

Third Supplement to Memorandum 87-97

Subject: Study L-2008 - Cleanup Bill (Modification of Trusts by Attorney in Fact)

The attached letter from Jack E. Cooper points up a technical problem in the Trust Law. An attorney in fact under a power of attorney may not terminate a trust unless both the power of attorney and the trust instrument give the attorney in fact such a power. See Civil Code § 2467(a)(5), Prob. Code § 15401(b). The Commission policy applicable to trust terminations should apply to modifications as well, since a power to modify a trust is tantamount to termination, if for no other reason than that the property may be withdrawn from the trust.

For the sake of consistency, the staff recommends that the following amendments be made:

Civil Code § 2467 (technical amendment). Estate transactions

SEC. . Section 2467 of the Civil Code is amended to read:

2467. . . .

(a)

(5) . . . exercise in whole or in part, release, or let lapse any power the principal may have under any trust whether or not created by the principal, including any power of appointment, revocation, or withdrawal, but a trust created by the principal may only be modified or revoked by the agent as provided in the trust instrument.

. . . .

Comment. Paragraph (5) of subdivision (a) of Section 2467 is amended to conform to Probate Code Section 15401(b) which precludes modification or revocation of a trust by an attorney in fact unless the trust instrument expressly so permits.

Probate Code § 15401 (amended). Method of revocation

15401. . . .

(b) A trust may not be modified or revoked by an attorney in fact under a power of attorney unless it is expressly permitted by the trust instrument.

. . . .

Comment. Subdivision (b) of Section 15401 is amended to make clear that the rule applicable to revocation by an attorney in fact applies to modification. This is consistent with the rule provided in Section 15402.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1
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CA LAW REV. COMM'N

SEP 21 1987

RECEIVED

September 18, 1987

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

Gentlemen:

Probate Code, section 15401(2)(b) provides:

"A trust may not be revoked by an attorney in fact under a power of attorney unless it is expressly permitted by the trust instrument."

Probate Code, section 15402 provides:

"Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation."

I understand these sections to mean that a person acting under a power of attorney cannot revoke a trust unless the trust instrument specifically so provides. If the person given the power of attorney is authorized in the trust instrument to revoke the trust, then he/she has the power to modify the trust even though the power is not specifically given.

Civil Code, sections 2450 and 2467 provide that if a person is given a power of attorney with authority to make "Estate transactions", that person has the power:

" . . . to exercise in whole or in part, release, or let lapse any power the principal may have under any trust whether or not created by the principal, including any power of appointment, revocation, or withdrawal, but a trust created by the principal may only be revoked by the agent as provided in the trust instrument."

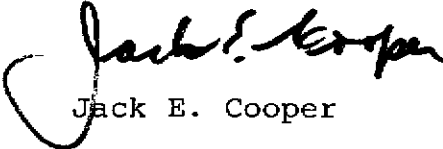
Reading the above-quoted sections together I come to the conclusion that the agent has the power to amend or modify the trust, and the power to withdraw all of the assets in the trust, if the principal had that power.

JACK E. COOPER

ATTORNEY AT LAW

I find nothing in the Law Revision Commission Comments to the quoted sections that would preclude such an interpretation. Yesterday I spoke with Ted Cranston and he says you feel that a person acting under a power of attorney cannot amend a trust. If in fact that was your intent why has it not been stated? How can full effect and meaning be given to Civil Code, section 2467(a)(5) with the interpretation attributed to you by Ted Cranston? [any power the principal may have under any trust . . . , but a trust created by the principal may only be revoked (nothing said about modified) by the agent as provided by the trust instrument.]

Very truly yours,

A handwritten signature in black ink, appearing to read "Jack E. Cooper". The signature is fluid and cursive, with a large initial "J" and "C".

Jack E. Cooper