

Third Supplement to Memorandum 91-38

Subject: Study L-3002 - Powers of Appointment (Comments of Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section)

Attached to this supplement is a letter concerning the power of appointment draft in the First Supplement to Memorandum 91-38 from Valerie Merritt on behalf of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section.

The Executive Committee suggests either (1) retaining existing law or (2) enacting a codification of the holding in *Estate of Wood*. The first position puts the Committee at odds with the Conference of Delegates resolution which is set out in AB 1722, discussed in the First Supplement to Memorandum 91-38.

The second alternative proposal -- to adopt the standard of *Wood* -- is in effect what the staff has proposed. The Executive Committee characterizes the *Wood* rule as a "substantial compliance" standard. However, this is not the *Wood* standard. *Wood* applied a "reasonable compliance" rule, coupled with a finding that no presumed purpose of the donor would be "thwarted."

The staff is also puzzled by the Executive Committee's statement that proposed Section 630.5 (alternative #1, on pages 7-8 of the First Supplement) is "too broad" in allowing exercise of the power "without full compliance with the limitations set forth in the document creating the power." The substantial compliance rule proposed by the Executive Committee would not require full compliance, by definition. And, as discussed in the First Supplement, the status of the existing statutory rule concerning compliance with the donor's formal requirements is not entirely clear, but probably includes an equitable or reasonable approximation factor. As *Wood* illustrates, "full compliance" or strict compliance is not required, notwithstanding a literal interpretation of the existing statutory language in Civil Code Section 1385.1.

The proposed rule in Section 630.5 comes closer to *Wood* than either the Executive Committee's "substantial compliance" suggestion or

the language of AB 1722. It is also the staff's understanding that proposed Section 630.5 (alternative #1) meets with the approval of Mary F. Gillick, the contact person with respect to the Conference of Delegates resolution, and that it satisfies the objections to AB 1722 expressed by James R. Birnberg on behalf of the Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association. (See letters attached to the First and Second Supplements to Memorandum 91-38.) Put another way, we remain unclear on the objections of the Executive Committee to the language of proposed Section 630.5; the arguments presented in Ms. Merritt's letter suggest that the Executive Committee should be supporting the proposed language.

Respectfully submitted,

Stan Ulrich
Staff Counsel

**ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA**

ChairBRUCE S. ROSS, *Beverly Hills***Vice-Chair**WILLIAM V. SCHMIDT, *Newport Beach***Executive Committee**ARTHUR H. BREIDENBECK, *Burlingame*CLARK R. BYAM, *Pasadena*SANDRA J. CHAN, *Los Angeles*MONICA DRILLOBO, *Oakland*MICHAEL G. DEBMAIS, *San Jose*ROBERT J. DURHAM, JR., *La Jolla*MELITTA FLECK, *La Jolla*ANDREW S. GARR, *Los Angeles*DENNIS J. GOULD, *Oakland*DON E. GREEN, *Sacramento*JOHN T. HARRIS, *Gridley*BRUCE S. ROSS, *Beverly Hills*WILLIAM V. SCHMIDT, *Newport Beach*THOMAS J. STICKER, *San Francisco*ROBERT L. SULLIVAN, JR., *Fresno*ROBERT E. TEMMERMAN, JR., *Campbell*MICHAEL V. VOLLMER, *Irvine*

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102
(415) 561-8289

July 23, 1991

AdvisorsIRWIN D. GOLDRING, *Los Angeles*ANNE K. HILKER, *Los Angeles*WILLIAM I. HOISINGTON, *San Francisco*BEATRICE L. LAWSON, *Los Angeles*VALERIE J. MERRITT, *Los Angeles*BARBARA J. MILLER, *Oakland*JAMES V. QUILLINAN, *Mountain View*STERLING L. ROSS, JR., *Mid Valley*ANN E. STODDEN, *Los Angeles*JANET L. WRIGHT, *Fresno***Technical Advisors**KATHRYN A. BALLSUN, *Los Angeles*MATTHEW S. BAE, JR., *Los Angeles*HARLEY J. SPITLER, *San Francisco***Reporter**LEONARD W. POLLARD II, *San Diego***Section Administrator**SUSAN M. OSLOFF, *San Francisco*

REPLY TO:

56570-000

Valerie J. Merritt
(213) 688-2520

BY FEDERAL EXPRESS

California Law Revision Commission
4000 Middlefield Road, D-2
Palo Alto, CA 94303-4739

Re: Memoranda 91-23, 91-38, 91-41, 91-45 and 91-51

Dear Commissioners:

Enclosed are two letters from Melitta Fleck, Captain of Team 3 reporting the position of Team 3 on Memoranda 91-23 and 91-41. These positions have not been reviewed by the entire Executive Committee.

At the Meeting of the Executive Committee of the Estate Planning, Trust and Probate Law Section on July 13, we discussed our position on Memorandum 91-38, Exercise of Power of Appointment by Residuary Clause of Will. The Executive Committee believes that the proposal of the Memorandum is too broad in the latitude that is granted in allowing the exercise of a power of appointment without full compliance with the limitations set forth in the document creating the power. The Executive Committee believes that the standard of substantial compliance set forth in the case of Estate of Wood is more limited in application and more desirable than the proposal of this memorandum. Therefore, we suggest either retaining existing law or enacting a codification of the holding in the Wood case.

At that same meeting of the Executive Committee, we also discussed Memorandum 91-45, Trustees' Fees. We agreed with the suggestion that "affected

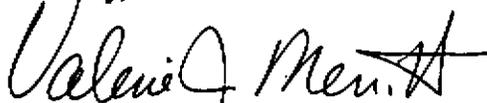
Nathaniel Sterling, Esq.
July 23, 1991
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interest" be removed, but we questioned the revised standard. We support a proposal that will require the Trustee to give notice of fee increases to the same persons who receive an accounting of the trust. We believe that any beneficiary who requests notice of fee increases should receive them, and that the same provision should apply with regard to accounts.

I also enclose a letter from Terry Ross indicating his personal views with regard to Memorandum 91-51. I have not yet received a team report on this memorandum.

I will be attending the meeting of the Commission on Thursday for the discussion of Memorandum 91-51 and on Friday. I hope to be able to expand upon these comments at that time.

Sincerely,



Valerie J. Merritt
Team Coordinator

VJM:gjm

cc: Bruce S. Ross
Team Captains
Robert Temmerman, Terry Ross, Clark Byam