#L-641 9/14/83

Second Supplement to Memorandum 83-60

Subject: Study L-641 - Creditor's Right to Reach Payments From Trust

Attached as Exhibit 1 is a letter from Professor Niles suggesting that the recommendation relating to the creditor's right to reach payments from a trust be held up until all aspects of the trust study can be completed.

The staff believes that the trust study may take a number of years to complete. We believe that the recommendation on reaching payments from a trust should be submitted in 1984, since we see no substantial reason to delay its submission.

Professor Niles refers to the problem of the exemption of a Keogh retirement plan in bankruptcy proceedings. California has a provision in the new Enforcement of Judgments Law that determines the extent to which a Keogh retirement plan is exempt, so the staff does not believe there is a need for clarifying legislation on this matter in California.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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September 9, 1983

Mr. John H. DeMoully
California Law Revision Commission
4000 Middlefield Road
Palo Alto, CA 94306

Dear John:

I shall not be able to attend the San Diego meeting on September 22-24. Professor Paul Basye expects to attend, and he will know my views on the various items on the agenda.

I should like, however, to emphasize a few points.

4. I hope that you do not take any definitive action on Memorandum 83-6, Creditors' Right to Reach Payments from Trust. The suggestion that a beneficiary of a spendthrift trust should have no more of a right to shield trust income than he or she would have to shield earned income has an appeal, but in the end, I think the Commission will reject it. The analogy is imperfect because the rights and privileges of donors are entitled to some consideration. I suspect that the bar will not be willing to limit protective trusts to an amount based on the minimum wage.

I believe that it is imperative to study all aspects of spendthrift and discretionary trusts. The claims of creditors are important, but the studies should include restraints on alienation of both income and principal interests as well as the termination of trusts.

There are some very recent problems that must be considered. For example, consider the current case of In re Goff, 76 Fed.2d 574 (1983); I enclose a copy. A doctor created his Keogh retirement plan in trust form. When he took advantage of the new federal bankruptcy law, he claimed that the retirement fund did not become part of the bankrupt estate. Indeed, the new bankruptcy statute protects spendthrift trusts, at least when created by third parties. But should a self-settled trust fund pass to the trustee in bankruptcy? The court conceded that

many pension plans are protected but held this one would not be unless state law so provided. The court suggests that the important issue may be whether or not the trust is terminable. At any rate, the California law should be clarified because many millions of dollars are at stake.

I hope that the garnishment proposal will be held up until various studies are completed.

Sincerely yours,

Russell D. Niles
Professor of Law

RDN/js

Enclosure