

Memorandum 85-68

Subject: Study L-640 - Probate Code (Spendthrift and Other Protective Trusts)

Existing California statutory law contains only an incomplete statement of the California law relating to spendthrift and other protective trusts:

(1) Civil Code Section 859 permits a creditor to reach the "surplus" of the rents and profits of property beyond the amount that may be necessary for the education and support of the beneficiary where the trust has no valid direction for accumulation.

(2) Civil Code Section 867 provides that the beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, may be restrained from disposing of his interest during his life or for a term of years by the instrument creating the trust.

(3) Code of Civil Procedure Section 709.010 permits a judgment creditor to reach a portion of the periodic payments to a beneficiary. After a court hearing, the court is authorized to order the trustee to withhold an amount from each periodic payment and to pay that amount to the judgment creditor to be applied to the satisfaction of the judgment. In the case of the ordinary creditor, the creditor can reach the portion of the payment that is in excess of the amount that the beneficiary proves is necessary for support of the beneficiary and the beneficiary's family supported in whole or in part by the beneficiary, but in no event may more than 25 percent of the payment be withheld and paid to the creditor. If the judgment is for delinquent child or spousal support, the creditor can reach the portion of the payment which the court determines is equitable, taking into account the needs of all persons the beneficiary is required to support, but in making the division between the support creditor and the beneficiary the court is subject to the restriction that not more than one-half of the payment can be withheld for the support creditor. (Under special circumstances set out in a federal statute, the court can award up to 65 percent of the payment to the support creditor.)

At the last meeting, the Chairperson stated for the Commission that the Commission is not satisfied with the existing law. The Commission is of the view that the protection afforded beneficiaries of spendthrift trusts should be as protective as it was before the amendment was made to Code of Civil Procedure Section 709.010, if not more protective. The staff was directed to prepare a new draft of legislation to effectuate this Commission's policy determination. It was suggested that the staff review the Civil Code provisions to determine if they can be improved.

In compliance with this directive, the staff has prepared the draft statute attached as Exhibit 3 to this memorandum. The draft statute is intended to provide a more adequate statement of the law concerning spendthrift and other protective trusts than the incomplete statements found in the existing statute. The draft statute is drawn from the 1969 Wisconsin statute (attached as Exhibit 2 of this Memorandum) and from the Restatement (Second) of Trusts (Extract attached as Exhibit 1 of this Memorandum).

At the meeting, we plan to go over the draft statute section by section. Draftsman's notes follow some of the sections and point out matters that should be considered in connection with the section. We hope that our consultants and the persons who submit comments on this Memorandum will discuss these matters in their comments and will raise other issues that can be considered at the meeting.

Although the staff suggests that the Commission consider the various policy issues in connection with its consideration of the section of the draft statute that presents the issue, there are some general observations in connection with the draft statute that are set out below to give you an overview of the draft statute and the policy issues presented:

(1) The draft statute is prepared in a form that can be used to give whatever degree of protection is desired. Sections 15301 and 15302 provide complete protection to the interest of the beneficiary in the income and principal of the trust. This protection is subject

to later provisions in the draft statute that permit certain favored creditors to reach the beneficiary's interest in the trust. These later provisions can be revised or omitted from the statute. They are discussed below.

(2) Generally the draft statute is written to provide a maximum protection to the beneficiary against transferees and creditors. The draft statute provides much greater protection than the Restatement. (The significant change--discussed below--that the draft statute would make in the law in effect prior to 1984 is that it would give the court authority to allocate payments from a spendthrift trust or support trust between the trust beneficiary and the dependents of the beneficiary who have a valid support order.) Draftsman's notes indicate areas where the draft statute provides greater protection than the Restatement.

(3) The basic policy issue presented by the draft statute arises out of the conflict between the policy of providing the maximum protection to trust beneficiaries and the policies (1) that a person should be required to support his or her dependents where that duty is imposed by a court order and (2) that a person who is supported by welfare or whose spouse or minor child is supported by welfare should reimburse the taxpayers for the support provided if the person has the resources to do so. The staff draft resolves the conflicting policy considerations by giving the court discretion to allow a person having a valid support order to reach such amount of the beneficiary's interest as the court determines is equitable and reasonable under the circumstances of the particular case to the extent the beneficiary could compel payment or the trustee determines, pursuant to the exercise of the trustee's discretion, to make payment in favor of the beneficiary. A similar provision is included in the draft statute to permit reimbursement for public support provided to the beneficiary or the spouse of minor child of the beneficiary. The draft statute includes a provision that prevents reimbursement of public support if the trust is established for the benefit of an individual who is permanently disabled and substantially unable adequately to provide for his or her own care or custody. This limits the existing right of reimbursement for public support. Both of these issues involve not only a determination of the weight to be given to the conflicting

policy considerations but also consideration of the political ramifications of seeking to limit the existing ability to enforce support orders or the existing ability of counties to recover for support.

(4) The draft statute gives the beneficiary of a trust for support the same protection as a trust with an express spendthrift provision. This follows the approach of the Restatement.

(5) The draft statute contains an express provision that a transferee or creditor cannot compel the trustee of a discretionary trust to make any payment at all to or for the beneficiary, even where the beneficiary himself or herself could compel such payment. This would limit a right creditors may have under existing law, but the provision is consistent with what appeared to be the desire of the Commission when this matter was discussed at a past meeting. The provision is drawn from the Restatement but provides much broader protection to the beneficiary than the Restatement provision.

(6) The draft statute continues the substance of existing Civil Code Section 859 which makes surplus income subject to creditors' claims.

(7) The draft statute repeals the provision that gives the court authority to order the trustee to withhold for a creditor from periodic payments from a trust to the same extent as a like amount of wages would be subject to garnishment.

(8) The draft statute does not include a provision found in the Restatement and in the statutes of other states that permits a creditor who furnishes necessities to the trust beneficiary to reach the interest of the beneficiary in the trust to secure payment. See Section 157 of the Restatement (Second) of Trusts (Exhibit 1 attached) for this and other provisions for particular classes of claimants.

(9) Where a provision is drawn from the Restatement (Second) of Trusts, you should read the Comment in the Restatement to the provision for a discussion of the provision and illustrations of its application. The Restatement is attached as Exhibit 1.

The effect of the draft statute is to greatly reduce the ability of an ordinary creditor to reach a beneficiary's interest in a spendthrift or support trust. The draft statute will not greatly

affect the ability to enforce a support order. The right of the state and counties to obtain reimbursement for support will be reduced under the draft statute.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT 1

§ 150. Forfeiture for Alienation

A provision in the terms of the trust that the interest of a beneficiary shall terminate upon an attempt by him to transfer it or by his creditors to reach it or upon his bankruptcy is valid as to his interest in income, and is valid as to his interest in principal to the extent to which a restraint on alienation of an interest in principal is valid under the rules stated in § 153.

See Reporter's Note.

Comment:

a. Interest in the income. If the interest of the beneficiary is a right to receive the income during his life, or for a term of years, a provision in the terms of the trust that it shall terminate upon an attempt by him to transfer it or by his creditors to reach it or upon his bankruptcy is valid, unless the beneficiary himself created the trust. Compare Restatement of Property, § 409.

Illustrations:

1. A transfers property to B in trust to pay the income to C for life and to pay the principal on C's death to D. By the terms of the trust it is provided that if C should convey his interest or if his creditors should attempt to reach it or if he should become bankrupt his interest under the trust should cease and that the income should be paid to C's wife during the remainder of C's life. C becomes bankrupt. His interest under the trust terminates.

2. The facts are as stated in Illustration 1, except that the trust is created by C. On C's bankruptcy the trust does not terminate but his trustee in bankruptcy is entitled to C's life interest under the trust.

A forfeiture of the right of a beneficiary to receive income under a trust is valid even in States which do not permit a restraint on alienation under the rules stated in § 152, or which by statute allow only a limited restraint on alienation.

b. Interest in the principal. Where a beneficiary is entitled to the principal, a forfeiture on alienation is valid to the same extent to which a valid restraint on alienation would be valid, under the rules stated in § 153.

c. Trust becoming discretionary on alienation. By the terms of the trust it may be provided that the right of the beneficiary to compel the payment of the income to him for his life shall cease upon voluntary or involuntary alienation of his interest and that thereafter the trustee shall have discretion whether to make any further payments to the beneficiary. As to the rights of transferees and creditors of the beneficiary of a discretionary trust, see § 155.

d. Cross reference. As to the validity of restraints on alienation of legal estates and equitable estates other than those arising under a trust, see Restatement of Property, §§ 404-417.

§ 151. Restraint on Alienation of Principal

This Section is combined with § 153.

§ 152. Restraint on Alienation of Income

(1) Except as stated in §§ 156 and 157, if by the terms of a trust the beneficiary is entitled to the income from the trust property for life or for a term of years and it is provided that his interest shall not be transferable by him and shall not be subject to the claims of his creditors, the restraint on the voluntary and involuntary transfer of his right to the income accruing during his life is valid.

(2) A trust in which by the terms of the trust or by statute a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary is imposed is a spendthrift trust.

See Reporter's Note.

Comment:

a. Section 156 relates to the situation where the settlor is a beneficiary of the trust. Section 157 relates to particular classes of claimants who can reach the interest of the beneficiary of a spendthrift trust.

b. "*Spendthrift trusts.*" The term "spendthrift trust," as used in the Restatement of this Subject, is limited to such a trust as is described in this Section. It is to be distinguished from a trust for support (see § 154) and from a discretionary trust (see § 155).

c. "*No specific language necessary to create.*" No particular form of words is necessary for the creation of a spendthrift trust. It is sufficient if by the terms of the trust the settlor manifests an intention to create such a trust.

Illustrations:

1. A bequeaths \$100,000 to B in trust to pay the income to C during his life, "such payments to be made to him personally when convenient, otherwise upon his order or receipt in writing; in either case free from the interference or control of his creditors, my intention being that the use of said income shall not be anticipated by assignment." There is a gift over of the principal to D. A spendthrift trust is created.

2. A bequeaths Blackacre to B in trust to collect the rents and profits and to pay the money to C "into his own hands, and not into another's whether claiming by his authority or otherwise" for the life of C and on the death of C to convey Blackacre to D. A spendthrift trust is created.

3. A transfers \$100,000 to B in trust to pay over the income to C "on his personal receipt therefor, without the said C having any powers to sell, assign or pledge the same previous to the payment thereof to him, as aforesaid, by way of anticipation." There is a gift over of the principal to D. A spendthrift trust is created.

4. A bequeaths \$100,000 to B in trust to pay the income to C for life, "such income to be paid to C personally or upon his order or receipt in writing, free from the interference or control of the creditors and never by way of anticipation or assignment." There is a gift over of the principal to D. A spendthrift trust is created.

d. Words in terms restraining voluntary alienation may manifest an intention also to restrain involuntary alienation.

Illustration:

5. A devises Blackacre to B in trust "to pay over all the rents and income in cash into the hands of C, in person, and not upon any written or verbal order, nor upon any assignment or transfer by the said C." There is a gift over to D of the land upon C's death. C's creditors cannot reach this interest except under the circumstances stated in § 157.

e. Words in terms restraining involuntary alienation may manifest an intention also to restrain voluntary alienation.

Illustration:

6. A bequeaths \$100,000 to B in trust to pay the income to C for life and to pay the principal on C's death to D. It is provided in the will that "it is my will in creating the foregoing trusts for the maintenance and support of C that the sum shall be enjoyed by him without being in any way subject to or liable for his debts or engagements." C cannot make a voluntary transfer of his interest except under the circumstances stated in § 157.

f. *Extrinsic evidence not admissible.* The intention to restrain the transfer of the interest of the beneficiary of a trust must appear from the terms of the trust. Extrinsic evidence is not admissible to show the settlor's intention to prevent the voluntary or involuntary transfer of the interest of the beneficiary, if in the trust instrument there is nothing to indicate such an intention.

Illustration:

7. A bequeaths \$100,000 to B "in trust to pay the income" to C for life and on C's death to pay the principal to D. In an action brought by a creditor of C to reach his interest under the trust, C offers evidence of declarations made by A that he intended to create a spendthrift trust. C also offers evidence that at the time A made his will C was insolvent and in fact a spendthrift both of which facts A knew. The evidence is not admissible and the trust created is not a spendthrift trust.

g. Restraint valid though beneficiary competent. A spendthrift trust may be created in favor of a beneficiary although he is competent to manage his own affairs.

Illustration:

8. A bequeaths \$100,000 to B in trust to pay the income to C, "without C having any power to alienate the same, and free from the claims of his creditors" with remainder to D after the death of C. C is an adult of full capacity and a leading business man in the community. The trust created is a spendthrift trust, and C cannot transfer his interest nor may his creditors reach it.

h. Income received by trustee but not paid to beneficiary. A spendthrift trust protects income which has been received by the trustee but has not been paid by him to the beneficiary.

Illustration:

9. A bequeaths to B \$100,000 upon a spendthrift trust to pay the income semi-annually on the first of January and the first of July to C during his life and on his death to pay the principal to D. Creditors of C cannot reach the income collected by B which is still in B's hands, whether the time for the payment of it to C has not yet arrived or has arrived or has passed without such payment being made.

i. Payment of income by trustee to third person on order of beneficiary. If income has been received by the trustee which is payable to the beneficiary and it is paid by the trustee to a third person on the order of the beneficiary, the trustee is under no liability to the beneficiary for making such payment, although by the terms of the trust the interest of the beneficiary is inalienable, and even though by the terms of the trust it is provided that the income shall be paid to the beneficiary personally or on his personal receipt. This is true whether the payment is made to the credit of the beneficiary in a bank designated by him, or is paid to a creditor of the beneficiary or a third person. The trustee is under no liability for making such payment even though the order of the beneficiary was given by him to the trustee before the income had accrued in the hands of the trustee. The trustee is under no liability for making such payment even though it was in the form of an assignment by the beneficiary of his right to income thereafter accruing. Such an assignment has the effect of a revocable order to the trustee to pay the income to the assignee. Since the interest of the beneficiary is not assignable by him, however, even though value was given for the assignment, the beneficiary can revoke the authority of the trustee to make payment to the assignee at any time before the trustee has made such payment. The assignee can keep any payment made to him prior to the revocation by the beneficiary of the authority of the trustee. Whether the as-

signee can keep a payment made to him after revocation by the beneficiary of the authority of the trustee depends upon whether he is a bona fide purchaser. See § 284.

Illustration:

10. A bequeaths to B \$100,000 upon a spendthrift trust to pay the income semi-annually on the first of January and the first of July to C during his life and on his death to pay the principal to D. On June 1st C assigns his interest under the trust to E, as security for a loan of \$20,000 made by E to him, and directs B to pay the income to E thereafter until E has received the amount of the loan and interest thereon. On the following July 1st B pays E \$2500. Before the following January 1st C instructs B to make no further payments to E. B is under no liability to C for the payment made to E, but will be liable if he makes any further payment to E. E can keep the payment made to him, but cannot compel B to make any further payment to him.

j. Income paid to beneficiary. After the income of a spendthrift trust has been paid to the beneficiary it can be transferred by him and can be reached by his creditors.

Illustration:

11. The facts are as stated in Illustration 9, except that the trustee has paid an instalment of income to C who has deposited it in a bank. A creditor of C can reach the deposit.

k. Personal liability of beneficiary. If by the terms of the trust it is provided that the interest of the beneficiary shall not be transferable by him and shall not be subject to the claims of his creditors, and the beneficiary for value agrees to transfer his interest or purports to transfer it to another, the beneficiary is liable to the other for breach of contract; and although the other cannot obtain satisfaction of his claim from the interest of the beneficiary under the trust, he can obtain satisfaction from such property as the beneficiary may own other than his interest under the trust, to the extent to which any other creditor of the beneficiary could reach it.

l. Bankruptcy of beneficiary. Under the provisions of the National Bankruptcy Act the interest of a beneficiary, if it cannot be transferred by him and cannot be reached by his creditors, does not pass to his trustee in bankruptcy. See § 147, Comment *d*.

m. Beneficiary also trustee. The rule stated in this Section is applicable although the beneficiary or one of the beneficiaries is one of several trustees, or one of several beneficiaries is the sole trustee. A person, however, cannot be both sole beneficiary and sole trustee of a trust. See §§ 93, 115. As to the situation which arises where the sole beneficiary of a spendthrift trust subsequently becomes sole trustee, see § 341, Comment *c*.

The rule here stated is applicable to the interest of the trustee as beneficiary, but is not applicable to the benefits which he receives as trustee. Thus, the salary or commissions of the trustee as trustee can be reached by his creditors.

n. *Estate for years.* If by the terms of a trust the beneficiary is entitled to the income from the trust property for a term of years or other period not terminable on his death, and it is provided that his interest shall not be transferable by him and shall not be subject to the claims of his creditors, the restraint on the voluntary and involuntary transfer of his right to the income accruing after his death is not valid, although the restraint is valid as to his right to the income accruing during his life.

Illustration:

12. A bequeaths \$100,000 to B in trust to pay the income to C for twenty years and at the expiration of twenty years to pay the principal to D. By the terms of the trust C's interest is subject to a restraint on alienation. C conveys to E his interest under the trust. Although E is not entitled to income accruing before C's death, he is entitled to income accruing after C's death and prior to the expiration of the twenty-year period.

o. *Possessory interest.* The rule stated in this Section is applicable although the beneficiary is entitled to the possession of the subject matter of the trust during his life.

Illustration:

13. A devises Blackacre to B in trust to allow C to have possession of Blackacre during his lifetime and to convey Blackacre to D on C's death. By the will C's interest is subject to restraints on alienation. C cannot transfer his interest and his creditors cannot reach it.

p. *Statutory restraints on alienation.* Statutes in several States limit the power of the beneficiary to transfer his interest and the power of his creditors to reach it. Thus, in some States no person beneficially interested in a trust for the receipt of the rents and profits of land can transfer his interest. In other States, statutes impose such a restriction unless the trust instrument otherwise provides. In other States, statutes impose such a restriction if the trust instrument so provides. In some States, statutes limit the power of a beneficiary of a trust of personal property to transfer his interest. In some States, statutes limit the power of the creditors of the beneficiary of a trust to reach his interest.

In a number of States there are statutes which provide that the proceeds of insurance policies may be left with the insurance company under an agreement by the company to pay installments to the beneficiary, and that in such a case the installment payments may be made inalienable and free from the claims of the creditors of the beneficiary if the insurance company and the insured so agree. Under these statutes a trust, as the term is used in this Restatement, is not created, since no specific property is held by the company for the beneficiary of the policy. Although the interest is therefore a legal chose in action, the statutory provisions making the beneficiary's claim inalienable have much the same effect as the establishment of a spendthrift trust. See § 12, Comment k.

q. Cross references. As to the effect of the consent to a breach of trust by the beneficiary of a spendthrift trust, see § 216, Comment *e*.

As to the effect of an advance or loan of trust money by the trustee to the beneficiary of a spendthrift trust, see § 255, Comment *f*.

As to the effect of participation in a breach of trust by the beneficiary of a spendthrift trust, see § 256, Comment *f*.

As to the impounding of the share of a beneficiary of a spendthrift trust who is also a trustee and has committed a breach of trust, see § 257, Comment *f*.

As to the effect of a transfer of the trust property by the trustee to the beneficiary of a spendthrift trust before the purposes of the trust have been fully accomplished, see § 342, Comment *f*.

As to the validity of restraints on alienation of legal estates and equitable estates other than those arising under a trust, see Restatement of Property, §§ 404-417.

§ 153. Restraint on Alienation of Principal

(1) Except as stated in §§ 156 and 157, if by the terms of a trust the beneficiary is entitled to have the principal conveyed to him at a future time, a restraint on the voluntary or involuntary transfer of his interest in the principal is valid.

(2) If the beneficiary is entitled to have the principal conveyed to him immediately, a restraint on the voluntary or involuntary transfer of his interest in the principal is invalid.

(3) If the principal is not to be conveyed to the beneficiary during his lifetime, a restraint on the voluntary or involuntary transfer of his interest in the principal is invalid.

See Reporter's Note.

Comment on Subsection (1):

a. Section 156 relates to the situation where the settlor is a beneficiary of the trust. Section 157 relates to particular classes of claimants who can reach the interest of the beneficiary of a spendthrift trust.

b. *Where beneficiary entitled to the principal in the future.* Where a beneficiary of a trust is entitled to receive the principal at some future time, a restraint on the voluntary or involuntary alienation of his interest is valid, whether or not he is entitled to receive the income in the meantime.

Illustrations:

1. A transfers \$100,000 to B in trust to pay the income to C until he reaches the age of thirty-five, and to pay him the principal when he reaches that age or to pay the principal to D on C's death if he dies before reaching thirty-five. By the terms of the trust it is provided that C's interest in income and in principal shall not be transferred by him or reachable by his creditors. The restraint on alienation is valid, both as to income and as to principal, and prior to C's reaching thirty-five or dying under that age his interest in income and principal is not assignable by him or reachable by his creditors.

2. A transfers \$200,000 to B in trust to pay the income to C during C's life and at C's death to convey the principal to D. By the terms of the trust it is provided that D's interest shall not be transferable by him or reachable by his creditors. The restraint on alienation is valid, and prior to C's death D cannot transfer his interest and his creditors cannot reach it.

By statute in some States, and in some States even in the absence of a statute, a restraint on the alienation of a beneficiary's right to receive the principal under a trust is invalid.

Comment on Subsection (2):

c. Where beneficiary entitled to immediate payment of the principal. If a beneficiary is entitled to have the principal paid or conveyed to him immediately or at any time he may call for it, a restraint on alienation of his interest is invalid.

Illustrations:

3. A transfers certain securities to B in trust to convey them immediately to C. Under the terms of the trust it is provided that C's interest shall not be transferable by him and that his creditors cannot reach it. The restraint on alienation is invalid and C can transfer his interest and his creditors can reach it.

4. A transfers Blackacre to B in trust to hold Blackacre for the benefit of C and to convey it to C whenever C shall demand a conveyance. By the terms of the trust it is provided that C's interest shall not be transferable by him and that his creditors cannot reach it. The restraint on alienation is invalid and C can transfer his interest and his creditors can reach it.

In some States a restraint on alienation of a beneficiary's right to receive the principal immediately is valid, and until he has received the principal his interest is not transferable by him or reachable by his creditors.

Comment on Subsection (3):

d. Where beneficiary not entitled to payment during his lifetime. If a beneficiary is not himself entitled to receive the principal, but it is payable only on or after his death to his estate, a restraint on the alienation of his interest in the principal is invalid. A restraint on alienation is valid only if it affords protection to the beneficiary. Where the restraint merely operates to prevent him from disposing of the property on his death, it is not valid.

Illustration:

5. A bequeaths \$50,000 to B in trust to pay the income to C during his life and to pay the principal on his death to his estate. By the terms of the trust it is provided that C's interest in the income and principal shall not be transferred by him or reachable by his creditors. The restraint on alienation is valid as to the income, but is invalid as to the principal. A creditor of C may by judicial process reach C's interest in the principal, and this interest may be sold or mortgaged under the direction of the court and the proceeds used in discharging C's debt.

§ 154. Trusts for Support

Except as stated in §§ 156 and 157, if by the terms of a trust it is provided that the trustee shall pay or apply only so much of the income and principal or either as is necessary for the education or support of the beneficiary, the beneficiary cannot transfer his interest and his creditors cannot reach it.

See Reporter's Note.

Comment:

a. Section 156 relates to the situation where the settlor is a beneficiary of the trust. Section 157 relates to particular classes of claimants who can reach the interest of the beneficiary of a spendthrift trust.

b. Trust for support distinguished from spendthrift trust. A trust containing such a provision as is stated in this Section is a "trust for support" and is to be distinguished from a spendthrift trust. In a trust for support it is the nature of the beneficiary's interest rather than a provision forbidding alienation which prevents the transfer of the beneficiary's interest. The rule stated in this Section is not dependent upon a prohibition of alienation by the settlor; but the transferee or creditor cannot compel the trustee to pay anything to him, because the beneficiary could not compel payment or compel application in any way except for the restricted purpose set out in the terms of the trust.

c. Power of assignee or creditor to compel payment. Under the rule stated in this Section a person receiving a conveyance from the beneficiary or a creditor of the beneficiary cannot compel the trustee to pay to him any part of the income or principal, and the trustee is not liable to the transferee or creditor though the trustee pays to or applies for the beneficiary so much of the property as is necessary for his education or support, even though the trustee has knowledge of the conveyance or has been served with process in proceedings instituted by the creditor to reach the interest of the beneficiary.

d. Where amount limited to education and support. The rule stated in this Section is applicable where by the terms of the trust the amount to be paid to or applied for the beneficiary is limited to so much of the income or principal as is in fact necessary for his education or support. The application of this Section is not dependent upon the use of any particular form of words in the terms of the trust.

Illustrations:

1. A bequeaths \$100,000 to B in trust to pay or apply so much of the income or principal as is necessary for the comfortable maintenance of C. It is provided that upon C's death the trustee shall pay to D any of the income and principal which has not been expended for C's maintenance. C cannot transfer his interest and his creditors cannot reach it.

2. A bequeaths \$10,000 to B in trust to apply so much of it as may be necessary for the support of C. It is provided that upon C's death the trustee shall pay to D any of the income and principal which has not been expended for C's support. C cannot transfer his interest and his creditors cannot reach it.

e. Where amount not limited to education and support. The rule stated in this Section is not applicable where the amount to be paid or applied by the trustee is a specified sum or is not limited to what is necessary for the education and support of the beneficiary, although by the terms of the trust it appears that the settlor's motive in creating the trust is to provide for the education or support of the beneficiary. If by the terms of the trust the trustee is under a duty to pay to the beneficiary or to apply for his benefit the whole or a fixed part of the income or principal or a fixed amount from the income or principal, although it is expressed that the payments or applications are for the education or support of the beneficiary, and although the amount is no more than is reasonable for his education and support, the beneficiary can transfer his interest and his creditors can reach it, except so far as a valid provision for forfeiture for alienation or restraint on alienation has been imposed as stated in §§ 150, 152 and 153.

Illustrations:

3. A transfers Blackacre to B in trust "to pay over to C yearly the net profits or income for the better support and maintenance of said C." C is entitled to the entire income during his life and can transfer his interest and his creditors can reach it.

4. A bequeaths \$100,000 to B in trust to pay the income to C "to be for her comfort and support." C is entitled to the entire income during her life and can transfer her interest and her creditors can reach it.

f. Motive of settlor. Although an expression of the settlor's motive to provide for the education or support of the beneficiary does not necessarily indicate an intention to restrain the transfer by the beneficiary of his interest, it may be a circumstance showing this intention; and if from the terms of the trust such an intention appears, a spendthrift trust is created. See §§ 152, 153.

g. Principal and accumulated income. If by the terms of a trust it is provided that the trustee shall during a designated period pay or apply only so much of the income and principal or either as is necessary for the education or support of the beneficiary but it is also provided that any income and principal or either not so paid or applied shall ultimately be paid to the beneficiary or to those deriving title through him, the beneficiary can transfer and his creditors can reach so much of the income and principal as is not necessary for the education or support of the beneficiary. Compare § 153.

h. Bankruptcy of beneficiary. The rule stated in this Section is applicable where the beneficiary becomes bankrupt. See § 147, Comment *d*.

§. 155. Discretionary Trusts

(1) Except as stated in § 153, if by the terms of a trust it is provided that the trustee shall pay to or apply for a beneficiary only so much of the income and principal or either as the trustee in his uncontrolled discretion shall see fit to pay or apply, a transferee or creditor of the beneficiary cannot compel the trustee to pay any part of the income or principal.

(2) Unless a valid restraint on alienation has been imposed in accordance with the rules stated in §§ 152 and 153, if the trustee pays to or applies for the beneficiary any part of the income or principal with knowledge of the transfer or after he has been served with process in a proceeding by a creditor to reach it, he is liable to such transferee or creditor.

See Reporter's Note.

Comment on Subsection (1):

a. Section 156 relates to the situation where the settlor is a beneficiary of the trust.

b. *Discretionary trust distinguished from spendthrift trust.* A trust containing such a provision as is stated in this Section is a "discretionary trust" and is to be distinguished from a spendthrift trust, and from a trust for support. In a discretionary trust it is the nature of the beneficiary's interest rather than a provision forbidding alienation which prevents the transfer of the beneficiary's interest. The rule stated in this Section is not dependent upon a prohibition of alienation by the settlor; but the transferee or creditor cannot compel the trustee to pay anything to him because the beneficiary could not compel payment to himself or application for his own benefit.

c. *Rule applicable only if payment discretionary.* The rule stated in this Section is applicable only where the trustee may in his absolute discretion refuse to make any payment to the beneficiary or to apply any of the trust property for his benefit.

It is not applicable where the trustee has discretion merely as to the time of payment, and where the beneficiary is ultimately entitled to the whole or to a part of the trust property.

If by the terms of the trust the trustee must pay to or apply for the beneficiary the whole or any part of the income or principal, the interest of the beneficiary can be reached by his transferee or creditor, unless the trust is a spendthrift trust (see §§ 152, 153) or a trust for the support of the beneficiary (see § 154).

d. *Trust for members of a class.* If a trust is created for the members of a class of persons and the trustee has discretion to exclude altogether a member of the class, a transferee or creditor of the member cannot compel the trustee to pay over any part of the trust property.

Illustration:

1. A bequeaths \$100,000 to B in trust to pay or apply the income for the benefit of C and his wife or either of them in his discretion, and on C's death to pay to D the principal and any part of the income not so paid or applied. C transfers his interest to E. E cannot compel B to pay him any part of the trust property.

e. *Power of transferee or creditor to compel payment.* If by the terms of a trust it is provided that the trustee shall pay to or apply for a beneficiary so much of the income and principal or either as the trustee in his uncontrolled discretion shall see fit to pay or apply, and upon the death of the beneficiary shall pay to another person all of the income and principal not so paid or applied, a transferee or creditor of the beneficiary cannot compel the trustee to pay over any part of the trust property. The result is the same where whatever is not paid to or applied for the beneficiary passes to the estate of the settlor by a resulting trust.

Illustration:

2. A bequeaths \$100,000 to B in trust to pay to or apply for the benefit of C all or so much of the income as B in his uncontrolled discretion shall see fit, and on C's death to pay to D the principal and any part of the income not so paid or applied. A creditor of C obtains a judgment against him, and files a bill in equity to reach and apply C's interest under the trust, making B a party to the suit. The creditor cannot compel the trustee to pay him any part of the trust property.

f. Bankruptcy of beneficiary. The rule stated in this Section is applicable where the beneficiary becomes bankrupt. See § 147, Comment *d*.

g. Methods of reaching beneficiary's interest. The rules as to the appropriate proceedings by which creditors of the beneficiary can subject his interest to the satisfaction of their claims are not within the scope of the Restatement of this Subject. See § 147, Comment *c*.

Comment on Subsection (2):

h. Effect of payment by trustee to beneficiary after assignment. Although in the case of a discretionary trust a transferee or creditor of the beneficiary cannot compel the trustee to pay over any part of the trust property to him, yet if the trustee does pay over any part of the trust property to the beneficiary with knowledge that he has transferred his interest or after the trustee has been served with process in a proceeding by a creditor of the beneficiary to reach his interest, the trustee is personally liable to the transferee or creditor for the amount so paid, except so far as a valid provision for forfeiture for alienation or restraint on alienation has been imposed as stated in §§ 150, 152 and 153.

Illustrations:

3. The facts are as stated in Illustration 1. If B with knowledge of the transfer to E pays to C any part of the trust property, he is liable to E for the amount so paid.

4. The facts are as stated in Illustration 2. If B after being served with process in the creditor's suit pays to C any part of the trust property, he is liable to the creditor for the amount so paid.

i. Effect of applying property by trustee for beneficiaries after assignment. If the trustee applies for the benefit of the beneficiary income or principal, he is liable to an assignee of the beneficiary's interest or to a creditor of the beneficiary, if he makes such application after he has knowledge of the assignment or after he has been served with process in a proceeding brought by a creditor of the beneficiary to reach the beneficiary's interest.

§ 156. Where the Settlor is a Beneficiary

(1) Where a person creates for his own benefit a trust with a provision restraining the voluntary or involuntary transfer of his interest, his transferee or creditors can reach his interest.

(2) Where a person creates for his own benefit a trust for support or a discretionary trust, his transferee or creditors can reach the maximum amount which the trustee under the terms of the trust could pay to him or apply for his benefit.

See Reporter's Note.

Comment:

a. Intention to defraud creditors not required. The rules stated in this Section are applicable although the transfer is not a fraudulent conveyance. The interest of the settlor-beneficiary can be reached by subsequent creditors as well as by those who were creditors at the time of the creation of the trust, and it is immaterial that the settlor-beneficiary had no intention to defraud his creditors.

Illustration:

1. A transfers property to B in trust to pay the income to A for life and to pay the principal on A's death to C. By the terms of the trust it is provided that A's interest under the trust cannot be transferred or reached by his creditors. A can transfer his interest; his creditors can reach his interest.

b. Statutory provisions. In several States there are statutes which provide that creditors may reach property held in trust for a debtor except when such trust was created by some person other than the debtor. In some States there are statutes which provide that a trust created by a person for his own benefit shall be void as against his creditors.

c. Reservation of general power to appoint principal. If the settlor reserves for his own benefit not only a life interest but also a general power to appoint the remainder by deed or will or by deed alone or by will alone, his creditors can reach the principal of the trust as well as the income. See Restatement of Property, § 328.

d. Trust for settlor's support. Where the settlor creates a trust for his own support, he can assign his interest and it can be reached by his creditors. They can compel the trustee to pay to them the maximum amount which he could pay to the settlor-beneficiary or apply for his benefit.

e. Discretionary trust for the settlor. Where by the terms of the trust a trustee is to pay the settlor or apply for his benefit as much of the income or principal as the trustee may in his discretion determine, his transferee or creditors can reach the maximum amount which the trustee could pay to him or apply for his benefit.

f. Under what circumstances beneficiary is settlor. In order that a trust shall come within the terms of this Section, it is not necessary that the beneficiary shall have himself conveyed the property held in trust. It is sufficient that he paid the purchase price for a conveyance upon a trust, of which he is the beneficiary or one of the beneficiaries.

Illustration:

2. In consideration of the payment of \$10,000 by A to B, B transfers Blackacre to C in trust to pay the rents and profits to A during his life, and to convey Blackacre to D on A's death. At A's request B inserts a provision in the trust deed to the effect that A's interest should not be transferable by him or subject to the claims of his creditors. A can transfer his interest; his creditors can reach his interest.

If the beneficiary of a spendthrift trust already created pays off encumbrances on the trust property, the beneficiary has to that extent created a spendthrift trust for himself and his creditors can reach his interest to the extent of his payment.

If a person contests a will and in order to settle the contest a spendthrift trust is created in his favor, he has given consideration in agreeing to the settlement made, and the trust created is within the rule of this Section.

Where a trust is created by the will of one spouse in favor of the other, the surviving spouse does not become the settlor of the trust merely because she or he waives a right to insist on dower or curtesy or a statutory distributive share of the estate of the deceased spouse.

g. Voluntary transfer. If a person attempts to create a spendthrift trust for his own benefit, he may voluntarily transfer his interest although the terms of the trust contain an express restraint against his voluntary alienation.

h. Cross reference. As to the termination of a trust created by a person for his own benefit, see § 339.

§ 157. Particular Classes of Claimants

Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary,

(a) by the wife or child of the beneficiary for support, or by the wife for alimony;

(b) for necessary services rendered to the beneficiary or necessary supplies furnished to him;

(c) for services rendered and materials furnished which preserve or benefit the interest of the beneficiary;

(d) by the United States or a State to satisfy a claim against the beneficiary.

See Reporter's Note.

Comment:

a. Scope of the rule. The enumeration in this Section of situations in which the interest of the beneficiary of a spendthrift trust or of a trust for support can be reached is not necessarily exclusive. The interest of the beneficiary of a spendthrift trust or a trust for support may be reached in cases other than those herein enumerated, if considerations of public policy so require. Thus it is possible that a person who has a claim in tort against the beneficiary of a spendthrift trust may be able to reach his interest under the trust.

Comment on Clause (a):

b. Dependents of the beneficiary. Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against him for support by his wife or children. In some cases a spendthrift clause is construed as not intended to exclude the beneficiary's dependents. Even if the clause is construed as applicable to claims of his dependents for support, it is against public policy to give full effect to the provision. The beneficiary should not be permitted to have the enjoyment of his interest under the trust while neglecting to support his dependents. It is a matter for the exercise of discretion by the court having jurisdiction over the administration of the trust as to how much of the income under the trust should be applied for such support and how much the beneficiary himself should receive. Even though the beneficiary's wife has obtained a decree for alimony directing the beneficiary to pay certain sums to her, she cannot compel the trustee to pay her the full amount so decreed unless the court which has jurisdiction over the administration of the trust deems it to be fair to the beneficiary himself to compel the trustee to make such payment. The result is much the same as though the trust were created, not solely for the benefit of the beneficiary, but for the benefit of himself and his dependents.

Illustrations:

1. A bequeaths \$100,000 to B upon a spendthrift trust for C. C neglects to support his wife and children. The wife and children can reach for their support C's interest under the trust.

2. A, domiciled in State X, bequeaths \$100,000 to B upon a spendthrift trust for C. C's wife brings a proceeding in State Y against C for divorce, serving C personally with process in State Y. A divorce is granted with a decree awarding alimony of \$3000 a year. In a proceeding in State X, C's wife can reach C's interest under the trust in satisfaction of her claim for alimony to the extent to which the court in State X determines to be reasonable.

Comment on Clause (b):

c. Claims for necessities furnished to the beneficiary. Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against him for necessary services rendered to him or necessary supplies furnished to him. If such a claim were not enforced, it would tend to prevent the beneficiary from obtaining necessary assistance, and a refusal to enforce such a claim is not necessary for the protection of the beneficiary's interest under the trust.

Illustrations:

3. A bequeaths \$100,000 to B upon a spendthrift trust for C. C is suddenly taken ill and D, a physician who is present at the time, renders medical services. D can reach C's interest under the trust in payment for the services.

4. A bequeaths \$100,000 to B upon a spendthrift trust for C. D furnishes to C necessary food, clothing and lodging. D can reach C's interest under the trust in payment of his claim.

Where, however, the trustee is ready and willing to supply necessities to the beneficiary from his interest under the trust, and the person supplying the necessities is acting officiously, he cannot enforce his claim against the beneficiary's interest.

Comment on Clause (c):

d. Benefits conferred upon the beneficiary's interest. Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim for services rendered and materials furnished which preserve or benefit the interest of the beneficiary. In such a case the beneficiary would be unjustly enriched if such a claim were not allowed. Even if it were not allowed, the person rendering the services and furnishing the materials would have a claim against the trustee if he contracted for such services and materials, and the trustee would be entitled to indemnity out of the trust property. See § 244, Comment *d*. Even if the trustee made no contract, the trust estate would be unjustly enriched if it were permitted to retain the benefits derived from such services and materials without paying for them.

Illustrations:

5. A bequeaths \$100,000 to B upon a spendthrift trust for C. D, A's next of kin, institutes an action to contest the will, which if successful would result in the destruction of C's interest under the trust. C employs E, an attorney, to represent him in the action and the will is upheld. E can reach C's interest under the trust in payment for his services rendered in protecting the interest.

6. A devises Blackacre to B upon a spendthrift trust for C. There is a building on Blackacre and C keeps this insured in his own name. The building is destroyed by fire and C hires D to rebuild it. D can reach C's interest under the trust in payment of his claim for improving the trust property.

Where, however, a person acts officiously in conferring a benefit upon the beneficiary's interest, he cannot enforce his claim against that interest.

Comment on Clause (d):

e. Governmental claims. The United States or a State which has a claim against the beneficiary of a trust can enforce its claim by reaching the interest of the beneficiary under the trust, although it is a spendthrift trust or a trust for support. This is true not only where the claim arises out of the administration of the trust, as, for example, where it is a claim for an income tax due with respect to the interest of the beneficiary under the trust, but also where the claim arose independently of the trust, as, for example, where it is a claim for a tax due from the beneficiary with respect to other property owned by him.

f. Alien enemies. If a federal statute provides that an officer of the United States shall seize all property within the United States belonging to alien enemies, this officer is entitled to seize the interest of a beneficiary of a trust although the trust is a spendthrift trust.

Illustration:

7. A bequeaths \$100,000 to B upon a spendthrift trust for C. C is an alien enemy. It is provided by a federal statute that the Alien Property Custodian appointed thereunder may seize all property belonging to alien enemies. The Alien Property Custodian or the Attorney General as his successor can seize C's interest under the trust.

Comment:

g. Voluntary transfer. Not only may the claimants enumerated in this Section reach the interest of the beneficiary by judicial proceedings to satisfy their claims, but a voluntary conveyance by the beneficiary of his interest so far as necessary to satisfy such claims is valid.

h. Appointment of receiver. In order that the claimant may reach the interest of the beneficiary a receiver may be appointed by the court and the trustee may be compelled to pay over the income to him.

EXHIBIT 2

WISCONSIN STATUTES ANNOTATED § 701.06**701.06 Spendthrift provisions and rights of creditors of beneficiaries**

(1) **Income beneficiaries.** A settlor may expressly provide in the creating instrument that the interest in income of a beneficiary other than the settlor is not subject to voluntary or involuntary alienation. The income interest of such a beneficiary cannot be assigned and is exempt from claims against the beneficiary until paid over to him pursuant to the terms of the trust.

(2) **Principal beneficiaries.** A settlor may expressly provide in the creating instrument that the interest in principal of a beneficiary other than the settlor is not subject to voluntary or involuntary alienation. The interest in principal of such a beneficiary cannot be assigned and is exempt from claims against the beneficiary, but a judgment creditor, after any payments of principal have become due or payable to the beneficiary pursuant to the terms of the trust, may apply to the court for an order directing the trustee to satisfy the judgment out of any such payments and the court in its discretion may issue an order for payment of part or all of the judgment.

(3) **Disclaimer or renunciation not an assignment.** A disclaimer or renunciation by a beneficiary of part or all of his or her interest under a trust shall not be considered an assignment under sub. (1) or (2).

(4) **Claims for child support.** Notwithstanding any provision in the creating instrument or subs. (1) and (2), upon application of a person having a valid order directing a beneficiary to make payment for support of the beneficiary's child, the court may:

(a) If the beneficiary is entitled to receive income or principal under the trust, order the trustee to satisfy part or all of the claim out of part or all of payments of income or principal as they are due, presently or in the future;

(b) In the case of a beneficiary under a discretionary trust, order the trustee to satisfy part or all of the claim out of part or all of future payments of income or principal which are to be made pursuant to the exercise of the trustee's discretion in favor of such beneficiary.

(5) Claims for public support. Notwithstanding any provision in the creating instrument or subs. (1) and (2), if the settlor is legally obligated to pay for the public support of a beneficiary under s. 46.10 or the beneficiary is legally obligated to pay for his public support or that furnished his spouse or minor child under s. 46.10, upon application by the appropriate state department or county official, the court may:

(a) If such beneficiary is entitled to receive income or principal under the trust, order the trustee to satisfy part or all of the liability out of part or all of payments of income or principal as they are due, presently or in the future;

(b) Except as otherwise provided in par. (c), in the case of a beneficiary under a discretionary trust, order the trustee to satisfy part or all of the liability out of part or all of future payments of income or principal which are to be made pursuant to the exercise of the trustee's discretion in favor of such beneficiary;

(c) In the case of a beneficiary under a discretionary trust who is a settlor or a spouse or minor child of the settlor, order the trustee to satisfy part or all of the liability without regard to whether the trustee has then exercised or may thereafter exercise his discretion in favor of the beneficiary.

(5m) Trust for disabled individual. Subsection (5) does not apply to any trust that is established for the benefit of an individual who has a disability which has continued or can be expected to continue indefinitely, substantially impairs the individual from adequately providing for his or her own care or custody, and constitutes a substantial handicap to the afflicted individual if the trust does not result in ineligibility for public assistance under ch. 49. A trustee of a trust which is exempt from claims for public support under this subsection shall notify the county department of social services or public welfare in the county where the disabled beneficiary resides of the existence of the trust.

(6) Settlor as beneficiary. Notwithstanding any provision in the creating instrument and in addition to the remedies available under subs. (4) and (5) where the settlor is a beneficiary, upon application of a judgment creditor of the settlor, the court may, if the terms of the instrument require or authorize the trustee to make payments of income or principal to or for the benefit of the settlor, order the trustee to satisfy part or all of the judgment out of part or all of the payments of income or principal as they are due, presently or in the future, or which are payable in the trustee's discretion, to the extent in either case of the settlor's proportionate contribution to the trust.

(7) Subsequent modification of court's order. Any order entered by a court under sub. (4), (5) or (6) is subject to modification upon application of an interested person.

(8) Exempt assets. Assets of a trust, to the extent they are exempt from claims of creditors under other statutes, shall not be subject to sub. (4), (5) or (6).

EXHIBIT 3

CHAPTER 2. RESTRICTIONS ON VOLUNTARY AND INVOLUNTARY TRANSFERS

§ 15300. Forfeiture for alienation

15300. A provision in the terms of a trust that the interest of a beneficiary shall terminate upon an attempt by the beneficiary to transfer it or by the beneficiary's creditors to reach it or upon the beneficiary's bankruptcy is valid as to the beneficiary's interest in income or principal or both.

Comment. Section 15300 is a new provision that provides an unqualified rule as to the validity of a forfeiture restraint on voluntary or involuntary alienation. The forfeiture restraint should be distinguished from the disabling restraint of a spendthrift trust under Sections 15301 and 15302.

DRAFTSMAN'S NOTE. Compare Section 15300 with Section 150 of the Restatement (Second) of Trusts. See the Comment to that section. The Restatement provision does not provide an unqualified rule as to validity because a forfeiture is valid as to the beneficiary's interest in principal only to the extent that a restriction on alienation of an interest in principal is valid under the rules stated in Section 153 of the Restatement (Second) of Trusts. If the Restatement rule on restriction of alienation of an interest in principal is adopted, Section 15300 needs to be revised.

§ 15301. Restraint on alienation of income

15301. A settlor may expressly provide in the creating instrument that the interest in income of a beneficiary is not subject to voluntary or involuntary alienation. The income interest of such a beneficiary cannot be assigned and is exempt from claims against the beneficiary until paid over to the beneficiary pursuant to the terms of the trust.

Comment. Section 15301 is the same in substance as subsection (1) of Section 701.06 of Wisconsin Statutes Annotated. For

qualifications of the protection provided by Section 15301, see Sections 15305 (settlor a beneficiary), 15306 (claim for child or spousal support), 15307 (claim for public support), 15308 (surplus income subject to creditors' claims).

DRAFTSMAN'S NOTE. Compare Section 15301 to subsection (1) of Section 152 of the Restatement (Second) of Trusts. See the Comment to that subsection. Under the Restatement provision only restraints on the beneficiary's right to the income accruing DURING THE BENEFICIARY'S LIFETIME are valid. Section 15301 would change the result in Comment n to Restatement Section 152.

§ 15302. Restraint on alienation of principal

15302. A settlor may expressly provide in the creating instrument that the interest in principal of a beneficiary is not subject to voluntary or involuntary alienation. The interest in principal of such a beneficiary cannot be assigned and is exempt from claims against the beneficiary; but a judgment creditor, after one or more payments of principal have become due or payable to the beneficiary pursuant to the terms of the trust, may file a petition under Section 709.010 of the Code of Civil Procedure for an order directing the trustee to satisfy the judgment out of any such payments and the court in its discretion may issue an order directing the trustee to pay part or all of the judgment out of such payments.

Comment. Section 15302 is the same in substance as subsection (2) of Section 701.06 of Wisconsin Statutes Annotated. For qualifications of the protection provided by Section 15302, see Sections 15305 (settlor a beneficiary), 15306 (claim for child or spousal support), 15307 (claim for public support), 15308 (surplus income subject to creditors' claims).

The provision of Section 15302 that makes clear that a restraint on voluntary or involuntary alienation is valid is generally consistent with prior California law. See *San Diego Trust & Savings Bank v. Heustis*, 121 Cal.App. 675, 10 P.2d 158 (1932) (where husband was income beneficiary and remainderman, estranged wife could not reach trust funds for support); *Seymour v. McAvoy*, 121 Cal. 438, 444, 53 P. 946 (1898) (creditor could not reach contingent remainder); *Coughran v. First Nat. Bank*, 19 Cal. App.2d 152, 64 P.2d 1013 (1937) (in an action to quiet title, attachment levied against beneficiary's contingent fractional interest in trust property was held invalid). There was no clear holding under former California law as to the validity of disabling restraints on alienation of trust principal by a

noncontingent remainderman who was not an income beneficiary. Likewise, under former California law, there was no judicial decision determining whether a judgment creditor could reach amounts of principal held by the trustee that were due or payable. Where the trust principal has been delivered to the remainderman beneficiary, it is subject to the claims against the beneficiary like any other property. Kelly v. Kelly, 11 Cal.2d 356, 79 P.2d 1059 (1938).

POLICY ISSUES:

(1) Should a restraint on the voluntary or involuntary transfer of the remainderman's interest in the trust be valid where the remainderman is NOT AN INCOME BENEFICIARY? If such a provision is valid, it may hamper estate planning.

(2) If the principal is not to be conveyed to a beneficiary DURING THE BENEFICIARY'S LIFETIME, should a restraint on the voluntary or involuntary transfer of the beneficiary's interest in the principal be valid? Such a restraint is invalid under Section 153 of Restatement (Second) of Trusts. See that section and the Comment to that section.

(3) The Restatement provision—Section 153—provides protection only if the beneficiary is entitled to have the principal conveyed to him or her AT A FUTURE TIME. Is this a desirable limitation on the protection to be given to the beneficiary?.

§ 15303. Trust for support

15303. If by the terms of the trust it is provided that the trustee shall pay or apply only so much of the income and principal or either as is necessary for the education or support of the beneficiary, the beneficiary cannot transfer his or her interest and the creditors of the beneficiary cannot reach it.

Comment. Section 15303 is the same in substance as Section 154 of the Restatement (Second) of Trusts. See the Comment to that section. Section 15303 is consistent with prior California law. See Seymour v. McAvoy, 121 Cal. 438, 53 P. 946 (1898).

§ 15304. Transferee or creditor cannot compel trustee to exercise discretion; liability of trustee for payment to or for beneficiary

15304. (a) If by the terms of a trust it is provided that the trustee shall pay or apply for a beneficiary only so much of the

income and principal or either as the trustee in his or her discretion shall see fit to pay or apply, a transferee or creditor of the beneficiary cannot compel the trustee to pay any part of the income or principal. Unless a valid restraint on alienation has been imposed in accordance with the rules stated in Sections 15301 and 15302, if the trustee pays to or applies for the beneficiary any part of the income or principal with knowledge of the transfer or after the trustee has been served with process in a proceeding under Section 709.010 of the Code of Civil Procedure by a judgment creditor to reach it, the trustee is liable to such transferee or creditor.

(b) This section applies whether or not the terms of the trust provide a standard for the exercise of the trustee's discretion.

(c) Nothing in this section limits any right the beneficiary may have to compel the trustee to pay all or part of the income or principal to or for the beneficiary.

Comment. Section 15304 is drawn from Section 155 of the Restatement (Second) of Trusts, and provides that a judgment creditor cannot compel the trustee of a discretionary trust to pay any part of the trust income or principal, although a judgment creditor may be able to reach any payment the trustee does decide to make. Subdivision (a) is consistent with prior California law. See Estate of Canfield, 80 Cal. App.2d 443, 181 P.2d 732 (1947) (citing Restatement of Trusts, § 155) (trustee's discretion uncontrolled); Canfield v. Security-First Nat. Bank, 13 C.2d 1, 30, 87 P.2d 830 (1939) (citing Restatement of Trusts, § 155).

Unlike Section 155 of the Restatement, Section 15304 applies whether or not the trustee's discretion is subject to a standard. See subdivision (b) of Section 15304. The Restatement provision applies only where the trustee has "uncontrolled discretion." Accordingly, under Section 15304, even though the beneficiary of the trust could compel the trustee to make payment pursuant to the standard set out in the terms of the trust, the transferor or creditor has no similar right to compel the payment. Subdivision (c) of Section 15304 makes clear that the section does not affect or limit any right the beneficiary (as distinguished from a transferor or creditor of the beneficiary) may have to compel payment. See Estate of Ferrall, 41 C.2d 166, 258 P.2d 1009 (1953) (whether fraud, bad faith or an abuse of discretion has been committed by trustees in refusing to make payments for the support of the beneficiary of a discretionary trust is subject to review by the court).

DRAFTSMAN'S NOTE. Section 15304 provides the beneficiary with broader protection than the Restatement provision from which Section 15304 is drawn. The Restatement provision (Section 155) applies only where the trustee has "uncontrolled discretion." Should Section 15304 be subject to this limitation?

§ 15305. Where settlor is a beneficiary

15305 (a) Except as otherwise provided in Section 704.115 of the Code of Civil Procedure, notwithstanding any provision in the creating instrument or Sections 15301 to 15304, inclusive, where a person creates for the person's own benefit a trust with a provision restraining the voluntary or involuntary transfer of the person's interest, the restraint is invalid against transferees or creditors of the person. The invalidity of the restraint does not affect the validity of the trust.

(b) Where a person creates for the person's own benefit a trust for support or a discretionary trust, the transferee or creditors of the person can reach the maximum amount which the trustee under the terms of the trust could pay to the person or apply for the person's benefit.

Comment. Section 15305 is the same in substance as Section 156 of the Restatement (Second) of Trusts. See the Comment to that section. Section 15306 codifies the case-law rule applicable under former law. See, e.g., *Nelson v. California Trust Co.*, 33 Cal.2d 501, 202 P.2d 1021 (1949). The introductory clause to subdivision (a) recognizes that a different rule applies to certain pension trusts. See Code Civ. Proc. § 704.115 and the Comment thereto.

If a person furnishes the consideration for the creation of a trust, he is the settlor. *McColgan v. Walter Magee, Inc.*, 172 Cal. 182, 155 P.995 (1916) (beneficiary transferred assets into trust although certain other persons by refusal to consent could have prevented transfer); *Parscal v. Parscal*, 148 Cal. App.3d 1098, 1104, 196 Cal. Rptr. 462 (1957)(child support enforceable against beneficiary's interest in trust created by beneficiary's employers under a collective bargaining agreement with benefit credits according to the amount contributed by employers to employee's account).

§ 15306. Claims for child or spousal support

15306. Notwithstanding any provision in the creating instrument or Sections 15301 to 15304, inclusive, upon petition under Section 709.010 of the Code of Civil Procedure by a person having a valid order directing a beneficiary to make payment for support of the beneficiary's child or the spouse or former spouse of the beneficiary, to the extent that the court determines equitable and reasonable under the circumstances of the particular case, the court may:

(a) To the extent that the beneficiary has the right to compel the trustee to pay to the beneficiary income or principal under the trust, order the trustee to satisfy part or all of the claim out of part or all of the payments of the income or principal as they are due, presently or in the future.

(b) To the extent that the beneficiary does not have the right to compel the trustee to pay to the beneficiary income or principal under the trust, order the trustee to satisfy part or all of the claim out of part or all of future payments of income or principal which the trustee, pursuant to the exercise of the trustee's discretion, determines to make in favor of the beneficiary.

Comment. Section 15306 is drawn from subsection (4) of Section 701.06 of Wisconsin Statutes Annotated and reflects the same public policy as clause (a) of Section 157 of the Restatement (Second) of Trusts.

Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary for child or spousal support. In some cases a spendthrift clause may be construed as not intended to exclude the beneficiary's dependents. Even if the clause is construed as applicable to claims of the dependents for support, it is against public policy to give full effect to the provision. The beneficiary should not be permitted to have the enjoyment of the interest under the trust while neglecting to support his or her dependents. It is a matter for the exercise of discretion by the probate court (see Code Civ. Proc. § 709.010) as to how much of the amount payable to the beneficiary under the trust should be applied for such support and how much the beneficiary should receive. Even though the beneficiary's wife has obtained a spousal support order directing the beneficiary to pay a specified amount to her for support, she cannot compel the trustee to pay her the full amount so ordered unless the court determines that it is equitable and reasonable under the circumstances of the particular case to the beneficiary himself to compel the trustee to make such payment. The result is much the same as though the trust were created, not solely for the benefit of the beneficiary, but for the benefit of himself and his dependents.

Section 15306 changes prior California law. See *San Diego Trust & Savings Bank v. Heustis*, 121 Cal.App.2d 675, 10 P.2d 158 (1932) (estranged wife); *Canfield v. Security First Nat. Bank*, 8 Cal. App.2d 277, 48 P.2d 133 (1935) (former wife); *Smith v. Smith*, 51 Cal. App.2d 29, 124 P.2d 117 (1942) (former wife); *In re Estate of Lawrence*, 267 Cal. App.2d 77, 72 Cal. Rptr. 851 (1968) (former wife); *In re Estate of Johnston*, 252 Cal. App.2d 923, 60 Cal. Rptr. 852 (1967) (minor child). But see *Parscal v. Parscal*, 148 Cal. App.3d 1098, 1104, 196 Cal. Rptr. 462 (1957) (child support enforceable against beneficiary's interest in trust created by beneficiary's employers under a collective bargaining agreement with benefit credits according to the amount contributed by employers to employee's account).

§ 15307. Claims for public support

15307. (a) Notwithstanding any provision in the creating instrument or Sections 15301 to 15304, inclusive, if the settlor is legally obligated by a statute of this state to pay for the public support of a beneficiary or the beneficiary is legally obligated to pay for his or her public support or that furnished to the beneficiary's spouse or minor child, upon petition under Section 709.010 of the Code of Civil Procedure by the appropriate state or local agency or public official, to the extent the court determines equitable and reasonable under the circumstances of the particular case, the court may:

(1) To the extent that the beneficiary has the right to compel the trustee to pay to the beneficiary income or principal under the trust, order the trustee to satisfy part or all of the liability out of part or all of the payments of income or principal as they are due, presently or in the future.

(2) Except as otherwise provided in paragraph (3), to the extent that the beneficiary does not have the right to compel the trustee to pay to the beneficiary income or principal under the trust, order the trustee to satisfy part or all of the liability out of part or all of the future payments of income or principal which the trustee, pursuant to the exercise of the trustee's discretion, determines to make in favor of such beneficiary.

(3) If the beneficiary is a settlor or a spouse or minor child of the settlor and the beneficiary does not have the right to compel the trustee to pay to the beneficiary income or principal under the

trust, to the extent that the trustee pursuant to the exercise of the trustee's discretion has the right to make payments of income or principal in favor of the beneficiary, order the trustee to satisfy part or all of the liability without regard to whether the trustee has then exercised or may thereafter exercise his or her discretion in favor of the beneficiary.

(b) Subdivision (a) does not apply to any trust that is established for the benefit of an individual who has a disability which can be expected to continue indefinitely, substantially impairs the individual from adequately providing for his or her own care or custody, and constitutes a substantial handicap to the afflicted individual.

Comment. Section 15307 is drawn from subsections (5) and (5m) of Section 701.06 of Wisconsin Statutes Annotated.

Section 15307 is consistent with prior California law which permitted a state institution in which the beneficiary of a spendthrift trust was an inmate to reach the beneficiary's interest. Estate of Lackmann, 156 Cal. App.2d 674, 320 P.2d 186 (1958) (citing Restatement of Trusts, § 157). However, subdivision (b) of Section 15307 would make clear that the state or local agency has the right to reach the beneficiary's interest for reimbursement for support provided to the spouse or minor child of the beneficiary and would limit the right of the state or local agency to reach the beneficiary's interest in cases where the trust was established to provide for the care of a permanently disabled beneficiary unable adequately to provide for his or her own care of custody. This limitation is designed to encourage those who might benefit a permanently disabled person to make a provision in a trust for the care or support of the person without the fear that the benefits of the trust will be required to be used to reimburse the public agency for a minimal level of support provided by the public agency. Absent such a provision, the person who wishes to provide for the person is likely to make no provision at all for the disabled person.

DRAFTSMAN'S NOTE. Section 15307 gives public entities a much narrower right to reach the beneficiary's interest in a trust than the Restatement (Second) of Trusts. The Restatement provision--Section 157(d)--covers ANY CLAIM by the United States or a state, but Section 15307 is limited to WELFARE CLAIMS ("public support") and Section 15307 covers only claims by a public agency of THIS state, whereas the Restatement provision applies to any claim of the United States or A state.

§ 15308. Surplus income subject to creditors' claims

15308. Where a trust is created to receive the income from property and the trust instrument does not contain a valid direction for accumulation of income, the surplus income beyond the sum that is necessary for the education and support of the beneficiary may be applied to the satisfaction of a money judgment against the beneficiary.

Comment. Section 15308 continues former Civil Code Section 859 without substantive change. Sections 15306 and 15307 permit only certain preferred creditors to reach the beneficiary's interest in the trust. Section 15308 permits an ordinary creditor to reach "surplus income" under limited circumstances.

A station-in-life test is used to determine the amount necessary for education and support under this section. See *Canfield v. Security-First Nat'l Bank*, 13 Cal.2d 1, 21-24, 87 P.2d 830 (1939); *Smith v. Smith*, 51 Cal. App.2d 29, 124 P.2d 117 (1942); *Magner v. Crooks*, 139 Cal. 640, 642, 73 P. 585 (1903). Cf. *Alvis v. Bank of America*, 95 Cal. App.2d 118, 212 P.2d 608 (1949).

The California Supreme Court has rejected the more extreme New York cases, but has continued to embrace the station-in-life test which considers factors such as the social background of the beneficiary and the need for servants. See, e.g., *Canfield v. Security-First Nat'l Bank*, 13 Cal.2d 1, 24-28, 87 P.2d 830 (1939). If the trustee has discretion to determine the disposition of the trust income, the trustee may be able to defeat the creditor's attempt to reach the "surplus" under this section by reducing the amount to be paid to the beneficiary to the amount determined by the court to be necessary for the support and education of the beneficiary. See *Estate of Canfield*, 80 Cal. App.2d 443, 181 P.2d 732 (1947); *E. Griswold, Spendthrift Trusts* § 428 (2d ed. 1947).

Other provisions may permit a creditor of the beneficiary to satisfy part or all of the creditor's claim out of part or all of the payments of the income or principal as they are due, presently or in the future. See Sections 15306 (child or spousal support), 15307 (public support). See also Section 15305 (settlor is beneficiary).

DRAFTSMAN'S NOTE. With the repeal of the provision giving an ordinary creditor the right to reach such amount of a periodic payment to a beneficiary as the probate court in its discretion allows (but not more than 25 percent of any periodic payment), Section 15308 becomes the only provision that gives an ordinary creditor a right to reach a beneficiary's interest in a trust. The Restatement (Second)

of Trusts in Section 157(b) allows a creditor to reach the beneficiary's interest in satisfaction of an enforceable claim for necessary services rendered to the beneficiary or necessary supplies furnished to the beneficiary.

§ 15309. Subsequent modification of court's order

15309. Any order entered by a court under Section 15306, 15307, or 15308 is subject to modification upon petition of any interested person filed in the court where the order was made.

Comment. Section 15309 is drawn from subsection (7) of Section 701.06 of Wisconsin Statutes Annotated.

§ 15310. Disclaimer not an assignment

15310. A disclaimer or renunciation by a beneficiary of part or all of his or her interest under a trust shall not be considered a transfer under Section 15300, 15301, or 15302.

Comment. Section 15310 is drawn from subsection (3) of Section 701.06 of Wisconsin Statutes Annotated.

CONFORMING REVISIONS AND REPEALS

Civil Code § 859 (repealed). Surplus of rents and profits subject to satisfaction of money judgment

SEC. ____ . Section 859 of the Civil Code is repealed.

859 /// Where a trust is created to receive the rents and profits of real or personal property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, may be applied to the satisfaction of a money judgment against the person as provided in Section 709.010 of the Code of Civil Procedure.

Comment. The substance of former Section 859 is continued in Probate Code Section 15308.

Civil Code § 867 (repealed). Restraint on disposal of interest in trust

SEC. ____ . Section 867 of the Civil Code is repealed.

867 /// The beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, may be restrained from disposing of his interest in such trust, during his life or for a term of years, by the instrument creating the trust.

Comment. Former Section 867 is superseded by Sections 15300 to 15310 of the Probate Code. See especially Probate Code Sections 15301 to 15304.

Code Civ. Proc. § 695.030 (technical amendment). Property subject to enforcement of money judgment

SEC. ____ . Section 695.030 of the Code of Civil Procedure is amended to read:

695.030. (a) Except as otherwise provided by statute, property of the judgment debtor that is not assignable or transferable is not subject to enforcement of a money judgment.

(b) The following property is subject to enforcement of a money judgment:

(1) An interest in a ~~spendthrift~~ trust, to the extent provided by law.

(2) A cause of action for money or property that is the subject of a pending action or special proceeding.

Comment. Section 695.030 is amended to delete "spendthrift" from subdivision (b)(1) in recognition that trusts other than "spendthrift" trusts may be not assignable or transferable. See e.g., Prob. Code § 15303 (trust for support).

Code of Civil Procedure § 709.010 (technical amendment). Enforcement of money judgment against beneficiary's interest in trust

SEC. ____ . Section 709.010 of the Code of Civil Procedure is amended to read:

709.010. (a) As used in this section, "trust" has the meaning provided in Section ~~1138~~ 82 of the Probate Code ~~but includes a trust subject to court supervision under Article 1 (commencing with Section 1120) of Chapter 19 of Division 3 of the Probate Code.~~

(b) The judgment debtor's interest as a beneficiary of a trust is subject to enforcement of a money judgment only upon petition under this section by a judgment creditor to a court having jurisdiction over administration of the trust as prescribed in Chapter 19 Part 5 (commencing with Section 1120 16500) of Division 3 9 of the Probate Code ~~(administration of trusts)~~. The judgment debtor's interest in the trust may be applied to the satisfaction of the money judgment by such means as the court, in its discretion, determines are proper, including but not limited to imposition of a lien on or sale of the judgment debtor's interest, collection of trust income, and liquidation and transfer of trust assets by the trustee.

~~(c) Upon petition of the judgment creditor under this section, the court may make an order that the trustee withhold and pay to the judgment creditor all or a portion of the amount that otherwise would be paid periodically to the judgment debtor from the trust. Unless the order otherwise provides, the order shall continue in effect until the judgment of the judgment creditor is satisfied or the order is modified or terminated. In the case of periodic payments from a spendthrift or support trust, the order may not~~

has not duty to oppose a petition under this section or to hold any claim back or exempted or to withhold or to take any action or to do anything in compliance with any court order under this section.

(f) Except as provided in subdivision (d) or (e), nothing

(c) Nothing in this section affects the law relating to enforcement limitations on the enforcement of a money judgment against the judgment debtor's interest in a spendthrift trust under Chapter 2 (commencing with Section 15300) of Part 1 of Division 9 of the Probate Code, and the provisions of this section are subject to the limitations of that chapter or the law relating to spendthrift trusts or to Section 839 of the Probate Code or subject to enforcement of a money judgment under this section.

Comment. Section 709.010 is amended to conform to amendments in the Probate Code.

Subdivision (a) of Section 709.010 is amended to replace the reference to Section 1138 of the Probate Code with a reference to Section 82 of the Probate Code (defining "trust" for the purposes of the Probate Code).

Subdivision (b) of Section 709.010 is amended to replace the reference to Chapter 19 of Division 3 of the Probate Code with a reference to Part 5 of Division 9 of the Probate Code. The change is nonsubstantive.

Former subdivisions (c), (d), (e), and (f) are replaced by new subdivision (c). This eliminates the provisions formerly found in Section 709.010 that permitted the court to order that amounts be withheld by the trustee from periodic payments from a trust, whether or not a spendthrift or support trust, using the same standard that applies when earnings of a judgment debtor are subject to an earnings withholding order (wage garnishment). The eliminated provisions are replaced by language in new subdivision (c) referring to the new provisions of the Probate Code governing the rights of transferees and creditors of the beneficiary of a trust to reach the beneficiary's interest in the trust. See Sections 15300-15310 and the Comments to those provisions.