant to Section 998.

The Commission has never given this topic priority, but it is one that might be considered by the Commission sometime in the future on a nonpriority basis when staff and Commission time permit work on the topic.

Discovery in Civil Actions

The Commission requested authority to study this topic in 1974. Although the Commission considered the topic to be an important one, the Commission did not give the study priority because a joint commission of the California State Bar and the Judicial Council produced a new discovery act that was enacted into law. The Commission should consider whether this topic should be dropped from its Calendar of Topics.

Procedure for Removal of Invalid Liens

This topic was added to the Commission's Calendar of Topics by the Legislature in 1980 because of the problem created by unknown persons filing fraudulent lien documents on property owned by public officials or others to create a cloud on the title of the property. The Commission has never given this topic priority, but it is one that might be considered on a nonpriority basis in the future when staff and Commission time permit. The staff has done a preliminary

analysis of this matter that shows a number of remedies are available under existing law. The question is whether these remedies are adequate.

Special Assessment Liens for Public Improvements

There are a great number of statutes that provide for special assessments for public improvements of various types. The statutes overlap and duplicate each other and contain apparently needless inconsistencies. The Legislature added this topic to the Commission's Calendar of Topics in 1980 with the objective that the Commission might be able to develop one or more unified acts to replace the variety of acts that now exist. (A number of years ago, the Commission examined the improvement acts and recommended the repeal of a number of obsolete ones. That recommendation was enacted.) This legislative assignment would be a worthwhile project but would require a substantial amount of staff time.

Injunctions

This topic was added to the Commission's Calendar of Topics by the Legislature in 1984 because comprehensive legislation was proposed for enactment and it was easier for the Legislature to refer the matter to the Commission than to make a careful study of the legislation. The Commission has decided that due to limited funds, it will not give priority to this study, unless there is a legislative directive indicating the need for prompt action on this matter. The Commission currently is circulating a tentative recommendation on one aspect of the law governing temporary restraining orders.

Involuntary Dismissal for Lack of Prosecution

The Commission recommended a comprehensive statute on this topic in 1983. The Commission should consider whether this topic should be dropped from its Calendar of Topics.

Statutes of Limitations for Felonies

The Commission submitted a recommendation for a comprehensive statute on this topic which was enacted in 1984. The Commission should consider whether this topic should be dropped from its Calendar of Topics.

Rights and Disabilities of Minors and Incompetent Persons

The Commission has submitted a number of recommendations under this topic since its authorization in 1979 and it is anticipated that more will be submitted as the need becomes apparent.

Child Custody, Adoption, Guardianship, and Related Matters

The Commission obtained several background studies on child custody and adoption pursuant to this 1972 authority, but never pursued them. The Legislature is actively involved in this area and the staff would not devote Commission resources to it.

Evidence

The California Evidence Code was enacted upon recommendation of the Commission. Since then, the Federal Rules of Evidence have been adopted. The Commission has available a background study that reviews the federal rules and notes changes that might be made in the California code in light of the federal rules. However, the study was prepared many years ago and would need to be updated before it is considered by the Commission. In addition, a background study by an expert consultant of the experience under the California Evidence Code (enacted more than 25 years ago) might be useful before the Commission undertakes a review of the Evidence Code.

Arbitration

The present California arbitration statute was enacted in 1961 upon Commission recommendation. The topic was retained on the Commission's Calendar so that the Commission has authority to recommend any needed technical or substantive revisions in the statute.

Modification of Contracts

The Commission recommended legislation on this topic that was enacted in 1975 and 1976. The Commission should consider whether this topic should be dropped from its Calendar of Topics.

Governmental Liability

The comprehensive governmental tort liability statute was enacted upon Commission recommendation in 1963 and additional legislation on this topic was enacted in the following years upon Commission recommendation. Other groups

have been active in this field in recent years. The Commission should consider whether this topic should be dropped from its Calendar of Topics.

Inverse Condemnation

The Commission has made recommendations to deal with specific aspects of this 1971 topic but has never made a study looking toward the enactment of a comprehensive statute, primarily because inverse condemnation liability has a constitutional basis and because it is unlikely that any significant legislation could be enacted.

Liquidated Damages

The Commission submitted a series of recommendations resulting in enactment of a comprehensive liquidated damages statute under this 1973 authority. The Commission should consider whether this topic should be dropped from its Calendar of Topics.

Parol Evidence Rule

The Commission obtained enactment of the Parol Evidence Rule in 1978. The Commission should consider whether this topic should be dropped from its Calendar of Topics.

Pleadings in Civil Actions

The Commission obtained enactment of its recommendation proposing a comprehensive statute relating to pleading in 1971. The Commission should consider whether this topic should be dropped from its Calendar of Topics.

Administrative Law

This topic is under active consideration by the Commission. The Commission has circulated a tentative recommendation on the first portion of the study, relating to administrative adjudication, which will be reviewed and revised in the fall and winter, with legislation introduced in 1994. However, there remains a substantial amount of work to be done in searching out and amending nonconforming statutes that govern hundreds of different agencies.

The second phase of the administrative law study is judicial review, on which the Commission is currently working. We have made some initial policy decisions and reviewed some initial drafts. Professor Asimow will deliver the last portion of the background study on this matter shortly.

Payment and Shifting of Attorneys' Fees Between Litigants

The Commission requested authority to study this matter in 1988 pursuant to a suggestion by the California Judges Association. The staff has done a substantial amount of work on this topic. We understand that an American Bar Association committee has been preparing to publish proposals based on the staff's work.

The Commission has deferred work on this subject pending receipt from the CJA of an indication of the problems they see in the law governing payment and shifting of attorneys' fees between litigants.

Family Code

This topic is under active consideration by the Commission and needs to be continued to take care of technical problems over the next few years.

Uniform Unincorporated Nonprofit Association Act

This topic was authorized in 1993. The Commission has retained Professor Michael Hone of University of San Francisco Law School to prepare a background study. The study is due at the end of 1993. The Commission could circulate the study for comment by interested persons. If it appears that a recommendation could be prepared with relatively little trouble, we would do it. Otherwise, we would defer the matter for later Commission review.

Unfair Competition Litigation

This topic was authorized in 1993. The Commission has retained Professor Robert Fellmeth of University of San Diego Law School to prepare a background study. The study is due at the end of 1994.

Business Judgment Rule and Derivative Actions

This topic was authorized in 1993. The Commission has retained Professor Melvin Eisenberg of University of California, Berkeley, Law School to prepare a background study. The study is due September 1994.

TRIAL COURT UNIFICATION

Senator Lockyer's SCA 3 would add to the June 1994 ballot a proposal to consolidate the superior, municipal, and justice courts into a unified system of trial courts of equal jurisdiction, called district courts. There is currently sentiment inside and outside the Legislature to have the Law Revision

Commission play a role in this matter. Specifically, the Commission may be asked to make recommendations concerning the wording of the constitutional amendment, which would need to be submitted by February 1, 1994. In addition, the Commission might be asked to make recommendations concerning necessary statutory provisions for implementation of the change, if it is approved at the election.

As of this writing, the text of the reference to the Commission being discussed would read as follows:

Resolved by the Senate of the State of California, the Assembly thereof concurring, That the Legislature approves for study by the Law Revision Commission the proposed amendment to the State Constitution contained in SCA 3 (Lockyer) of the 1993-94 Regular Session, pertaining to the unification of the trial courts, with recommendations to be forwarded to the Legislature by February 1, 1994, pertaining to the appropriate composition of the amendment, and further recommendation to be reported pertaining to statutory changes that may be necessitated by court unification.

Needless to say, if this resolution is adopted, it will necessarily become the Commission's highest priority matter, and may preempt other matters for a time. The staff will supplement this memorandum when the situation becomes clearer.

NEW TOPICS

During the past year the Commission has received a number of suggestions for study of new topics. These suggestions are discussed below. For any of these topics, prior legislative authorization would be required. Only after the topic was approved by the Legislature would we would assign it a priority.

Vexatious Litigants

We have received correspondence from Arthur L. Johnson of International Services (Exhibit pp. 3-4) to the effect that the vexatious litigants statute, Code of Civil Procedure Sections 391-391.7, is in need of revision. The types of revisions suggested by Mr. Johnson are essentially that a vexatious litigant determination should not be based on a simple count of the number of cases a person has been involved with. Rather, more attention should be paid to the circumstances, including the nature of the case, whether there have been settlements, and whether the new case might nonetheless be meritorious.

The staff's feeling is that the problems with the vexatious litigant statute do not appear sufficiently serious in light of the other important matters on the Commission's agenda such that we would want to devote our resources to it. The State Bar was the origin of the vexatious litigant statute; we would refer the matter to the Litigation Section of the State Bar.

Statute of Limitations

We have noted an article, *California Code of Civil Procedure Section 351: Who's Really Paying the Toll?*, 23 Pac. L J. 1639 (1992), that indicates a need for review of the principle that statutes of limitation are tolled while the defendant is out of state. We have not reproduced the article here because of its length. It argues that the tolling provision is a relic of an era before long-arm service and jurisdiction concepts. It concludes that the statute should be repealed outright, or supplemented by a provision that a person is not considered to be out of state as long as the person is subject to jurisdiction of the California courts, or replaced by a provision that tolls the statute of limitations only when a defendant is not amenable to service of process.

This would be an appropriate matter for Commission study. However, given the demands on the Commission's resources, it is unlikely we would get to it for some time. We could get authorization to study the matter now, and then when funds permit engage a consultant to do a background study on the issue on a low priority basis.

Conservatorship

The presiding judge of the Sacramento Superior Court Probate Division, Kenneth L. Hake, has forwarded us a copy of an article by Professor Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 Geo. Wash. L. Rev. 1818 (1992). Judge Hake notes that the article raises important issues regarding the rights of proposed conservatees, and although the Commission has completed its work in the conservatorship area, it might want to revisit it. Exhibit p. 5.

Professor Rein argues that the substantive standards for imposition of a conservatorship need to be stricter to preserve fundamental liberty interests of the elderly, since conservatorship frequently leads to dehumanizing institutionalization. Existing statutes are too value-laden and vague, and

improperly focus on the disabilities of the conservatee rather than on what should be done for the person; they serve the benefit of others rather than the conservatee. Professor Rein proposes that the statutes be revised to require a realistic plan of positive benefit for the conservatee before conservatorship may be imposed, and that a reluctant or objecting conservatee's own choice be respected unless there is an indisputably powerful policy reason to override it.

These are matters that are thrashed out regularly in the Legislature, and the staff believes the Commission can add little to this debate. We would forward the article to the Senate Subcommittee on Aging, which is conversant with concerns of this type.

CONCLUSION

The Legislature has directed the Commission to give the Family Code project a priority equal to the administrative law study. In addition, the Legislature has mandated that the Commission review two other matters with statutory due dates:

(1) The Commission must review statutes providing for exemptions from enforcement of money judgments every 10 years and recommend any necessary changes, commencing July 1, 1993. We have deferred this study to January 1, 1995, pursuant to statutory authority. If we are to meet the deferred statutory deadline, we must devote resources to this task during the coming year.

(2) The Commission must study the impacts of changes in Code of Civil Procedure Sections 483.010 and 483.015, relating to prejudgment attachment, during the period from January 1, 1991, through December 31, 1993. The Commission's report is due on or before December 31, 1994. If we are to meet the statutory deadline, we must devote resources to this task during the coming year.

Also, the prospective project on trial court unification, if assigned, would occupy the highest priority, and work on that would need to be done immediately and possibly exclusively.

In light of these legislatively established priorities, the staff believes the Commission at present has little or no flexibility to elevate other matters to priority status.

The staff does recommend that the Commission seek authority to review at some time in the future the tolling of the statute of limitations while the defendant is out of state.

And the staff recommends that the following matters be dropped from the Commission's Calendar of Topics:

Discovery in Civil Actions
Involuntary Dismissal for Lack of Prosecution.
Statutes of Limitation for Felonies
Modification of Contracts
Governmental Liability
Liquidated Damages
Parol Evidence Rule
Pleadings in Civil Actions

As to any of these matters, the Commission still retains general statutory authority to study and recommend revisions to correct technical or minor substantive defects in the statutes. Gov't Code § 8298.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Should Rules of Construction of Wills be Applied to Living Trusts?

Melitta Fleck
Gray, Cary, Ames & Frye
La Jolla, California

California estate planning attorneys are familiar with the rules of construction of wills contained in Probate Code sections 6140 through 6179. The paramount rule of construction of wills is that the intention of the testator controls (§ 6140(a)).¹ The rules of construction apply where the intention of the testator is not clearly expressed in the terms of the will. Under those circumstances the rules of construction provide valuable guidance in interpreting wills. However, California practitioners are seeing that more clients are using living trusts rather than wills to transfer wealth at death. This article will explore the application of the rules of construction of wills to the construction of the terms of a revocable living trust.

A. Rules of Construction of Wills

The rules of construction of wills are found in Division 6 of the California Probate Code entitled "Wills and Intestate Succession." Chapter 5 of Division 6 contains the "Rules of Construction of Wills." It is helpful to review these rules before evaluating their possible application to living trusts.

For example, it is noteworthy that the rules of construction of wills are subject to a choice of law provision which allows a testator to select the local law of another state to determine the meaning and legal effect of a disposition in a will. This choice of law provision is, however, subject to certain limitations. It will not be given effect if the law elected to be applied is contrary to the community or quasi-community property rights of the surviving spouse. It will also not be given effect if it is contrary to the family protection provisions (e.g. probate homestead, family allowance) of California law or if it is contrary to any other public policy of this state (§ 6141).

The rules of construction are helpful in clarifying that a transfer of property to more than one person vests the property in the beneficiaries as tenants in common (§ 6143). They eliminate the common law rule of worthier title (§ 6145). They provide for the lapse of testamentary transfers if the beneficiary fails to survive the testator but also contain an antilapse provision where the beneficiary is a member of the class of kindred of the testator or kindred of a surviving, deceased or former spouse of the testator (§§ 6146 and 6147). The rules of construction clarify that if a testamentary transfer other than a residuary transfer fails for any reason, the property transferred becomes part of the residue, and if a residuary gift to two or more persons fails, the property is transferred to the other residuary beneficiaries (§ 6148).

These rules identify the members of a class who are to benefit from a class gift providing such detail as rules relating to the inclusion of a person conceived before the time of determining the members of a class but born afterwards (§ 6150). Devises to heirs are defined to benefit the testator's heirs with their identities and respective shares to be determined as if the testator died intestate at the time when the devise is to take effect in enjoyment and according to the California laws of intestate succession of property not acquired from a predeceased spouse (§ 6151). A recent amendment of this rule clarifies that if a person's surviving spouse is considered an heir but is remarried at the time the devise is to take effect in enjoyment, the spouse is eliminated from the group of heirs. The rules of construction provide assistance in defining the beneficiaries of a class gift if they are half-bloods, adopted persons, persons born out of wedlock, stepchildren or foster children, or the issue of all such persons (§ 6152). They also

define the various classes of testamentary gifts (e.g. a specific devise, general devise, demonstrative devise, general pecuniary devise and residuary devise) (§ 6154).

For purposes of ascertaining the meaning of language used in a will, the rules of construction require that every expression in a will be given effect and favor interpretation of wills that prevent intestacy over interpretations that result in intestacy (§ 6160). Words are to be construed in their ordinary and grammatical meaning unless a contrary intent is clearly expressed and technical words are to be given their technical meaning unless a contrary intent is clear or unless the testator was the scrivener and was not familiar with the technical sense of the language used (§ 6162). The rules of construction also encompass the rules for exoneration of gifts and ademption (§§ 6165-6179).

B. Should These Rules Be Applied to Living Trusts?

Estate planners frequently counsel their clients to avoid probate by using a revocable living trust rather than a will to transfer their estate. While revocable living trusts are created without observing the strict testamentary formalities required of wills, they clearly function as will substitutes. Unlike other will substitutes such as beneficiary designations and joint tenancies, trusts are not limited to specific assets. A revocable living trust can be used to transfer a wide range of assets upon the death of the trustor if title to those assets has been properly transferred to the trustee of the trust. Trusts are the most flexible alternatives to wills. They afford the trustor the opportunity to transfer wealth quickly, privately and frequently less expensively than would be the case under a will.

Given the popularity of living trusts, it is noteworthy that, with some exceptions, there are no helpful rules of construction which parallel the rules for construction of wills. It should be noted that, although technically not appropriate, there has been a de facto application of the rules of construction of wills to trusts. In addition, these rules of construction have historically been regularly applied to testamentary trusts. In *Lombardi v. Blois*, 230 Cal.2d 191 (1964), the court applied several of the rules of construction of wills in interpreting the meaning of dispositive provisions in a revocable living trust. In applying the paramount rule of construction, the court stated that:

in seeking the true construction of a trust instrument, inter vivos or testamentary as the case may be, we must if possible ascertain and effectuate the intention of the trustor or testator as expressed by the language of the instrument itself.
Lombardi at 197.

On the other hand, California courts have frequently declined to apply the rules of construction to documents other than wills (see, e.g., *Tassi v. Tassi*, 160 Cal.2d 680 (1958)). Despite the widespread use of trusts and the uncertainty created by the periodic de facto application of the will construction provisions to trusts, trustors are not yet protected by the guidance provided by the rules of construction of wills. This uncertainty should be clarified. Since the California Trust Law (Division 9 of the California Probate Code) has virtually eliminated the distinction between revocable

Continued on page 16

Should Rules of Construction of Wills be Applied to Living Trusts?

Continued from page 15

living trusts and testamentary trusts, it seems logical to revise the statutory provisions of the California Probate Code to apply the rules of construction of wills to revocable living trusts.

It should be noted that efforts have been made to so revise the statutes, but only on a piecemeal basis. Some of the rules of construction contained in the Probate Code have been expanded to apply to both wills and trusts. The 1985 statutory revisions to the interpretation of a disposition to heirs or beneficiaries reflected in Probate Code sections 240 through 247 expanded the application of these rules to wills, trusts and other instruments. Under these rules, if such an instrument reflects an intention to provide for issue or descendants without specifying the manner in which they are to take, rules of construction are provided. In addition, rules of construction are provided for circumstances where the instrument provides that property be distributed or taken "per stirpes," "by representation," "by right of representation," or by reference to "per capita at each generation." The revised statutory scheme provides guidance for interpretation of these provisions regardless of whether they are contained in a will or a trust. A similar effort should be made to expand the application of the general rules of construction of wills to revocable living trusts.

One issue warranting careful consideration in applying the existing rules of construction to trusts is the question of the application of the family protection provisions to trusts. The family protection provisions applicable to testamentary transfers by will include the rights to a probate homestead, family allowance rights and the rights of an omitted spouse or child (§§ 6500-6615). The expansion of these rights to transfers under revocable living trusts would constitute a significant change in California law.

The Uniform Probate Code, through its definition of the augmented estate contained in Section 2-202 et seq., gives the surviving spouse the right to a share of nonprobate assets. The surviving spouse's rights are, however, reduced if the decedent made substantial inter vivos or testamentary gifts to the spouse. The Uniform Probate Code augmented net estate approach is complex and specifically assumes that litigation may be required where a spouse asserts rights to an elective share of the estate.

The factors weighing in favor of subjecting transfers by trust to the family protection provisions include the fact that the public policy considerations which form the basis for the family protection provisions are the same whether an estate is transferred by will or by trust. The policy behind the family protection provisions is the protection of the decedent's surviving family against the demands of creditors and beneficiaries or heirs. These rights exist despite the fact that they may frustrate the estate plan of the decedent. The policy considerations that support the family protection provisions in the probate context also support application of these provisions to transfers by revocable living trusts.

Other factors weighing in favor of application of these protections in the trust context include the fact that the family protection provisions may be contractually released. A surviving spouse may waive his or her rights to protection. In a situation where a revocable living trust is used in a well-planned estate, the surviving spouse will be adequately protected and a waiver of the statutorily protected rights would be routine (although obtaining enforceable waivers in estate planning matters would add a level of complexity to these representations). The statutory rights would presumably only be asserted in those situations where they are required to afford protec-

tion to a surviving spouse. However, the rights of minors are not as easily waived, and while they would also, presumably, not be asserted unless the minors are not adequately provided for under the decedent's estate plan, there is a greater possibility that these rights would be asserted to disrupt the trustor's estate plan.

Another factor in favor of uniform application of the family protection provisions is consistency. If there is no policy reason to distinguish between application of the family protection provisions in the probate context and the trust context, it would appear that these provisions should consistently be afforded in both contexts.

There are, however, significant factors which weigh against expansion of the family protection provisions to transfers by a trust not the least of which is the long-standing California precedent that trust property is not the same as probate property just as joint tenancy property is not the same as probate property or trust property. California law has consistently supported and enforced these distinctions. Application of family protection to transfers by inter vivos trust may logically require their application to joint tenancy and other forms of transfer at death with the ultimate result of significantly limiting the distinctions which exist under current law.

It may also be argued that a testator should have the right to choose to transfer his or her estate without court involvement. Review of the family protection provisions highlights the extensive court involvement that is required to establish and administer rights to protection when they are invoked. Significant discretion rests with the court. Incorporation of these rights into the trust context mandates extensive court involvement in administering the protection afforded. This would obviously change the simplicity of a trust administration and negate one of the primary benefits of the use of revocable living trusts. The privacy afforded by the use of living trusts would also be compromised under circumstances where the family protection provisions are invoked.

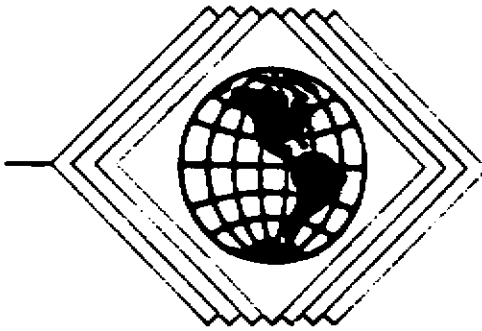
As an alternative to a wholesale incorporation or nonincorporation of the family protection provisions it is possible to review the scope of the family protection afforded in the probate context and selectively incorporate provisions into the trust context. In reviewing the scheme of equities provided by the family protection provisions it may be argued that the rights of adult surviving spouses are adequately protected by current law but that the rights of minor children may warrant additional protection when a trust is used to transfer the estate of a parent. This may be particularly true in the context of minor children by a prior marriage when a second spouse or children by a second marriage receive the bulk of the benefit of the parent's estate.

C. Proposed Legislation.

These issues have been under consideration by the Trust Subcommittee of this Section. The Trust Subcommittee has determined to proceed with proposed legislation to apply the rules of construction of wills to trusts and other instruments. This expansion of the rules of construction will most likely be accomplished by incorporating portions of Division 6 (§§ 6140-6165) into Division 11 entitled "Construction of Wills, Trusts and Other Instruments." The proposed legislation, as currently drafted, does not subject transfers by inter vivos trust to any of the family protection provisions. This proposal represents the current best thinking of the Trust Subcommittee after balancing all of the relevant factors. Obviously the legislative process leaves ample opportunity for debate and possible revision of this proposed legislative scheme and the final product may be substantially different from the original proposal.

Endnote

- 2 1. All code section references are to the California Probate Code unless otherwise indicated. ■



International Services

850 SOUTH VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA U. S. A. 94110
PHONE: 415-282-8220 (DAYS), 415-986-1771 (NIGHTS)
LOS ANGELES - P O BOX 1806 90028

REPLY TO: POB 1806/LA 90028
LAW REVISION COMMISSION
RECEIVED

JUL 23 1992

LAW REVISION COMMISSION
STATE OF CALIFORNIA
SAN FRANCISCO 94102

File: _____
Key: _____

RE: CCP 391

GENTLEMEN:


THE FOLLOWING ARE SOME OF THE ERRORS THAT YOU MAY WISH TO CORRECT IN THE ABOVE CODE SECTION:

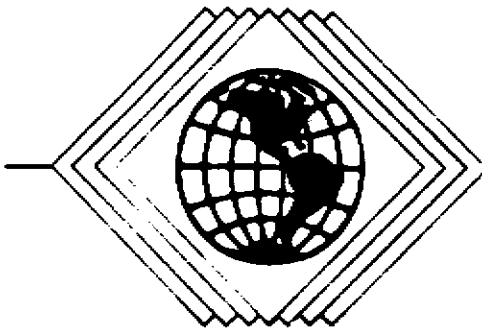
- 1) THE PRESENT STANDARD THAT THE DEFENDANT SHALL HAVE FILED FIVE COMPLAINTS IN THE PRIOR SEVEN YEARS IS NOT DEFINITIVE. THE COURT SHOULD EXAMINE THE FIVE CASES AND DECIDE THAT THEY WERE FRIVOLOUS AND VEXATIOUS.
- 2) CASES THAT WERE DISMISSED BECAUSE OF OUT-OF-COURT SETTLEMENTS SHOULD NOT BE INCLUDED.
- 3) CASES FILED AGAINST THE COMPLAINING PARTY SHALL NOT BE INCLUDED IF THESE HAVE MERIT, AS OTHERWISE THE COMPLAINING PARTY BECOMES IN EFFECT A "VEXATIOUS LITIGANT".
- 4) IF THE DEFENDANT SUBSEQUENTLY REQUESTS PERMISSION OF THE PRESIDING JUDGE TO FILE AN ACTION, THAT JUDGE MUST MAKE AN EFFORT IN GOOD FAITH TO EXAMINE THE CASE; AND IF THE CASE DOES HAVE MERIT, HE SHALL BE REQUIRED TO APPROVE IT'S FILING.
- 5) INASMUCH AS NORMALLY A PLAINTIFF IS ALLOWED THREE YEARS IN WHICH TO MAKE SERVICE, THE PERIOD OF DORMANCY SET BY CCP 391 SHOULD BE THE SAME.

P.S. AND TO AVOID THE USUAL PREJUDICE AGAINST PRO-PER'S, THESE MUST BE MADE APPEALABLE!

CC:

VERY TRULY YOURS,


ARTHUR L. JOHNSON
DIRECTOR



International Services

Law Revision Commission

850 SOUTH VAN NESS AVENUE
SAN FRANCISCO, CALIFORNIA U. S. A. 94110

PHONE: 415-282-8220 (DAYS), 415-986-1771 (NIGHTS)

LOS ANGELES - P O BOX 1806 90028

FEB 23 1992

Fi 2.3.10
Re, _____

REPLY TO: POB 1806/LA 90078

LAW REVISION COMMISSION
PALO ALTO CA

GENTLEMEN:

WE ARE VERY GLAD TO HEAR THAT YOU WILL REVIEW CCP 391 THIS YEAR. AS I RECALL, WE GAVE YOU THE NAME OF A JUDGE WHO HAD, BY THE USE OF "JUDICIAL DISCRETION", AMENDED CCP 391 SO AS TO DISBAR AN OLD LADY OVER HER THREE (3) VALID CASES AGAINST AN INSURANCE COMPANY. IN THIS WAY THIS LAW HAS BEEN EXPANDED TO BE USED AS AN INSTRUMENT TO TAKE CONSTITUTIONAL RIGHTS FROM MERE CITIZENS IN PRO PER. MANY JUDGES DO NOT SEE THEMSELVES AS HIRED SERVANTS OF THE PEOPLE, BUT AS ENFORCERS OF THE MONOPOLY OF THE JUSTICE BUSINESS BY LAWYERS.

HOWEVER, THE PURPOSE OF THIS COMMUNICATION IS TO ALERT YOU TO ANOTHER SUCH DEVICE. JUDGES, AS YOU KNOW, DO NOT LIKE APPEALS. THEY DISLIKE BEING REVERSED ON APPEAL. BUT THEY CAN AVERT THIS POSSIBILITY BY OBSTRUCTING ALL ROUTES TO AN APPEAL. THEY ORALLY DISMISS A CASE, A NOTICE OF RULING GOES OUT. THEN THEY REFUSE TO SIGN THE OFFICIAL ORDER OF DISMISSAL. THUS THE APPELLATE COURT HAS NO JURISDICTION. AND THE APPEAL CANNOT GO FORWARD FOR MONTHS OR YEARS.

AS EVER,

ARTHUR L. JOHNSON
DIRECTOR



Sacramento
Superior and Municipal Courts



720 Ninth Street
Sacramento, CA 95814

Judge Kenneth L. Hake
Presiding Judge, Probate Division
Department 17

(916) 440-5672

May 10, 1993

Law Revision Commission
RECEIVED

NATHANIEL STERLING
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

File: _____
Key: _____

RE: CONSERVATORSHIP LAW
PROFESSOR JAN REIN'S LAW REVIEW ARTICLE

Dear Mr. Sterling:

Enclosed please find a copy of the law review article of Professor Jan Ellen Rein, regarding the rights of proposed conservatees. This article raises various important issues. Although I understand that the Commission has currently redirected its focus from the Probate Code to other matters, it may be that this area should be revisited.

Sincerely,

Kenneth L. Hake

cc: Prof. Jan Rein

KLH:ss
encl.