Memorandum 85-54

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

At the March meeting, the Commission requested a draft of a provision that would permit creditors of beneficiaries under spendthrift, support, and discretionary trusts to reach the beneficiary's interest to the extent that the beneficiary could compel the trustee to make distributions. Professor Halbach has prepared a draft provision which, in modified form, is set forth in Exhibit 1 attached to this memorandum. The comment to the section explains its intended effect.

The Commission did not consider the other issues raised in Memorandum 85-33 and Professor Niles' study attached thereto which were on the agenda for the March meeting. The amendments to Code of Civil Procedure Section 709.010 set out in Exhibit 1 to this memorandum deal with some of the issues raised in the earlier material, but some issues remain. The remainder of this memorandum analyzes other issues in this area.

Right to Reach Surplus Over Amount Needed for Education and Support

Civil Code Section 859 provides:

> 859. Where a trust is created to receive the rents and profits of real and 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.

Thus, California does not permit absolute spendthrift trusts that totally defeat the claims of creditors. Under Section 859, spendthrift trusts are statutory support trusts based on the amount needed for education and support. The amount needed is measured by a station-in-life standard. See, e.g., Canfield v. Security-First Nat'l Bank, 13 Cal.2d 1, 28, 87 P.2d 830 (1939). The enactment of the wage garnishment exemption standard applicable to periodic payments in Code of Civil Procedure Section 709.010 left this law undisturbed as to "surplus" amounts. Thus a creditor may wish to pursue the remedy of Section 709.010, taking about one-fourth of the periodic payments due the beneficiary, and avoid the problem of proving the amount of surplus based on the beneficiary's station-in-life. But in the case of a large money judgment and a large trust, there would be decided advantages in pursuing the traditional remedy of supplementary proceedings (continued in substance in Code of Civil Procedure Section 709.010(b)) to reach the surplus, since the entire amount over that necessary for education and support is available to the creditor, assuming there is no "valid direction for accumulation" in the trust.

The staff would continue this traditional California rule as an optional remedy. See draft Section 709.010(k) in Exhibit 1. The suggestion has been made that the old standard should be abandoned and creditors restricted to the amount available by application of the wage garnishment standard. The staff would keep both options, but it would be possible to make creditors elect which remedy to pursue. Thus, if the creditor has taken the surplus, the creditor would not be able to take one-fourth of the periodic payments. Conversely, if the creditor is taking one-fourth of periodic payments, the creditor would not be able to get an order to apply the surplus. The staff recommends against this option because it ignores the possibility that the "surplus" might be insignificant, particularly since the amount is set based on the debtor's station-in-life. The creditor should not be penalized for not knowing which remedy would be the most profitable. In any event, if the wage garnishment standard is sufficient protection for a beneficiary who does not have a surplus, then the beneficiary with a surplus should not be heard to complain.

Distinctions Between Spendthrift, Support, and Discretionary Trusts

One advantage of the approach of draft Section 709.010 is that it avoids the need to define spendthrift, support, and discretionary trusts. The staff had suggested in Memorandum 85-33 that definitions be provided as the basis for a statute dealing with protective trusts. While these definitions might still be useful, the substantive rules of draft Section 709.010 make it unnecessary to determine which type of trust is involved. Existing law does not define these types of trusts, though the lack of clear rules has led to some muddy analysis in the cases. Some of this is unavoidable because of the lack of crystal clear distinctions in the law generally, including the Restatement. The staff thinks it is probably best at this point to leave these trusts undefined. However, a set of proposed definitions is set out in Exhibit 3 for your consideration should you wish to include definitions in the new trust statute.

Restraint on Alienation of Principal and Remainder

As discussed in Memorandum 85-33 and Professor Niles' background study, California law is unclear on whether or not the trustor may validly restrain alienation of principal. The wording of Civil Code Sections 859 and 867 applies to rents and profits from the trust corpus. Except to the extent that an annuity as mentioned in Section 867 might involve the distribution of principal, the old Field Code provisions ignore distributions of principal. Code of Civil Procedure Section 709.010 settles this issue in the cases to which it applies since it covers periodic payments from a trust without regard to source in income or principal. A gap remains, however, since non-periodic payments out of principal and distributions to remaindermen are not covered.

Professor Niles has suggested to the staff that it might be best to postpone legislating in this area. He believes that it would be preferable to revise the entire area of restraints on alienation, a study which he is currently undertaking. Pending a comprehensive review of restraints on alienation--which must await completion of the Probate Code revision--the staff suggests that the trust statute make clear that the trustor can impose a disabling restraint on voluntary alienation of an interest in trust principal. See draft Section 620 in Exhibit 2 attached to this memorandum.

Assuming that the statute makes this rule clear, the power to restrain alienation of interests in principal and remainder interests should not be absolute. Code of Civil Procedure Section 709.010(b) in Exhibit 1 permits the court to impose a lien on any interest in the trust in order to protect the creditor's priority and give some remedy, which may prove useful if and when the right vests in enjoyment. This power to impose a lien should be continued and condition the power to restrain alienation of principal under a spendthrift trust which is not currently being distributed. This approach would protect creditors in an orderly and nonintrusive manner while at the same time remaindermen and other principal beneficiaries would not be subjected to sacrifice sales of interests in the trust corpus.

Restraint on Voluntary Alienation of Trust Income

Civil Code Section 867 permits an absolute restraint on alienation of the beneficiary's interest in income:

> 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.

Should this principle be modified? Professor Niles suggests several alternative schemes in his background study. It appears that there may be tax advantages in permitting the beneficiary to assign some of the income to family members. Logically it might be thought that the ability to voluntarily assign should be coextensive with the right of a creditor to reach the interest, but this would involve a high degree of speculation if the law relating to involuntary alienation remains unchanged. Another scheme is to set a certain dollar level of income above which the beneficiary is free to make assignments. Professor Niles appears to prefer this approach, also recommended by Dean Griswold in his model statute. See E. Griswold, Spendthrift Trusts § 556 (2d ed. 1947). Does the Commission want to limit the power of the trustor to impose a total restraint on voluntary alienation of trust income? Draft Section 622 in Exhibit 2 would permit assignment of the beneficiary's interest to the same extent that creditors can reach it.

Invalidity of Spendthrift Protection in Favor of Trustor

California case-law reflects the rule that a trustor may not create a valid spendthrift trust in his own favor. See Nelson v. California Trust Co., 33 Cal.2d 501, 202 P.2d 1021 (1949). The staff would codify this rule. See draft Section 623 in Exhibit 2.

The Restatement (Second) of Trusts has a more refined approach. Section 156 makes spendthrift clauses invalid, but permits support and discretionary trusts to have a limiting effect by permitting the transferee or creditor to reach the maximum amount the trustee could pay to the trustor-beneficiary. In the case of a support trust, this rule would limit the amount available to creditors or transferees to the amount payable pursuant to a standard, if one is provided in the trust. In many if not most cases, the Restatement rule and draft Section 623 would probably yield the same amount. The Restatement rule would also seem to require defining the different types of trusts along Restatement lines.

Pension Trusts

Professor Niles discusses the broad outlines of the law relating to pension trusts with spendthrift features in his background study. He recommends that this area be the subject of a separate study, and the staff concurs. For now, the staff would continue the existing exemption for pensions in Code of Civil Procedure Section 704.115 and recognize it as an exception to the general rule against self-settled spendthrift trusts. See draft Section 623 in Exhibit 2.

Claims of Public Entities for Reimbursement

Professor Niles has suggested that a separate study be made of the right of a public entity to reimbursement for assistance paid or care furnished to a beneficiary of a spendthrift or support trust. The staff agrees that such a study would be useful, but the basic question must be confronted since the principle is embodied in existing Code of Civil Procedure Section 709.010(c). This provision recognizes that the wage garnishment exemption standard applicable to periodic payments from a trust as to general creditors does not limit the right of the state or other public entity to recover for support provided a trust beneficiary or to recover for payments made for the support of a trust beneficiary. Subdivisions (e) and (i)(3) of draft Section 709.010 modify the existing provisions along lines suggested by Professor Halbach to limit this right of reimbursement. See the draft comment to these subdivisions in Exhibit 1.

Another possibility suggested by Professor Niles is to adopt the approach of Wisconsin law. See Wis. Stat. Ann. § 701.06(5)(a)-(c), (5m). The Wisconsin statute does not allow the public entity to get reimbursement from a discretionary trust if the trustee has not exercised its discretion to make payments, unless the beneficiary is a settlor or a spouse or child of the settlor, in which case the trustee's discretion is ignored. Wisconsin law also exempts claims against certain trusts for disabled persons if the trust does not result in ineligibility for public assistance under state law. The staff is not certain that the Wisconsin provision is desirable, however, at least not before further study can be devoted to this topic.

Organization

As currently proposed, the enforcement remedies would remain in the Code of Civil Procedure, consistent with the comprehensive approach of the Enforcement of Judgments Law, which was enacted on Commission recommendation in 1982. This approach necessarily entails inclusion of some related rules in Code of Civil Procedure Section 709.010. Other substantive rules concerning spendthrift and other protective trusts would be included in the Probate Code as suggested in Exhibit 2. One obvious drawback of the suggested approach is that Code of Civil Procedure Section 709.010 is rather long and would be even longer if revised as proposed in the draft set out in Exhibit 1.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

Exhibit 1

Staff Draft

Creditor's Right to Reach
Beneficiary's Interest in Trust

One way to implement the suggestions made in Memorandum 85-54 would be to amend Code of Civil Procedure Section 709.010 as set out below. (The version of Section 709.010 used here reflects the amendments that would be made to conform it to the comprehensive trust statute.)

Code of Civil Procedure § 709.010 (amended). 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 82 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 Part 5 (commencing with Section 1100) of Division 3 of the Probate Code. ~~The~~ To the extent that the judgment debtor's interest in the trust may be applied to the satisfaction of the money judgment, it may be applied 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) For the purposes of this section, a judgment debtor's interest as a beneficiary of a trust includes an interest in trust income or principal that the judgment debtor can presently take for his or her own benefit by any means including the exercise of a power of revocation, termination, withdrawal, or appointment.

(d) Upon petition of the judgment creditor under this section, the court may make an order ~~that~~ requiring the trustee to withhold and pay to the judgment creditor all or a portion of the amount of any periodic payment 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, or discretionary trust, the order may not require ~~that the trustee pay~~ payment to the judgment creditor of any exempt portion of the amount that otherwise would be paid periodically to the judgment debtor from the trust~~, and for~~. For this purpose, the exempt portion is the amount that the court determines is substantially equivalent to the amount that would be exempt on a like amount of earnings under Chapter 5 (commencing with Section 706.010) (Wage Garnishment Law), including, but not limited to, amounts determined under Sections 706.050, 706.051, and 706.052.

(e) Nothing in ~~this~~ subdivision (d) limits the right of the state or other public entity to recover reimbursement for support provided to a trust beneficiary or for payments made for the support of a trust beneficiary.

~~(d)~~ (f) Except to the extent that the court order otherwise specifically provides, the provisions of any order entered under subdivision ~~(c) shall~~ (d) does not become effective until 30 days after the order has been served upon the trustee, except that the trustee may waive all or any portion of the 30-day period. The trustee may file with the court that made the order a petition requesting modification or clarification of any of the provisions of the order. Notwithstanding any contrary provision of law, the trustee is not required to pay any fee to the clerk of the court as a condition to filing a petition under this subdivision or any subsequent document in connection with a petition. If any provision of the order is modified or set aside, the court, on motion of the judgment creditor or judgment debtor, may set aside or modify other provisions of the order. The trustee, the judgment creditor, and the judgment debtor may present evidence or further evidence that is relevant to the issues to be decided by the court at any hearing on the trustee's petition. The court shall take this evidence into account in determining those issues. Nothing in this subdivision limits any right of a trustee or beneficiary to petition a court under Part 5 (commencing with Section 1100) of Division 3 of the Probate Code.

(g) For the purposes of subdivisions (c) and (d), periodic payments from a trust include all of the following:

(1) Periodic payments from income.

(2) Periodic payments from principal.

(3) Periodic payments that are actually made, whether or not required to be made under the terms of the trust.

(4) Payments that are required to be made under the terms of the trust, including rights to payments in the trustee's discretion pursuant to an objective standard, if and to the extent that the judgment debtor personally could require the trustee to make the payments to him or her.

~~(e) Where the trust gives the trustee discretion over the payment of either principal or income of a trust, or both, nothing in this section affects or limits that discretion or requires the exercise of that discretion in any particular manner.~~

(h) The trustee has no duty to oppose a petition under this section or to make any claim for exemption on behalf of the trust beneficiary. The trustee is not liable for any action taken, or omitted to be taken, in compliance with any court order made under this section.

(i) Nothing in this section:

(1) Affects or limits the discretion conferred on the trustee by the trust instrument with respect to the payment of income or principal of the trust.

(2) Requires the exercise of that discretion in any particular manner for the benefit of a judgment creditor or the state or other public entity.

(3) Allows discretionary periodic payments, whether or not based on an objective standard, to be applied to the satisfaction of a claim by the state or other public entity for remimbursement for support where this application of the discretionary payments would be inconsistent with the purposes for which the periodic payment is

made.

(j) Where the trustee has discretion with respect to investments, a power given by the trust instrument to a judgment debtor who is the spouse of the trustor to compel the trustee to change the investments shall be disregarded under this section as being personal to the judgment debtor, and neither the judgment creditor nor the state or other public entity may interfere with the trustee's investment discretion.

~~(f) Except as provided in subdivisions (c), (d), and (e), nothing~~

(k) Nothing in this section affects the ~~law relating to enforcement of a money judgment against the judgment debtor's interest in a spendthrift trust, but~~ extent to which surplus amounts from a spendthrift trust liable pursuant to Section 621 of the Probate Code are subject to enforcement of a money judgment under subdivision (b).

[Note. This comment combines the relevant parts of the original comment from the 1982 enactment of Section 709.010 and its 1984 amendment with new material to explain the revision proposed above.]

Comment. Subdivision (a) of Section 709.010 incorporates provisions that make clear that this section applies only to written, voluntary, express trusts, whether living or testamentary, and not to trusts such as Totten trusts, investment trusts, and deeds of trust. Subdivision (a) has been revised to conform to the new trust statute. See Prob. Code § 500 et seq.

Subdivision (b) provides for the application of the judgment debtor's beneficial interest in a trust to the satisfaction of a money judgment. Section 699.720(a)(8) (property not subject to execution) reverses the case law rule that made the judgment debtor's beneficial interest in a trust subject to execution. See, e.g., Houghton v. Pacific Southwest Trust & Sav. Bank, 111 Cal. App. 509, 295 P. 1079 (1931). Enforcement processes may not reach specific trust assets or the judgment debtor's interest in the trust, except pursuant to a court order applying the interest or assets to satisfaction of the judgment under this section. See, e.g., Poindexter v. Los Angeles Stone Co., 60 Cal. App. 686, 214 P. 241 (1923) (judgment lien). Subdivision (b) is also revised to take account of the revision reflected in subdivisions (c) and (d).

Subdivision (c) establishes the principle that the judgment debtor's interest as beneficiary of the trust includes whatever the judgment debtor can reach for his or her own benefit. This subdivision is consistent with Probate Code Section 1220 (creditor's rights against revocable trust during trustor's lifetime).

Subdivision (d) sets an exemption standard applicable to periodic payments to the trust beneficiary which applies to spendthrift, support, and discretionary trusts. The amount of a periodic payment that may be withheld and paid to the judgment creditor is determined in a manner consistent with the Wage Garnishment Law. In the case of an ordinary money judgment, the amount is determined by Section 706.050. Where the trust beneficiary can show that a greater amount is necessary for his or her support or the support of his or her dependents, the trust beneficiary may claim an exemption under Section 706.051. Where enforcement is sought of delinquent amounts payable under a judgment for the support of a child or of a spouse or former spouse, the amount that may be withheld is determined by Section 706.052. See also Sections 706.074 & 706.076 (withholding order for taxes issued by state). The exempt portion is the amount that the court determines is substantially equivalent to the amount that would be exempt under these provisions in the Wage Garnishment Law, but exact equivalence to wage garnishment standards is not required by Section 709.010.

Subdivision (d) also provides that the withholding order continues in effect until the judgment is satisfied unless the order otherwise provides or the order is modified or terminated. This rule precludes another creditor from reaching payments to the trust beneficiary while the court order is in effect. However, as is the case under the Wage Garnishment Law, a creditor with a higher priority may obtain a court order giving the creditor priority over the first order. Cf. Section 706.030 (priority of withholding order for support).

Subdivision (e) makes clear that the right of a public entity to collect reimbursement for monetary or in-kind support furnished to or for the benefit of a trust beneficiary is not limited by the exemption provided in subdivision (d). See Estate of Lackman, 156 Cal. App.2d 674, 320 P.2d 186 (1958). This subdivision continues what was formerly the last sentence of subdivision (c).

Subdivision (f) delays the effective date of the order for 30 days after service to allow time for the trustee to obtain modification or clarification of provisions of the order if necessary. However, the court may include in its order specific provisions that become effective immediately. For example, the court might include in its order a provision taking immediate effect that directs the trustee not to make unusual payments to beneficiaries. This sort of provision would prevent the trustee from defeating the purpose of the order during the 30-day period before the remainder of the order becomes effective. The provision that the trustee is not required to pay any filing fee is drawn from the second sentence of subdivision (b) of Section 4363.1 of the Civil Code. Most of the remainder of subdivision (f) is drawn from subdivisions (d) and (e) of Section 4363.2 of the Civil Code. Subdivision (f) continues material that was formerly in subdivision (d) of this section.

The last sentence of subdivision (f) makes clear that the right of the trustee or beneficiary to petition the court for instructions under the Probate Code is not limited by subdivision (f). See Prob. Code § 1130. Former subdivision (d) did not contain the reference to the right of the beneficiary to petition under the Probate Code. A trustee or beneficiary may petition for instructions or for some other purpose under the Probate Code whether or not the 30-day period specified in subdivision (d) has expired.

Subdivision (g) is new. Paragraphs (1) and (2) continue a principle that was implicit in the former version of Section 709.010. These provisions make clear that the creditor's right to reach periodic payments under this section is not affected by the characterization of the payment as income or principal. Paragraph (3) of subdivision (g) makes clear that a court order under this section reaches periodic payments that are being made by the trustee without regard to whether the trust actually requires such payments to be made. Thus, where periodic payments are being made, the rights of a creditor are not affected by the nature of the trustee's authority under the trust instrument. If the trustee exercises discretion to discontinue payments that are being made, the right of the creditor to reach the beneficiary's interest depends upon the principle stated in paragraph (4). This rule recognizes that the creditor's right is coextensive with the right of the beneficiary to compel the trustee to make payments. This right is not defeated merely by characterizing the trustee's power as discretionary, since an apparently discretionary power to make periodic payments to the beneficiary may be subject to an enforceable standard. Paragraph (4) makes clear that if the beneficiary can take advantage of this standard, so can the beneficiary's judgment creditor. The judgment creditor may have another option in a case where the trustee withholds payments pursuant to a valid direction in the trust permitting accumulation. See subdivision (k) and the Comment thereto.

Subdivision (h) provides that the trustee has no duty to appear in a proceeding under this section, to oppose the judgment creditor's petition, to make any claim of exemption on behalf of the beneficiary, or to do anything other than comply with the court's order. The trustee incurs no liability for complying with the court's order. Subdivision (h) continues what was formerly in the second and third sentences of subdivision (e).

Paragraphs (1) and (2) of subdivision (i) continue the substance of the first sentence of what was formerly subdivision (e). These provisions make clear that the nature of the trustee's discretion under the trust instrument and other applicable principles of law is not affected by Section 709.010. See, e.g., Prob. Code §§ 740-741 (duties with regard to discretionary powers). Paragraph (3) provides a special rule that is meant to preserve the opportunity of trust beneficiaries under the care of a state or other public institution to receive some amenities under the trust without being required to forfeit them to the public entity's right of reimbursement. This provision applies only to discretionary payments from the trust, not to situations where the beneficiary is receiving a certain sum for support.

Subdivision (j) makes clear that in a marital trust the power of a debtor-spouse to direct investments is not the sort of power that the creditor may reach under the principle stated in subdivision (g)(4).

Subdivision (k) makes clear that this section does not affect the provisions in Probate Code Section 621 relating to the right of the creditor to reach surplus amounts accumulated in a spendthrift or other protective trust.

Exhibit 2

Staff Draft

CHAPTER 2. SPENDTHRIFT AND OTHER PROTECTIVE TRUSTS

§ 620. Validity of spendthrift and other protective trusts

620. Subject to the limitations provided in this chapter and in other statutes, a trustor may create a trust that restrains the beneficiary from disposing of his or her interest in the trust, or that prevents creditors from reaching the beneficiary's interest in the trust, during the beneficiary's life or for a term of years. The trustor may restrain the disposition of the beneficiary's interest in income or principal.

Comment. Section 620 supersedes part of former Civil Code Section 859 and former Civil Code Section 867. Section 620 does not continue the misleading language of former Civil Code Section 867 which referred to trusts for the receipt of rents and profits of real property. Former Civil Code Section 867 was held to apply to both real and personal property. See Canfield v. Security-First Nat'l Bank, 13 Cal.2d 1, 12, 87 P.2d 830 (1939). The introductory clause of Section 620 recognizes that there are limitations on the extent to which a trustor can impose disabling restraints on the beneficiary's power to alienate his or her trust interest or restrict the rights of the beneficiary's creditors to reach the trust interest. See Code Civ. Proc. § 709.010 (enforcement of money judgment against interest in trust); Prob. Code §§ 621 (surplus income subject to creditor's claim), 622 (assignment of beneficiary's interest), 623 (invalidity of spendthrift trust in favor of trustor). The last sentence of Section 620 makes clear that the restraint may be imposed on any interest of the beneficiary under the trust, whether as an income beneficiary, a beneficiary of a distribution of principal during the life of the trust, or as a remainderman at the conclusion of the trust.

§ 621. Surplus income subject to creditors' claims

621. If a spendthrift or other protective trust 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 621 continues the substance of former Section 859. See Canfield v. Security-First Nat'l Bank, 13 Cal.2d 1, 12, 87

P.2d 830 (1939). This section provides an exception to the general principle stated in Section 620.

§ 622. Beneficiary's interest subject to assignment

622. The beneficiary may assign his or her interest in a spendthrift or other protective trust to the same extent and in the same amount that is subject to enforcement of a money judgment.

Comment. Section 622 is a new provision that makes clear that the limitations on the beneficiary's right to assign an interest in a spendthrift or other protective trust is coextensive with the right of creditors to reach that interest through appropriate enforcement procedures. See Code Civ. Proc. § 709.010 (enforcement of money judgment against beneficiary's interest in trust) and the Comment thereto; Prob. Code § 621 (surplus income subject to creditors' claims). This section provides an exception to the general principle stated in Section 620.

§ 623. Invalidity of spendthrift or other protective trust in favor of trustor

623. Except as otherwise provided in Section 704.115 of the Code of Civil Procedure, if a trustor attempts to create a trust for his or her own benefit with a provision restraining the voluntary or involuntary transfer of his or her interest, the restraint is invalid against transferees or creditors. The invalidity of the restraint does not affect the validity of the trust.

Comment. Section 623 is new. This section 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 recognizes that a different rule applies to certain pension trusts. See Code Civ. Proc. § 704.115 and the Comment thereto.

§ 624. Determination of amount for support of beneficiary

624. (a) If the trustee is required by the trust to make payments for the beneficiary's general support or to meet some other objective standard, in the absence of a trust provision to the contrary, the trustee shall take into account the beneficiary's other net income from all sources in determining the amount of the payments for the beneficiary's general support or under any other objective standard provided in the trust.

(b) In ascertaining the beneficiary's other income, the trustee may rely on representations by the beneficiary and need not make an independent investigation unless the trustee knows or has reason to believe that the beneficiary's representations are untrue.

Comment. Section 624 is new. This provision is intended to facilitate a fair determination of the amount that the beneficiary needs for support or to satisfy some other objective standard in the trust. This section eliminates the possibility that the beneficiary can require the trustee to pay full support out of the trust where other income is sufficient to satisfy all or part of the beneficiary's needs. This section also relates to the ability of creditors to reach the beneficiary's interest in the trust. See Code Civ. Proc. § 709.010(g)(4) (periodic payments subject to creditors' claims include payments that the beneficiary can require the trustee to make pursuant to the terms of the trust). Section 624 also limits the amount of the beneficiary's interest that the beneficiary can assign under Section 622.

Exhibit 3

Staff Draft

Possible Definitions of
Spendthrift, Support, and Discretionary Trusts

The Commission may decide that it would be useful to define discretionary, support, and spendthrift trusts. The following is a revised version of material that appeared in Memorandum 85-33 considered at the March meeting. At that time, the Commission tentatively decided not to define these trusts.

Discretionary Trust

"Discretionary trust" could be defined as follows:

> A "discretionary trust" is a trust that gives the trustee [uncontrolled] discretion whether or not to make or withhold payments or distributions of income or principal to the beneficiary or to determine the amount of any such payments or distributions. If the trustee has discretion only as to the time of payment or distribution, but not whether the beneficiary will ultimately receive the payment or distribution, the trust is not a discretionary trust.

The word "uncontrolled" is drawn from Section 155 of the Restatement (Second) of Trusts. If it is included in this definition, it will be subject to draft Section 741 in the comprehensive trust statute which makes clear that a trustee with "uncontrolled" discretion may not act in bad faith or in disregard of the purposes of the trust. Inclusion of the word "uncontrolled" is useful to distinguish the discretion of a trustee to act pursuant to a standard, such as that involved in a support trust.

Support Trust

"Support trust" could be defined as follows:

> A "support trust" is a trust which provides that the trustee shall make payments or distributions of income or principal to the beneficiary in an amount that is necessary for the education or support of the beneficiary or pursuant to some other objective standard stated in the trust instrument. If the trust gives the trustee discretion to determine the amount or the time of payments or distributions for education or support, but not the power to withhold payments or distributions, the trust is a support trust and is not a discretionary trust.

This definition attempts to distinguish between a "pure" discretionary trust and a trust that may provide discretion, but is in fact intended to provide for the support and education of the beneficiary in general or pursuant to some standard. The significance of this distinction is that a creditor may reach part of payments out of a support trust based on the wage garnishment standard provided in Code of Civil Procedure Section 709.010. Where the trustee does not have "uncontrolled" discretion, but discretion subject to a standard provided in the trust, then the court would be able to compel payment out of periodic payments pursuant to Section 709.010.

Spendthrift Trust

"Spendthrift trust" might be defined as follows:

> A "spendthrift trust" is a trust in which the trustor imposes a disabling restraint on voluntary or involuntary alienation of the beneficiary's interest in income or principal.

The definition of a spendthrift trust in relation to income is somewhat misleading since under existing and proposed law, the trustor cannot establish an absolute spendthrift trust that would protect the beneficiary's interest beyond the amount needed for education and support. See Civil Code § 859. However, this definition does establish the basic idea of a spendthrift trust, and if used in the statute would be made subject to appropriate exceptions.