

Memorandum 86-64

Subject: Study L-640 - Assembly Bill 2652--Trust Bill

Attached to this memorandum is a copy of AB 2652, the Commission's trust bill, as amended in the Senate. Also attached is a copy of comments that are revised to reflect the Senate amendments.

The amendments make technical corrections and implement Commission decisions. (See pages 16, 24, 43, 48, and 63 in the bill.)

The amendment of Section 15306.5 (see pages 42-43 in the bill) implements a decision made at the April meeting. The Commission decided that the provision permitting creditors to reach up to 25% of payments to the beneficiary of a spendthrift trust should make clear that the aggregate amount that may be reached by all general creditors is 25%. (See the Comment to subdivision (f) of Section 15306.5 in Exhibit 1.)

The amendment of subdivision (e) of Section 15602 (see page 48 in the bill) implements a decision made at the May meeting. The other changes correct ambiguities in the bond section. The revision of subdivision (b) ties the power of the court to excuse bond directly to the paragraph of subdivision (a) stating the general rule to which subdivision (b) is an exception. The revision of subdivision (c) eliminates a confusing phrase; the result is that subdivision (c) applies to any situation in which the trustee is required to give a bond.

Respectfully submitted,

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Exhibit 1**Trust Law Comments Revised to Reflect Senate Amendments**Civil Code § 5110.150 (added). Revocable living trust of community property

Comment. Section 5110.150 replaces former Section 5113.5. It should be noted that a transfer in trust by a married person is not exempt from the general limitations on transfers and transmutations by married persons acting alone. See Sections 5125 and 5127 (joinder or consent) and Sections 5110.710-5110.740 (transmutation).

Subdivision (a) states the rule that a revocable living trust of community property retains its community character regardless of the lack of other trust provisions referred to in former Section 5113.5. Although subdivision (a) is intended to be consistent with Revenue Ruling 66-283 in order to obtain community property income tax treatment for the trust property under Internal Revenue Code Section 1014(b)(6), whether the terms of a particular trust are sufficient to obtain such treatment is ultimately a matter of federal law.

One consequence of retention of its community character is that the trust property is subject to claims of creditors and to division at dissolution to the same extent as any other community property. See Civil Code § 5120.010 et seq.; Prob. Code § 18200 (creditors' rights against revocable trust during settlor's lifetime). Likewise, the interest of the decedent in the community property is subject to testamentary disposition at death unless a contrary method of disposition is provided in the trust instrument, as is typically the case. Prob. Code § 104. In this situation, the spouses' traditional community property right of testamentary disposition is substantially preserved by the unilateral power of revocation. See subdivision (b). Where the trust requires joint action for revocation, the trust could preserve the power of testamentary disposition by granting the first spouse to die a testamentary power of modification, appointment, or disposition as to the spouse's share of the community property.

Subdivision (b) establishes the presumption that either spouse acting alone may revoke the trust as to the community property. Prior law was not clear. The statute makes clear, however, that a unilateral revocation does not change the community property character of property received by the revoking spouse.

Subdivision (c) makes clear that the trustee may manage the trust community property in the same manner as other trust assets, free from the general limitations on disposition of community property imposed on spouses, unless the trust expressly provides such limitations.

Section 5110.150 is not restrictive and does not provide the exclusive means by which community property may be held in trust without loss of its community character. See subdivision (d).

Probate Code § 15306.5 (added). Rights of general creditors

Comment. Section 15306.5 restates the substance of former provisions of Code of Civil Procedure Section 709.010. Subdivision (a)

permits general creditors to seek to satisfy a money judgment from payments that are to be made to a trust beneficiary. This right applies to payments that are required by the terms of the trust, or that are determined by the trustee in the exercise of the trustee's discretion under the trust. Subdivision (e), however, makes clear that the right of the creditor does not affect any discretion the trustee may have under the trust instrument to change the amount of the payment, or even to cease payment altogether. See also Section 15307 (creditor's right to reach income in excess of amount for education and support). As provided in the introductory clause, this creditor's right applies regardless of a restraint on transfer provided in the trust instrument.

The creditor's right under subdivision (a) is subject to important limitations provided in subdivisions (b) and (c). Subdivision (b) provides a maximum amount that the creditor can reach, equal to 25% of each payment. This provision is comparable to the rule that applied under former subdivision (c) of Code of Civil Procedure Section 709.010 (incorporating the wage garnishment withholding standard of Code of Civil Procedure Section 706.050). See Code Civ. Proc. § 706.050 and the Comment thereto.

Subdivision (c) protects part or all of the payment that otherwise would be applied to the judgment where the amount is necessary for the support of the beneficiary and persons the beneficiary is required to support. This provision is comparable to Code of Civil Procedure Section 706.051 (wage garnishment exemption) which was incorporated by former subdivision (c) of Code of Civil Procedure Section 709.010 for purposes of enforcement of money judgments against trust payments.

Subdivision (d) makes clear that an order in favor of a creditor under this section is subject to the claim of a creditor who has obtained an order for enforcement of a support judgment, i.e., a minor child, spouse, or former spouse. The second sentence of subdivision (d) makes clear that the priority of support judgments does not depend on the time of issuance of the order for enforcement. This scheme is comparable to the priority that applies to earnings withholding orders under the Wage Garnishment Law. See Code Civ. Proc. § 706.030(b)(2). It should also be noted that while a spouse, former spouse, or minor child enforcing a support judgment may use this section, in the normal case, support creditors will apply under Section 15305. The limitations provided in this section do not apply to enforcement of a support judgment under Section 15305.

Subdivision (e) continues former subdivision (e) of Code of Civil Procedure Section 709.010 without substantive change.

Subdivision (f) limits the aggregate amount of the beneficiary's interest in one trust that is subject to enforcement where several creditors have obtained orders. Thus, if one creditor is receiving 25% of the payment that otherwise would have been made to the beneficiary, a second general creditor will not be able to reach any of the payment in the hands of the trustee. If one creditor is receiving 15%, a second general creditor can reach only 10% of the original amount of the payment. Of course, the aggregate amount of all orders may be less than 25% if the court has determined under subdivision (c) that more than 75% of the original payment is necessary for the beneficiary's support. The introductory clause of subdivision (f) recognizes that the 25% limitation does not affect the amount that may be reached in satisfaction of a support judgment.

Probate Code § 15602 (added). Trustee's bond

Comment. Subdivisions (a)-(c) of Section 15602 are drawn from Section 7-304 of the Uniform Probate Code (1977). Subdivision (a)(3) restates part of former Probate Code Section 1127 without substantive change, except that subdivision (a)(3) applies only to an individual trustee who is not named or nominated as an original or successor trustee in the trust instrument. See also Sections 15643 (vacancy in office of trustee), 15660 (appointment of trustee to fill vacancy). In other respects this section supersedes former Probate Code Sections 1127 (bond of trustee named by court) and 1127.5 (exception for substitute or successor trustee that is charitable corporation). Subdivision (d) supersedes the second sentence of former Probate Code Section 1127.

Subdivision (e) makes clear that a trust company is not required to give a bond. See Section 83 ("trust company" defined). This restates part of former Probate Code Sections 480 and 481 without substantive change. A nonprofit or charitable corporation that acts as trustee under a charitable trust is not a trust company, as defined in Section 83, and thus is subject to the provisions of paragraphs (1) and (2) of subdivision (a) of this section relating to when a bond is required. A bond is required if the trust instrument requires it (subject to the court's power to excuse the bond) or if the bond is found by the court to be necessary to protect the interests of beneficiaries. But a bond is not required of a nonprofit or charitable corporation that is appointed as trustee under a charitable trust merely because the corporation is not named as a trustee in the trust instrument. For provisions relating to nonprofit or charitable corporations acting as trustees, see, e.g., Corp. Code §§ 5140(k) (power of nonprofit public benefit corporation to act as trustee), 7140(k) (power of nonprofit mutual benefit corporation to act as trustee), 9140(k) (power of nonprofit religious corporation to act as trustee); Gov't Code § 12582.1 ("charitable corporation" defined for purposes of Uniform Supervision of Trustees for Charitable Purposes Act).