

## First Supplement to Memorandum 85-73

Subject: Study L-640 - Probate Code (Comprehensive Trust Law)

Attached to this supplement are several letters we have received commenting on trust matters. At the September meeting, we will discuss the issues raised as we proceed through the draft statute. If we receive any additional comments before the meeting, we will distribute them at the meeting.

§ 15603. Certificate of trustee

Mr. Irwin D. Goldring and Mr. K. Bruce Friedman have sent suggested forms for the certificate of trusteeship. (See Exhibits 1 and 2.)

§ 16226. Acquisition and disposition of property

Some time ago, Mr. Richard A. Gorini wrote concerning sales of trust real property. (See Exhibit 3.) He suggests that a structured system be adopted, at least for sales of real property under testamentary trusts. Mr. Gorini's suggestion runs counter to the trend away from formal (and thus more expensive and time-consuming) procedures in trust administration. Under existing law and the draft statute, only a limited number of trusts will remain under the continuing jurisdiction of Probate Code Section 1120. Perhaps Mr. Gorini's suggestion is limited to the problem of what procedures are available to the court for accepting overbids under Section 1120. In this case, the successor to Section 1120 (see draft Sections 17300-17302) could be amended to make clear that the court can use the overbid procedure.

§§ 16300-16314. Revised Uniform Principal and Income Act

Mr. Charles A. Collier, Jr., has proposed some refinements in the Revised Uniform Principal and Income Act to deal with the allocation

of estate tax, interest, and penalties. (See Exhibit 4.) The staff has not fully analyzed this question, but it appears that it would be desirable to include the uniform provisions discussed in Mr. Collier's letter in the draft statute. As noted in the memorandum, we anticipate that we will receive further suggestions for revision of the RUPIA, and are continuing to work on this subject. Ideally, the Uniform Law Commissioners will undertake the job of revising the Uniform Act of 1962 to deal with the various problems that have been raised.

§§ 18200-18201. Rights of creditors of settlor

Mr. Richard S. Kinyon's letter in response to the ABA Committee report (attached to Memorandum 85-73 as Exhibit 4) is attached to this supplement. (See Exhibit 5). Mr. Kinyon argues for a comprehensive treatment of the substantive and procedural rights of creditors to reach a decedent's probate and non-probate assets.

Respectfully submitted,

Stan G. Ulrich  
Staff Counsel

EXHIBIT 1

TO . John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
400 Middlefield Road, Room D-2  
Palo Alto, CA 94303

FROM

IRWIN D. GOLDRING  
ATTORNEY AT LAW  
433 NORTH CAMDEN DRIVE  
SUITE 888  
BEVERLY HILLS, CALIFORNIA 90210  
Telephone 274-5913

SUBJECT: Revocable Living Trust  
Incumbency Certificate DATE: Aug. 28, 1985

As a follow-up to my letter of August 16th, I am enclosing a  
copy of a draft of an Incumbency Certificate which, upon  
review, obviously needs revision but which, at least, is a  
beginning.

SIGNED: *Irwin D. Goldring*

IDG:hs Enclosure

cc: K. Bruce Friedman, Esq.  
Kenneth M. Klug, Esq.  
Charles A. Collier, Jr., Esq.

DATE:

SIGNED:

ATTORNEY'S CERTIFICATION OF EXISTENCE  
OF TRUST AND INCUMBENCY OF TRUSTEE

This is to certify:

1. That I am an active member in good standing of the State Bar of California.

2. That I have examined the following document(s):

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3. That I know of no act or other document amending, superseding or revoking the trust(s) established by said document(s).

4. That the trust(s) empowers the following person(s) to act as trustee(s) without court appointment:

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5. That Exhibit "A" which is attached to this Certification (each page of which is initialed by me) is a true and accurate copy of the following portions of the trust(s):

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6. That based on the facts given me by the current trustee(s) I am of the opinion that there is no vacancy requiring the appointment of an additional trustee(s).

Dated: \_\_\_\_\_

Initials: \_\_\_\_\_

Certified by: \_\_\_\_\_

EXHIBIT 2

LAW OFFICES

FRIEDMAN & OLIVE

A PROFESSIONAL CORPORATION

1430 ALCOA BUILDING

ONE MARITIME PLAZA

SAN FRANCISCO, CALIFORNIA 94111

K. BRUCE FRIEDMAN  
JACK H. OLIVE

TELEPHONE  
[415] 434-1363

August 26, 1985

John H. DeMouilly  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, California 94303

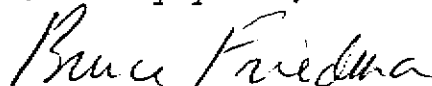
Re: Revocable Living Trust  
Incumbency Certificate

Dear John:

Following Irv Goldring's letter to you of August 16, I enclose a proposed form of "Certificate of Appointment and Incumbency of Trustee." This form represents the work product of an American Bar Association committee on formation, administration and distribution of trusts, chaired by Chuck Collier. I am unable to put my hands on Irv Goldring's earlier certificate of incumbency.

A statutory form of incumbency certificate, along the lines of the enclosure, would be useful.

Sincerely yours,



K. Bruce Friedman

KBF:tn

Enclosure

cc: Irwin D. Goldring, Esq.  
Charles A. Collier, Jr., Esq.

Certificate of Appointment  
and Incumbency of Trustee

The undersigned certifies (certify) as follows:

1. The name of the trust is: \_\_\_\_\_
2. The trust is dated \_\_\_\_\_
3. The trust is administered under the laws of the state of \_\_\_\_\_
4. The trust as described above is in full force and effect as of the date hereof.
5. There is no vacancy in the office of the trustee requiring the appointment of any successor or additional trustees.
6. The undersigned is (are) the duly qualified and acting trustee(s) of the above described trust.
7. The trust grants to the trustee(s) the authority to take the actions to which this certificate relates.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_  
TRUSTEE(S)

ACKNOWLEDGMENT

STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_\_ day of \_\_\_\_\_ in the year \_\_\_\_\_,  
before me personally appeared \_\_\_\_\_ personally  
known to me or proved to me on the basis of satisfactory  
evidence to be the person(s) whose name(s) is (are) subscribed  
to this instrument and acknowledged that he (she or they)  
executed it as the duly qualified and acting trustee(s).

\_\_\_\_\_  
SIGNATURE LINE

\_\_\_\_\_  
TITLE

(Notary seal or stamp--if signed by notary)

\_\_\_\_\_  
OFFICE ADDRESS (if not a notary)

## EXHIBIT 3

## BOSKOVICH, GORINI &amp; VANASSE

ATTORNEYS AT LAW

1671 THE ALAMEDA

SUITE 304

SAN JOSE, CALIFORNIA 95126-2222

Peter J. Boskovich  
Richard A. Gorini

(408) 286-6314

Charles F. Vanasse  
Associate Counsel

December 11, 1984

Mr. John DeMouilly  
Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, California 94306

RE: Cal. Probate Code 1120

Dear Mr. DeMouilly:

One of my clients has a problem which may require a revision to the above-mentioned statute which the Commission may wish to draft.

A trustee of a testamentary trust wishes to sell a parcel of real property. The property was listed, offers submitted, and one was accepted subject to court confirmation, which was not required by the terms of the trust but was desired by the trustee given the existence of serious disagreements with one of the beneficiaries. A hearing date was obtained, at which time other parties previously unknown submitted bids slightly more advantageous than the one originally accepted.

Regardless of the outcome in this case, current law gives the probate court jurisdiction to resolve this matter, and under the holding In re De La Montanya's Estate (1948) 83 Cal. App 2d 322, 328, the court has the authority to borrow procedures from a probate setting, such as the acceptance of overbids in court, while still adhering to the principle that laws established for a probate administration do not apply to trust administration absent any provision to the contrary. Estate of Loring (1947) 29 Cal. 2d 423.

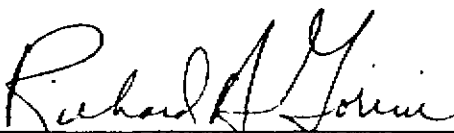
Montanya is the only case on this point, and although it stands for the court's authority to take a practical approach in resolving such trust matters, there are virtually no other guidelines (statutory or otherwise) for the court in handling overbids. There is no law, for

LETTER TO JOHN DE MOULLY, Dated December 11, 1984 - Continued:

example, applying the structure and safeguards in Probate Code Sections 780-794 to a trust setting, thus potentially converting the court into disorganized auction.

I would suggest that either the probate procedures be used in their present form by cross reference in Section 1120, or that some other system be created in order to allow some definite structure in these matters.

Sincerely,

  
\_\_\_\_\_  
Richard A. Gorini, Esq.

RAG/dc



## EXHIBIT 4

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TELEX 181258

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NEWPORT BEACH, CALIFORNIA 92660

TELEPHONE (714) 780-0991

August 7, 1985

Stan Ulrich, Esq.  
California Law Revision Commission  
4000 Middlefield Road, Room D-2  
Palo Alto, California 94303

Re: Revised Principal and Income Act

Dear Stan:

California, when it enacted the Revised Principal and Income Act, did not adopt Section 5(a) which provided that, among other things, estate tax and interest and penalties concerning taxes in connection with the administration of a decedent's estate were charged against principal. As far as I can ascertain, the reason for not enacting this was that it is believed that what were then Probate Code Sections 160 through 164 dealt with this area and Section 5(a) was not necessary.

Also, the word "interest" from Section 13(c)(5) was deleted with reference to payment of inheritance tax, interest and penalties.

There is some discussion of these points in your Memoranda 83-17 and in 84-32 and the Supplements.

Our office has been asked about the treatment of the interest on California and federal estate tax and whether it is a charge against principal under California law. Perhaps this point has been discussed in your drafting sessions. For example, if after audit of the federal estate tax return additional tax is assessed plus interest, the additional tax is clearly a charge against principal. Is the interest also a charge against principal or is that a charge against estate income? Former Section 162.5, now Section 664, spoke of net income and its distribution but did not attempt to define what would be charged against income in determining net income. Similarly, if a probate estate

Stan Ulrich, Esq.

August 7, 1985

Page Two

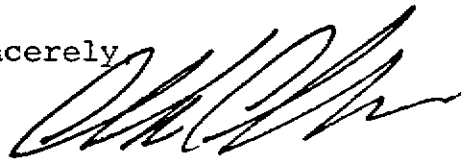
has been closed, the assets have been distributed to a testamentary trust, the estate tax audit is then completed and again a deficiency is assessed, is the interest paid on that deficiency a charge against trust principal or trust income? Does it make any difference if the interest on the deficiency is taken for tax purposes as a deduction against the federal estate tax by, for example, filing an amended return or is taken as an income tax deduction? Presumably, the income or estate tax treatment would not affect its treatment under the Principal and Income Act.

Under the Revised Principal and Income Act, it is very clear that these kinds of interest payments are charged against principal. Deletion of these sections (Section 5(a) and a portion of Section 13(c)(3)) make it less clear in California. I have not researched it carefully but have not found any case law that clarifies the point. I do not recall it being specifically discussed at any of the meetings that I have attended where trust law has been the subject of the Commission's deliberations.

Perhaps the matter should be clarified further either by some amendments to Probate Code Section 664 or enacting Sections 5(a) and that deleted portion of 13(c)(5) as part of the new trust law.

I would appreciate your comments.

Sincerely,



Charles A. Collier, Jr.

CAC:vjd

EXHIBIT 5  
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July 18, 1985

Charles A. Collier, Jr., Esq.  
Irell & Manella  
1800 Avenue of the Stars  
Suite 900  
Los Angeles, CA 90067

Re: Creditors' Claims and Non-probate Property

Dear Chuck:

Thank you for your letter of July 3 and the copy of your ABA Committee D-2 report regarding the above-referenced matter. As I discussed with you and with Art Marshall last week during the ABA annual meeting in Washington, D.C., this is an opportune time for California to deal with this problem, and hopefully the Law Revision Commission will propose appropriate legislation to the California Legislature.

It seems to me that in general creditors should be able to reach all assets of a decedent's "gross estate," as determined for federal estate tax purposes. If a creditor is given adequate notice by the personal representative and does not file a timely claim in the probate proceeding, both probate and non-probate assets should be free of the claim. If a creditor does file a timely claim and it is allowed by the court, the personal representative should be both authorized and required to pursue non-probate assets to satisfy the claim if the probate estate is insolvent. Fiduciaries holding and beneficiaries receiving non-probate assets should be given notice and an opportunity to be heard with respect to the determination of the validity of the claim, if it appears that resort to non-probate assets may be needed to satisfy the claim.

If non-probate assets are to be subject to creditors' claims, a system of abatement among the beneficiaries of the

gross estate will need to be established. It may even be appropriate to provide that certain non-probate dispositions should abate before or in proportion to specific, demonstrative, or general legacies. For example, a specific gift under a will probably should take precedence over a residuary gift under a revocable living trust.

If no probate proceeding is commenced within a certain period of time after the decedent's death, consideration should be given to establishing a procedure for a fiduciary holding or a beneficiary receiving non-probate assets to give notice to creditors and determine the validity of claims in order to protect those assets from creditors not filing timely claims.

A related topic that I hope the Law Revision Commission will consider is the application of certain other probate concepts to non-probate dispositions. For example, the law should be clarified with respect to the right to interest on a general legacy under a revocable trust (or under any trust following the occurrence of an event, giving rise to the right to the legacy, such as the death of a life tenant). The order of abatement among beneficiaries of a revocable trust also should be clarified.

It is important to recognize that for most if not all practical purposes, following the grantor's death, a revocable living trust is the equivalent of an estate, and in general concepts applicable to an estate also should apply to a revocable trust. (As we discussed at our last meeting with the staff regarding the proposed new trust law, in many respects a revocable living trust also is similar to an agency arrangement prior to the grantor's death, and many general concepts relating to trusts should not apply to revocable trusts.)

Sincerely yours,



Richard S. Kinyon

RSK:mjf

cc: Arthur K. Marshall  
Stanley G. Ulrich

bc: Bruce S. Ross  
Diane McCabe  
First Thursday Group  
Members