

## Memorandum 2000-23

### Rights and Duties Under Revocable Trust

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This memorandum suggests that the Commission consider tabling the study of rights and duties under revocable trusts.

As discussed at the February meeting, the Commission's limited review of the problems presented in *Evangelho v. Presoto*, 67 Cal. App. 4th 615, 79 Cal. Rptr. 2d 146 (1998) (allowing beneficiaries to demand accounting under the Trust Law, after settlor's death, covering period when trust was revocable), has expanded to a review of a number of related issues involving liabilities and duties, and competing interests and claims, relating to the time when the settlor of a revocable trust may not be competent or may not be receiving accountings.

Attached for the record are several letters directed to revocable trust issues and to recent trust litigation problems in general:

	<i>Exhibit p.</i>
1. Charles A. Collier, Jr., Irell & Manella, Los Angeles (Feb. 29, 2000) . . . . .	1
2. Terence S. Nunan, on behalf of State Bar Estate Planning, Trust and Probate Law Section (Dec. 22, 1999) . . . . .	3
2. Terence S. Nunan, Rutter, Hobbs & Davidoff, Los Angeles (March 24, 2000) . . . . .	5

Practitioners have been seeing more trust litigation in recent years, which is a problem considered by the Commission last year in general terms. (The letter from Terence Nunan in Exhibit pp. 3-4 was in response to the earlier inquiry.) Some of that litigation relates to revocable living trusts, as evidenced by *Evangelho* and *Johnson v. Kotyck*, 76 Cal. App. 4th 83, 90 Cal. Rptr. 2d 99 (1999) (beneficiary of revocable trust did not have right to accounting where settlor under conservatorship and trust remained revocable).

The staff participated in a lengthy conference call with a working group of State Bar Estate Planning Section members convened by Don Travers, our liaison with the Executive Committee. The discussion was quite interesting, and a number of issues were discussed and addressed. The group, or part of it, has apparently continued working on the problems, as evidenced in Terry Nunan's letter in Exhibit pp. 5-7. Members of the group have also received the

Commission's background materials, including notably the letters from Chuck Collier, who initially moved the Commission to consider the issues arising out of the *Evangelho* case. (See, e.g., Minutes, August 1999, p. 9.) Terry Nunan's letter of March 24 indicates that the bar group is actively pursuing this topic, preparing a draft proposal, and planning how to review and finalize a proposal. (Exhibit p. 5.) Mr. Nunan and others have invested significant time and energy into working on their proposal. And, of course, the State Bar has traditionally had an omnibus probate bill each year, which, we assume, would be an appropriate vehicle for the working group's efforts.

We discussed the matter with Don Travers and, in light of the State Bar's active involvement, **the staff recommends that the Commission table further work on this topic so as not to duplicate the State Bar's efforts.** In view of the current Commission workload, it is not inappropriate to defer to others in this type of situation. If the State Bar effort stalls, the Commission could consider at a later time whether to revive the study. In addition, revisions in this area are likely to come before the Commission if the Trust Law is reviewed for possible revisions in light of the new Uniform Trust Code headed for final approval this year.

Respectfully submitted,

Stan Ulrich  
Assistant Executive Secretary

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February 29, 2000

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File: \_\_\_\_\_

Stanley Ulrich  
California Law Revision Commission  
40000 Middlefield Road, Room 1-D  
Palo Alto, CA 94303-4739Re: Probate Code Section 15800 - Memorandum 2000-7

Dear Stan:

The following are comments about possible revision of Probate Code Section 15800 and related sections. These are as follows:

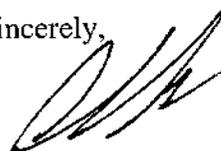
1. A intervivos trust is used in California as a will substitute. Rights should be similar to those rights of beneficiaries under a will which remains ambulatory until the testator dies.
2. If a grantor creates a trust and he or she serves as trustee, all rights belong to that grantor under the trust so long as it remains revocable, and there should be no obligation to account to anyone, just as there is no duty to account under a will during the testator's lifetime.
3. If the grantor should become for some reason incompetent, the grantor's rights can be exercised by a conservator. For example, Johnson v. Kotyck (November 1999 decision).
4. In the case of a husband and wife where there is community property involved in the trust, the spouse with legal capacity should have rights over the trust assets. Probate Code Section 3051.
5. The grantor's interest can be represented by a holder of a durable power of attorney. Probate Code Section 4000 and subsequent.
6. If there is neither a spouse who is competent and the trust contains community property nor a conservator nor a holder of a power of attorney, then the beneficiaries whose rights are subsequent to that of the grantor could enforce the grantor's rights.

Stanley Ulrich  
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7. If a trust is revocable and a third party acts as trustee, the trustee would act in a fiduciary capacity and would have a duty to account to the grantor or to someone acting on his behalf, such as a competent spouse, conservator or holder of a power of attorney.
8. The rights of subsequent beneficiaries are not "postponed" while the trust is revocable but simply do not arise until the trust becomes irrevocable except to the extent the absence of any other party the subsequent beneficiaries may have a right on behalf of the grantor to have, for example, a third party compel an accounting.
9. Even if a grantor becomes incompetent, the trust nonetheless remains revocable during the grantor's life and only becomes irrevocable on the death of the grantor.
10. So long as the trust is revocable, the only rights are those of the grantor whether competent or incompetent. The only issue is who can exercise rights on behalf of the grantor if the grantor is not able to exercise rights himself or herself.
11. A successor trustee of a revocable trust should have no obligation to account for the acts of a predecessor trustee who is other than the grantor.

I hope these observations are of some assistance to you in considering this issue.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd

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December 22, 1999

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DEC 27 1999

File: L-1-10

Mr. Stan Ulrich  
California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, California 94303-4739

Re: Fiduciary Litigation

Dear Mr. Ulrich:

In response an inquiry by the CLRC regarding an increase in trust litigation, the Estate Planning, Trust and Probate Law Section has the following observations:

1. To some extent, any increase in trust and estate litigation may be a demographic expression of aging in California's population. As the number of elderly Californians increases, one might anticipate an increase in contested proceedings concerning the legal affairs of the elderly.
2. The increasing use of the revocable trust and durable power of attorney, which permit fiduciary transactions to normally go forward without prior court review increases the probability of subsequent litigation concerning transactions which are controversial or inappropriate. In a traditional probate, inappropriate or controversial transactions will be blocked by the court or may not be initiated because of court approval requirements. One trade-off for non-court supervision of revocable trusts and durable powers of attorney is a certain increase in subsequent litigation concerning transactions by means of those vehicles.
3. The very old ages to which many people now live, combined with an extended period when the elderly are in a "gray" area with respect to their testamentary capacity, has tended to generate more will and trust contests than was true in the past.

Mr. Stan Ulrich  
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4. Multiple marriages with children from such multiple marriages, together with the recognition of non-traditional relationships, have also increased the number of contested will and trust proceedings.

5. There is probably a somewhat greater tendency for lawyers to concentrate on fiduciary litigation as a practice area than in the past. This may cause more contested trust and estate matters to be filed than in the past.

6. The growth in net worth of many California residents may contribute to an increase in litigation. With greater amounts at issue in an estate on trust controversy, more contestants may be willing to initiate contested proceedings .

The Section is uncertain if anything can or should be done to diminish the current level of fiduciary litigation. If you have any questions concerning the opinions in this letter, please let us know.

Sincerely,



TERENCE S. NUNAN  
Chair, Trust & Estate Administration  
Committee

TSN/ac

cc: James Ellis, Esq. - Chairperson, Estate Planning, Probate & Trust Law Section  
Don Travers, Esq.

**RUTTER**  
**HOBBS**   
**DAVIDOFF**  
INCORPORATED  
LAWYERS

March 24, 2000

See Attached List

Re: Revocable Trust Accounting

Attached is a chart I prepared which I think outlines a proposal to address most of the revocable trust accounting issues we have been discussing.

1. To the extent possible, I have tried to track existing law including the Livangelo/Johnson decisions. I have also tried to make the legal results clear and predictable.
2. Since I sympathize with Don Green's concerns, I had attempted to have the proposal to "match" the power of attorney rules while not doing too much violence to the historical trust accounting rules.
3. I think the proposal permits: 1) the correct result for most cases of trustee misconduct; 2) preserves reasonable privacy rights during the trustor's life and 3) matches the expectations of the public concerning fairness and the way the law should work.
4. I acknowledge that I have in some situations relied on the good judgment of trial court judges, but this approach provides a useful safety valve.
5. Because the issues addressed in this proposal affect the central core of current California estate planning, I suggest that once the Executive Committee has reached a consensus, we 1) have a discussion of the proposal in the Quarterly and invite comments, and 2) have a discussion of the issues and proposal as part of the Fall educational program.

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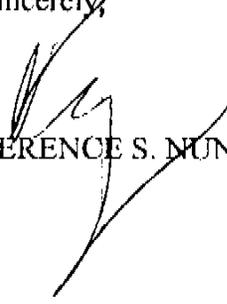
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6. I think that for purposes of adding the probate code provisions to embody the proposal, 5 or 6 simple paragraphs following Section 16462 can be inserted to clearly define the revocable trust accounting rules.

Let me know what you think.

Sincerely,



TERENCE S. NUNAN

TSN/ac

Enclosure

